A top-down view of a desk with a laptop, glasses, a pen, and a mouse. The laptop is on the left, the glasses are at the top right, and the pen is on the right side. The mouse is partially visible at the top left.

Work**Smarts** Half-Day Seminar

The Great Resignation: Dangling Carrots and Other Legal Strategies to Attract and Retain Top Talent

Moderator: William “Paz” Haynes

Speakers: Helen Holden and Julia Vander Weele

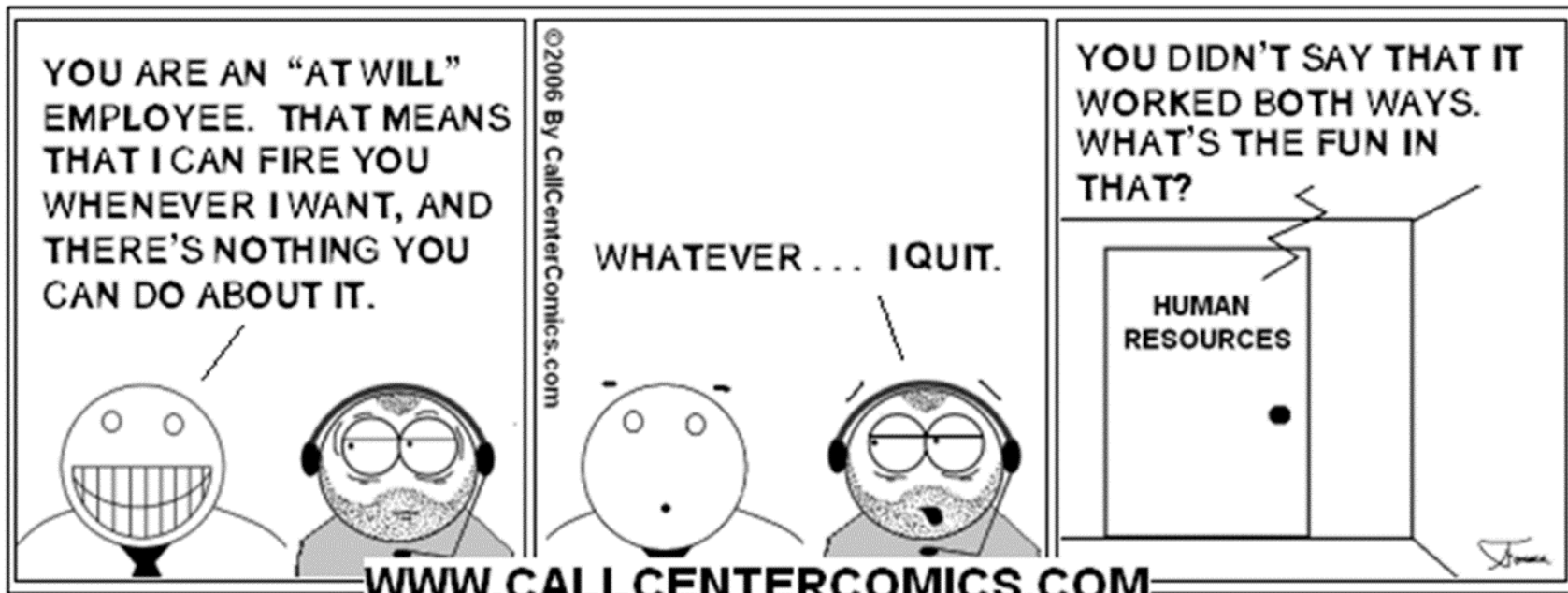
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Agenda

- What is the “Great Resignation”?
- Legal Strategies to Address Attraction and Retention of Talent
 - Salary Adjustment
 - Pay equity
 - Performance management
 - Retention Bonuses
 - Agreements
 - Tax and benefit considerations
 - Equity or appreciation rights
 - Other Benefits Strategies
 - PTO cash outs
 - Health plan opt-outs
 - 401(k) enhancements
 - Student loan payments
 - Educational Assistance
 - Additional paid leave
 - Culture
 - Remote and Hybrid Work
 - Flexible Workplace Policies
 - DEI Initiatives

The background of the slide is a light, faded image of a desk. On the left, a portion of a laptop keyboard is visible. In the center, a pair of dark-rimmed glasses rests on a white surface. To the right, a dark pen lies horizontally. The overall aesthetic is clean and professional.

