

Texas Employment Relations Symposium



Welcome



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THE TEXAS STATE CHAMBER



Remote Workers: Not as Simple as it Seems



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Employers' Involuntary Pivot to Remote Work

- First U.S. COVID case diagnosed Jan. 2020 and stay-at-home orders were widespread by March 2020
- 37% of U.S. jobs can be done entirely remotely, per 2020 U of Chicago study
- 52 % of managers will allow their employees to work remotely more often post-COVID, per a KPMG survey
- 71% of workers say they would want to work remotely at least a quarter of the time, per a KPMG survey

What Do Employees Say? Benefits of Home vs Office

Home

- 60% - No commute
- 49% - Flexible schedule
- 47% - Less time getting ready
- 38% - Quiet
- 37% - More time with family & friends
- 16% - Fewer meetings

Office

- 55% - Face to face collaboration
- 54% - Socializing
- 44% - Work/personal life boundaries
- 39% - Better equipment
- 31% - Face time with manager
- 16% - Quiet

Source: Survey of Working
Arrangements and Attitudes March
2022

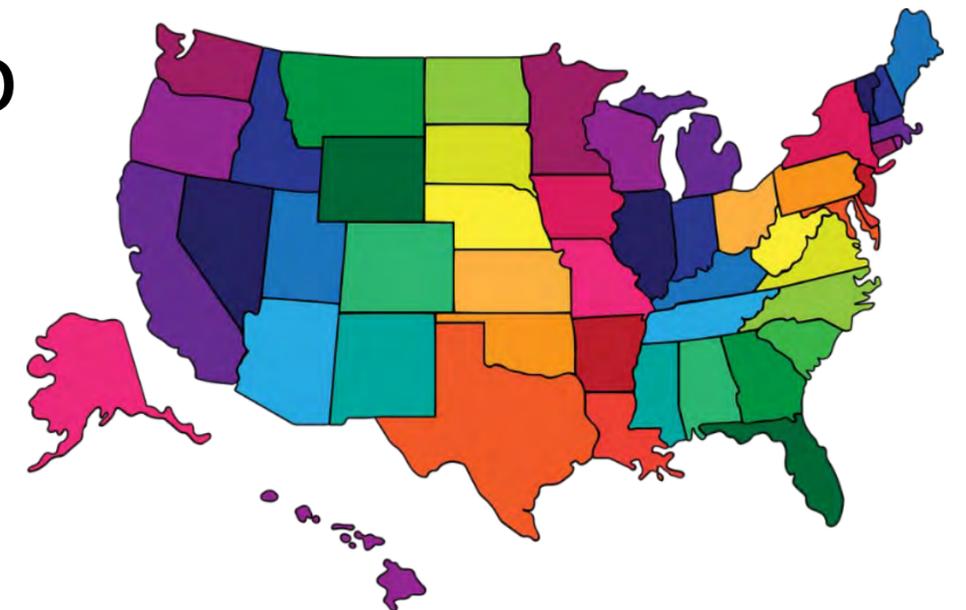
Taxes

- State income tax
- Other business taxes, if nexus (CA, ID, NJ, VA say one worker establishes nexus)
- Pre-COVID models
 - Convenience of the employer
 - Reciprocal agreements
 - Statutory definition of “resident”
- COVID response
 - States’ temporary waiver of state income tax on telecommuters expired or expiring
 - IL 2020 law requires withholding of state tax for remote ee in IL for more than 30 days
 - MA law challenged by NH; SCOTUS declined to review



Which States' Law Applies?

- Varies by statute
- Coverage often triggered by number of employees
 - Count only the employees in the state?
 - There may be a small employer exclusion
 - Count all U.S. employees?
- Changes to those thresholds due to #metoo



Wage and Hour

- FLSA Exempt Workers
 - Varying duties' tests
 - Varying minimum salary amount
- FLSA Nonexempt Workers
 - Higher minimum wage
 - Daily overtime
 - Off the clock work
- Meals and Breaks
- Notice of Wage Rate Deduction



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Payday Laws

- Frequency of paydays
- Timing of final pay
- Inclusion of unused PTO as part of final pay
- Allowed deductions from pay
 - Most laws identify 3 broad categories
 - Some have “laundry lists” of approved deductions
- Reimbursement of employee expenses
 - Reimburse for direct costs of telework in AK, CA, DC and IL or risk claim that wages weren’t paid “free and clear”