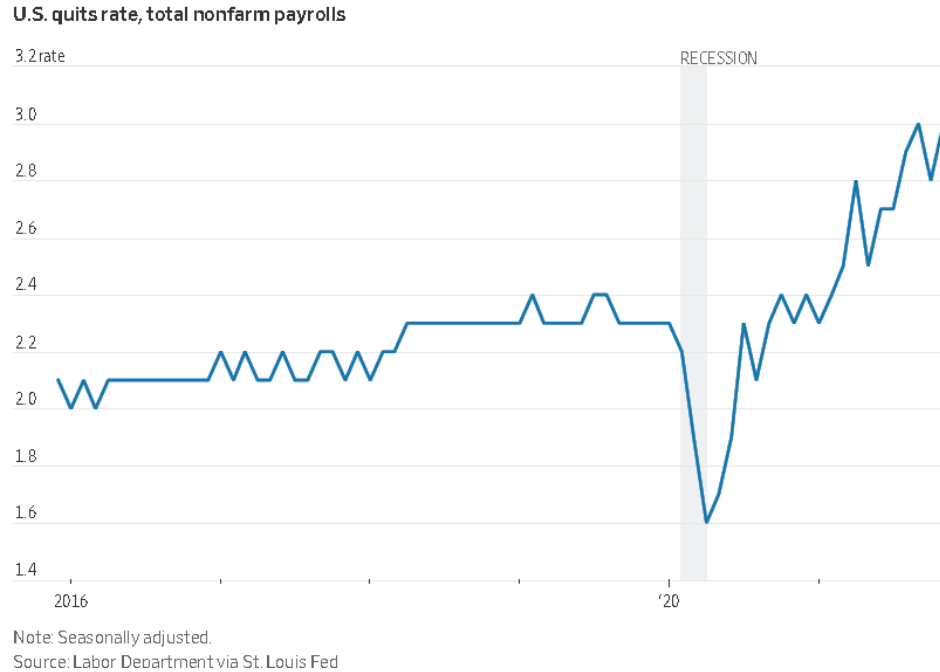
The Great Resignation



What is the “Great Resignation”?

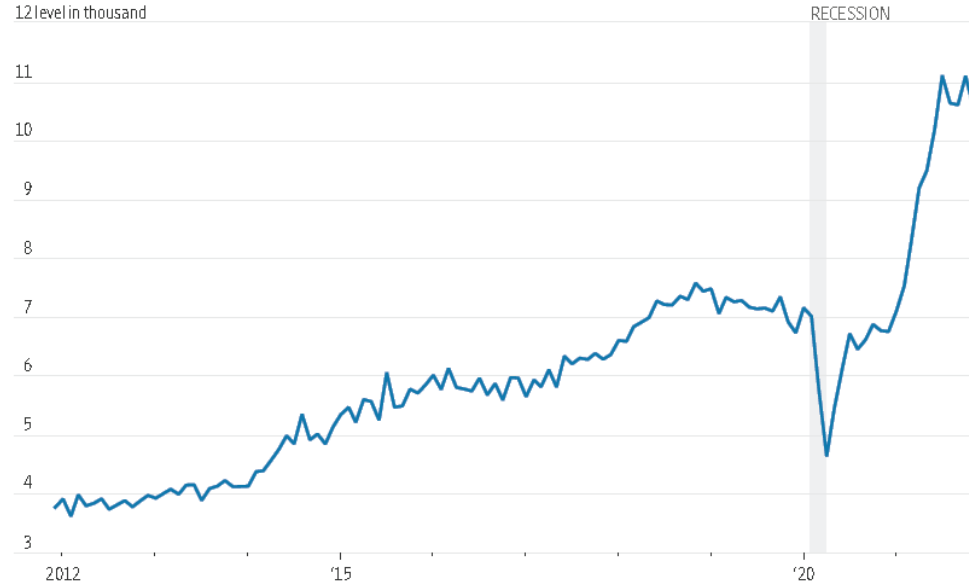
- A record number of voluntary separations from employment by employees in 2021, after the economic uncertainty during the onset of the COVID-19 Pandemic abated.
- The Bureau of Labor Statistics estimates that over 47 million Americans voluntarily quit their jobs in 2021 alone.
- Harvard Business Review analysis shows that the monthly “quit rate” in 2021 was 2.5%, up from less than 1.5% in 2009

Record Worker Quit Rate



U.S. Job Openings

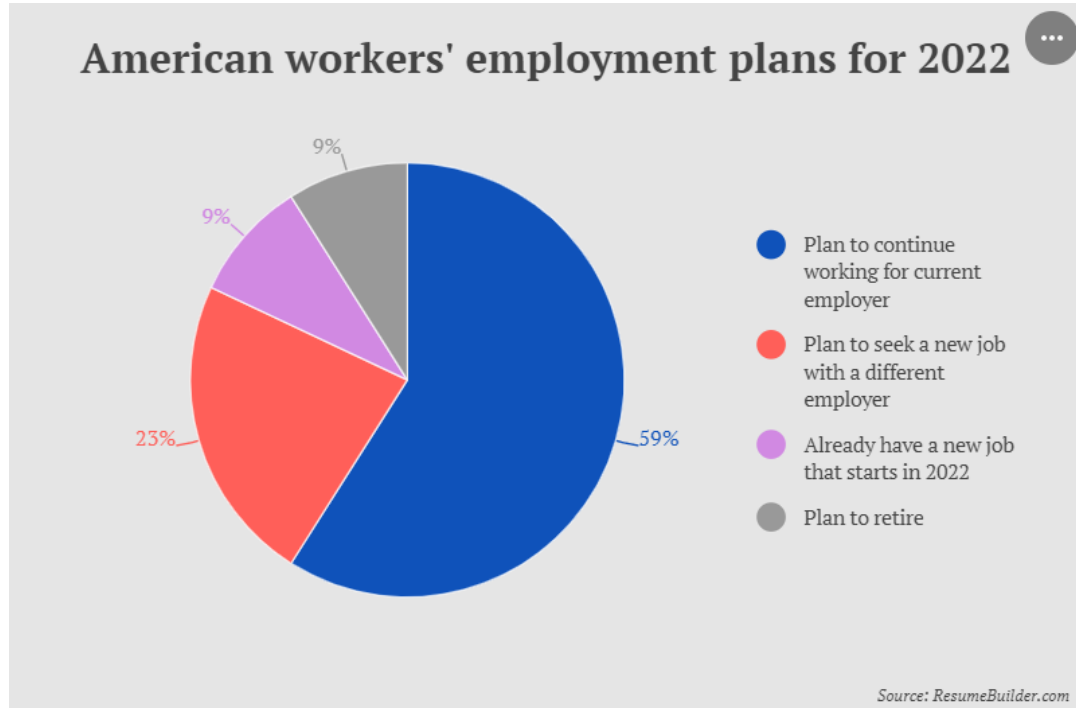
U.S. job openings, monthly



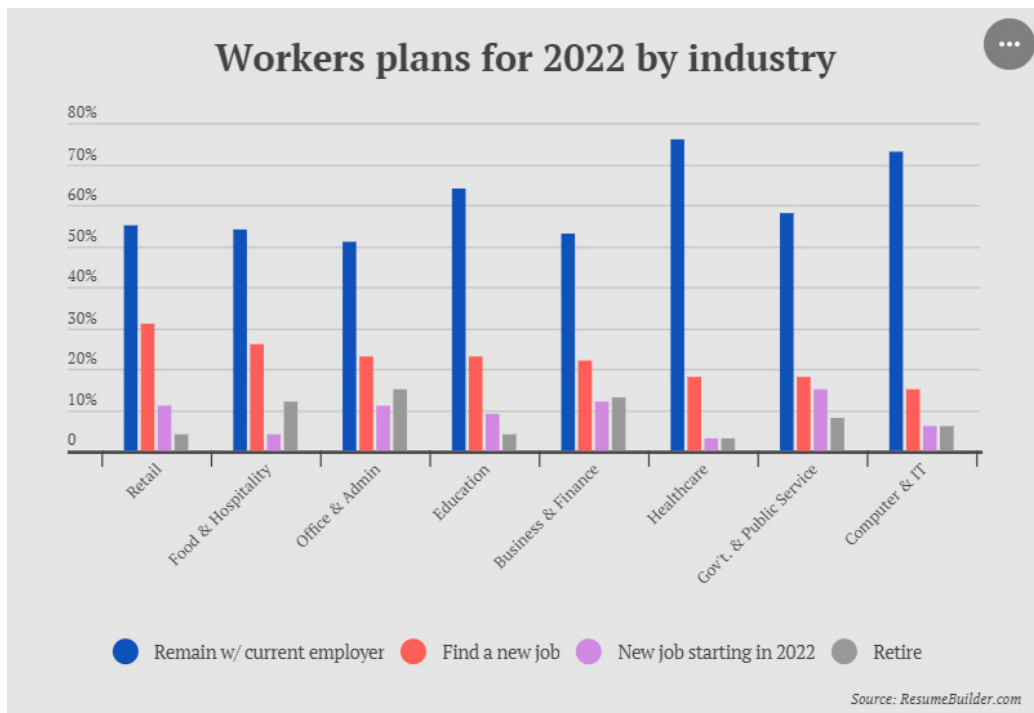
Note: Seasonally adjusted.