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Paid Sick Days



- Paid Sick Days
 - Temporary, COVID-specific measures
 - State and local enactments
 - States include AZ, CA, CT, DC, MD, MA, MI, NV, NJ, OR, PR, VT and WA
 - Local ordinances in CA (many), IL (Chicago & Cook County), MD (Montgomery County), MN (Duluth & Minneapolis), NJ (many), NY (NYC & Westchester County), PA (Philly & Pittsburgh) and WA (Seattle & Tacoma)
 - Typical formula is 1 hour of sick pay for each 30 hours worked, up to an annual cap
- Employer's existing paid sick days policy may satisfy the state and/or local enactment but the qualifying reasons in the law often broader than employee's own illness or injury

Paid Leaves of Absence

- Temporary, COVID-specific measures
- State insured programs funded by deductions from employee pay, employer match or both
- CA, NJ, RI, NY, WA, DC, MA, CT and OR have laws
- CT example
 - Ers began registering with CT agency on Nov. 1, 2020
 - Eff. Jan. 1, 2021 er began deducting .05% from ees' pay & remitting to state agency
 - Eff. Jan. 1, 2022, eligible ees could collect for qualifying absences under FMLA plus two CT leave laws

Other Leaves

- Combo of paid & unpaid; some address whether employer can force employee to use available paid time
- Adopting a child
- Blood, platelet, organ or bone marrow donor
- School activities
- Adult literacy education
- Military + military spouse
- Olympic participation
- Crime victim, including domestic violence, sexual assault or stalking
- Jury & witness duty; time off for voting

Workers' Compensation

- Not required by law in Texas
- Many other states do require it
- Some state laws have small employer exceptions (e.g., 2, 3, 5 employees)
- Some state laws except by type of job or type of industry



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Discrimination Laws

- Age – all ages, threshold lower than 40, cap at age 70
- Hair texture, hair type & protective hairstyles
- Height and weight
- Marital status, familial status, mothers (married & unmarried)
- Individual who is currently unemployed
- Individual who received public assistance, source of income
- Lawful off-premises and off-duty activities
- Reproductive health decisions
- Use of support or guide animal due to certain disabilities
- Users of medical marijuana
- Tobacco user

A Note on ADA & Accommodation

– Working From Home

- Employers reluctant to offer working from home as a reasonable accommodation pre-COVID
- Courts often supported employers saying regular attendance at the physical work location is an essential function
- After COVID, it will be difficult to deny the request if the employee or an incumbent in the same job was able to do the essential functions of the job successfully from home

Resistance to Electronic Posting – NY DOL

- “. . . requirements to post information are not uniformly satisfied by providing a copy of the posting, electronic or otherwise, to the employee.” They are meant to ensure “continuing and easy access . . . regarding their rights and the employer’s duties” The poster may go unnoticed until the employee is injured on the job or feels victimized by discrimination. Notice provided one time, at hiring, or via computer does not confer the benefit that comes from a “conspicuous, continuous notice.” (RO-10-0118 2011)

DOL Guidance

- Field Assistance Bulletin 2020-7
- Applies to posters mandated under FLSA, FMLA, EPPA & SCA
- The first three have “post and keep posted” requirements
- Electronic posting via intranet, internet website or shared is substitute for hard copy posting only if
 - All ees exclusively work remotely;
 - All ees customarily receive info from the er electronically; and
 - All ees have readily available access to the electronic posting at all times

EEOC Guidance

- Encourages employers to post the EEOC's electronic notice on their internal websites in a conspicuous location, but does not fulfill the basic obligation to physically post in all workplaces
- For employees who telework and do not visit the employer's workplace on a regular basis, electronic notice may be required in addition to the physical posting

Employee Notices

- Recruiting
 - Eff. Jan. 1, 2021 in CO, employers are required to disclose pay and benefits in each posting for each job, whether the posting is hard copy or electronic; covered postings include work tied to CO locations or remote work performable anywhere; n/a to work to be performed only outside of CO
- Hiring – Various notices often related to ee rights
- Sexual Harassment
 - Required to be given to new hire, annually thereafter & whenever a complaint is made

Mandatory Training

- First state mandate for sexual harassment prevention training was CA in 2005; trigger dropped from 50 ees to 5 (anywhere in the U.S.); included training of remote mgrs supervising ees in CA
- #metoo resulted in many additional mandates, often applying to an er with one or more ees
- Laws dictate who must be trained, how soon, how often & in what manner
- DE says its mandate applies to ees who regularly work in DE and those who work there periodically and are based elsewhere