Source: Labor Department via St. Louis Fed

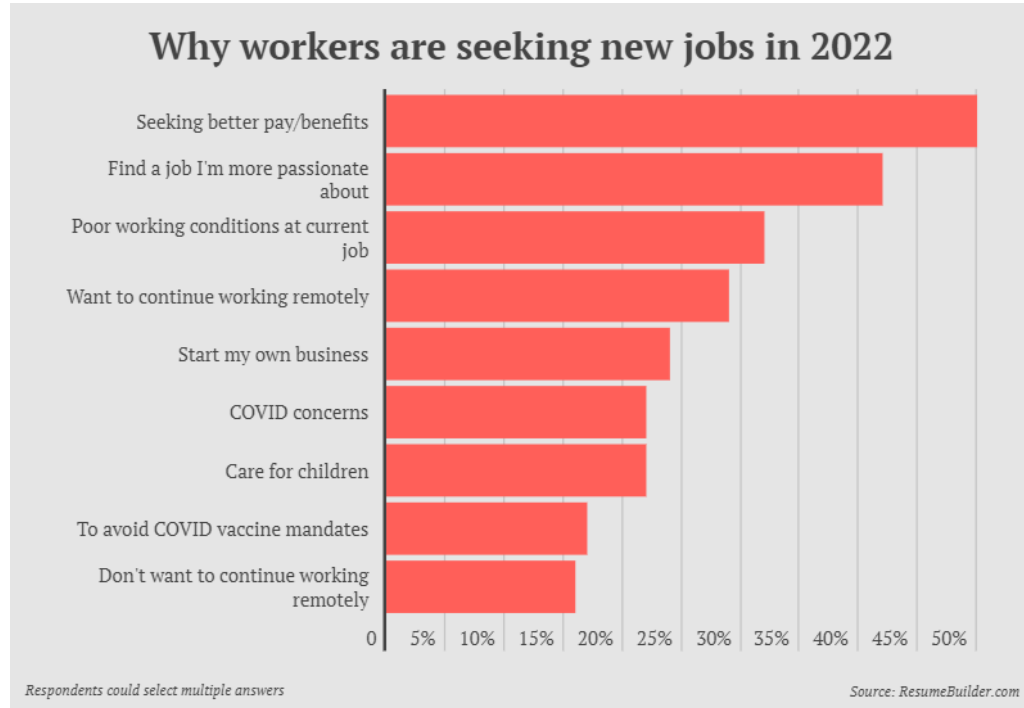
23% of Workers Will Quit in 2022



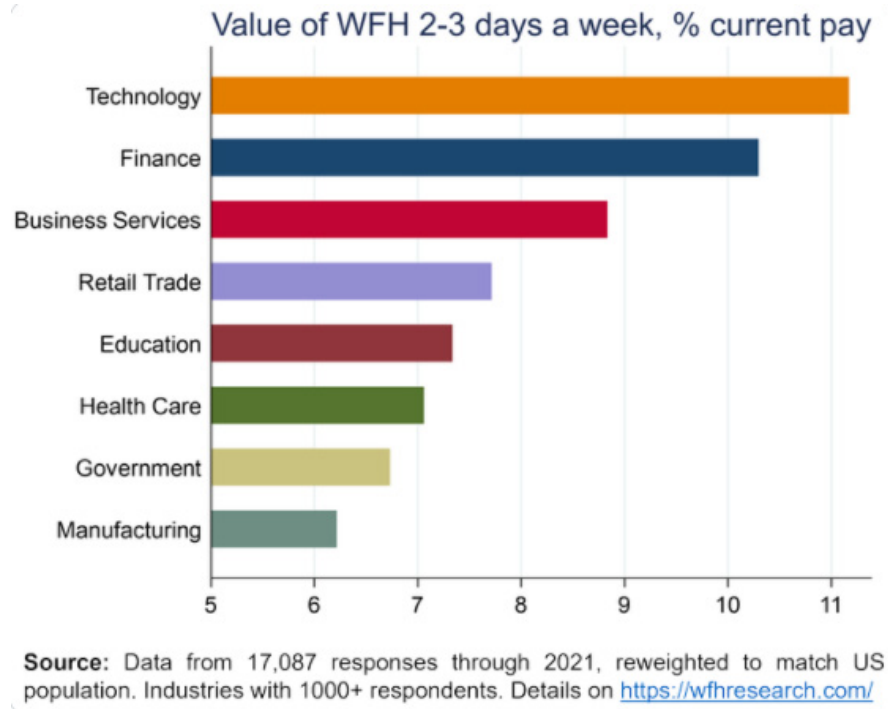
By Industry ...



Why Quit?



Employees Value Flexible Work Arrangements



What Will Entice / Keep Workers?

Worker Objectives	Potential Strategies
Flexible Work Environment	PTO Policies, PTO Cash-outs, Hybrid Work, Culture
Higher Pay	Salary Adjustments, Health Plan Opt-outs, Bonuses, 401(k)
Career Enhancement	Student Loan Payments, Education Assistance, Internal Opportunities for Training



Legal Strategies

Salary Adjustments

- Two approaches
 - Across the board
 - Selective groups
- Concerns
 - Performance management
 - Pay equity

Special Bonuses: Employment Law Considerations

- Retention bonuses
 - Written agreements
 - Conditioned on certain events
 - Additional terms and conditions

Special Bonuses (Cash is King)

- Deductible by employer and taxable to employees
- Potential for retirement plan errors
 - Is bonus “compensation” for retirement plan purposes?
 - If yes, elective deferrals must be taken from bonuses, absent special election
 - If yes, must be included in matching contribution calculation
 - Error correction for missed deferrals/match under IRS’s EPCRS program
 - Off-cycle payments create risk for being late on deferral remittances
 - DOL’s VFCP program to correct late remittances
 - Deferred compensation considerations

PTO Cash-outs

- Attractive feature to deal with staffing shortages
- Sticky constructive receipt issues if offered with carryover feature
- Mandatory Paid Sick Leave
- What works
- What does not work

Opt-Out Incentives

- Appealing to younger, healthier workforce
- Sometimes also referred to as “cash in lieu” programs
- Can create several potential legal issues

Enhanced 401(k) Contributions

- Approximately 16% of large and mid-size employers plan to increase or reinstate match in 2022 (another 8% are considering it)
 - Callan LLC
- Most are increasing match by 1% to 2% or adding a one-time profit sharing contribution
- Some attempt to target select groups (e.g., nurses)

Enhanced 401(k) Contributions

- Employer matching contributions
 - Reinstate suspended match
 - Increase matched amount
 - Increased percentage
 - Fixed dollar amount, up to a maximum
- Issues:
 - Nondiscrimination rules (for enhancements targeted to select groups)
 - Notice requirements
 - Plan amendments

Enhanced 401(k) Contributions

- Examples (*Wall Street Journal Jan. 19, 2022*):
 - **Meta** (Facebook parent)
 - In 2022, \$ for \$ match (100%) up to \$10,250
 - Previously matched 50% on first 7% of compensation
 - **KMPG** (global consulting firm)
 - In 2022, replaced match with nonelective profit sharing contribution between 6% and 8% of compensation (including bonuses)
 - Previously matched 25% on first 5% of compensation

Enhanced 401(k) Contributions

- Other options:
 - Relaxed eligibility rules to allow earlier (or immediate) participation
 - Relax or eliminate vesting rules
 - Permit contributions of unused vacation balances

Benefit Strategies

- Identify what will engage your workforce
- Engage consultants and counsel
- Remember your current employees
- Don't forget the details
- Have an exit strategy for new benefits

Employer Payment of Student Loans

- CARES Act expanded flexibility under Code § 127 educational assistance programs to permit tax-free employer payment of student loans
- Up to \$5,250 total benefit (including any other EAP benefits)
- Must be pursuant to a written and compliant § 127 plan document
- Originally limited to loan repayments between 3/27/2020 and 1/1/2021
- CAA extended through 12/31/2025

Educational Assistance Programs

- Qualified educational assistance programs (Code § 127)
 - Tax-free employer assistance up to \$5,250 per calendar year
 - Broad range of educational expenses, including expenses for graduate-level courses and for courses that are not job-related
 - Written plan required; nondiscrimination restrictions

Educational Assistance Programs

- Working condition fringe benefits (Code § 132)
 - Work-related educational expenses
 - Education must either maintain or improve required skills or meet express requirements of individual's employer or law
 - Expenses **not** excludable if course required to meet minimum educational requirements of current trade or business or part of a program that will qualify the individual for a new trade or business
 - No \$ limit

Educational Assistance Programs

Feature	§ 127 Qualified Educational Asst.	§ 132(d) Working Condition Fringe
Written Plan Required?	Yes	No
Undergrad & Grad Courses?	Yes	Yes
Must be Job-Related?	No	Yes
Courses Qualifying Eee for New Trade/Business?	Yes	No
Courses to Meet Min. Job Requirements?	Yes	No
Nondiscrim. Requirement?	Yes	No
\$ Limitation	\$5,250	None
Tuition, Books, Supplies, Equipment?	Yes	Yes

Paid Leave

- Family Leave
- “Paw”-ternity leave



Culture

Flexible and Hybrid Work Environments

- The Great Resignation, and the assimilation of “Millennials” and “Generation Z” generations into the work force are accelerating cultural changes in the workplace.
 - Surveys such as one from Citrix indicate that 51% of Millennials and Gen Z’ers want to continue to work from home most of the time. (*Work 2035 – The Born Digital Effect*, Citrix (2021))
- Remote or Hybrid work
 - The ADA

Remote Work and the ADA

Gentile v. County of DuPage, Feb 4, 2022

- Employee was “Weatherization Program Associate,” who helped make homes more energy efficient. In March 2020, performed all functions of position remotely.
- Employee had lung condition, a pulmonary embolism. Provided doctor’s note to continue teleworking in June, 2020.
- Employer denied, although offered to provide PPE. Employer also denied request for FMLA leave, stating that employee could not perform home inspections, an essential function of the position.
- Other employees reportedly allowed to telework.
- Did employee’s complaint survive motion to dismiss?

The ADA . . . Is still the ADA

- Nondiscrimination
- Duty to accommodate
- Reasonable
- Effective
- No undue hardship
- Interactive process
- Limited medical inquiries
- Confidentiality

Other Cultural Adjustments

- DEI Initiatives
- Employee engagement strategies
- Career opportunity growth



Top Tips for Attracting and Retaining Talent

- Know your workforce, and what will engage them, then design strategies with those initiatives in mind.
- Be mindful of legal pitfalls associated with compensation and benefit changes. These include:
 - Pay equity pitfalls;
 - State law compliance issues; and
 - Complex taxation considerations.

WorkSmarts

Top Tips

Thank You



Paz Haynes

Partner | Nashville

615.238.6324 | whaynes@spencerfane.com



Helen Holden

Partner | Phoenix

602.333.5485 | hholden@spencerfane.com



Julia Vander Weele

Partner | Kansas City

816.292.8182 | jvanderweele@spencerfane.com