Form I-9 and E-Verify

- Form I-9
 - Eff. March 20, 2020 through April 30, 2022 employers who were 100% remote could defer the requirement of being physically present when examining the employee's documentation
 - Guidance on hiring remote workers allows employer to designate authorized representative to examine the employee's documentation, but employer remains liable for any violations in connection with the I-9 form and process
- E-Verify
 - DHS & SSA system to verify work authorization of new hires
 - Required of all employers in AL, AZ, GA, MS, NC, SC and UT with some exceptions
 - Other variations are public sector only, state contractors; some local enactments in MI, NY, OR and WA

Wage Transparency

- Laws require disclosure of wage info to job applicants and/or employees upon hire, upon employee request, upon change in employee's position
- Mandates in CA, CO, CT, MD, NV, RI, WA, NYC, Cincinnati and Toledo, OH
- May require disclosure of pay rate, range of pay, description of other pay (e.g., bonus), description of benefits
- Pay rate must be disclosed in job posting in CO and NYC; others require it post-application, post-interview, prior to job offer

Independent Contractors

- Factors that establish a rebuttable presumption of contractor status
 - Most onerous is ABC test; being used in CA, CT, DE, IL, IN, MA, NE, NV, NH, NJ, VT, WA and WV; other states using parts of the ABC test
- Requirement to file a report with the state upon hire
- Requirement to report all payments to the state
- Requirement to seek a determination from the state (MS)
- Requirement of a written agreement
- Heavy penalties for misclassification, including criminal
- Employer liable for misclassified employee's health care costs (HI)

3 State Laws on Employee Monitoring

- CT – Only applies if the employer monitoring of employee is “on the employer’s premises”
- DE – Option to provide daily notice of monitoring or give a one-time notice of the monitoring policy in writing or electronic form & obtain employee acknowledgment
- NY – Notice to employee upon hire & mandatory poster
- Both DE and NY laws apply to employers “who have a place of business” in the state

Safety

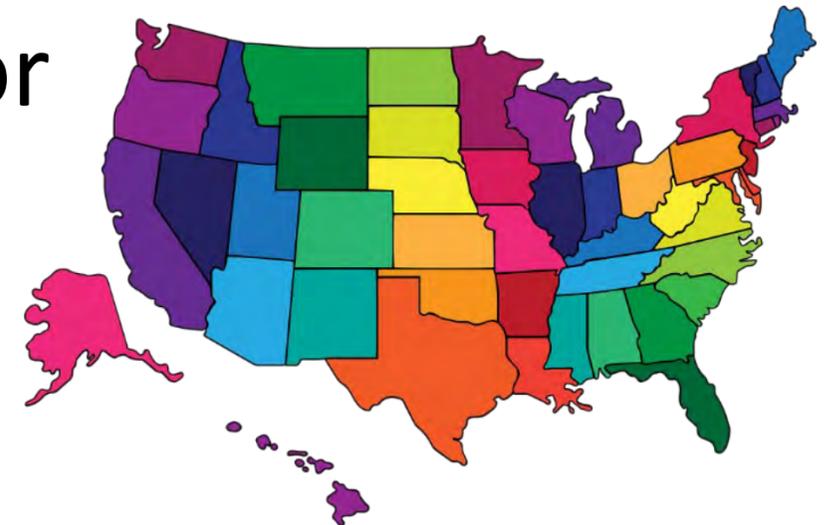
- OSHA general duty clause applies anywhere the work is done, including at home
- Guidance issued in 2000 says they will not inspect a “home office” where office activities are being conducted
- Work done from home that is hazardous or dangerous will be inspected by OSHA upon receipt of a complaint
- OSHA recordkeeping of injuries and illness

Noncompetes

- July 9, 2021 E.O. on Promoting Competition in the American Economy
- In the meantime, the issue is analyzed by applying state law
 - Broad bans in CA, OK, ND and DC
 - Examples of restrictions
 - FL – Presumptively reasonable time restraints
 - IL – No noncompete if ee earns \leq \$75K; no nonsolicit if ee earns \leq \$45K
 - OR – Duration of 12 months or less; n/a to ee who earned \leq \$100,533K at termination unless er will provide pay during restricted period
 - Penalties are both civil and criminal for violations

Miscellaneous State Laws

- Automatic deduction from pay to deposit into an IRA
- Day of rest
- Employee access to own personnel file
- Limits on use of credit checks on applicants and employees
- Service letter
- Veterans hiring preference in the private sector





Remote Workers: Not as Simple as it Seems

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TWC Update: How COVID-19 Impacted Unemployment Claims and Employer Taxes



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TWC Update – How COVID-19 Impacted Unemployment Claims & Employer Taxes

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Book: twc.texas.gov/news/efte/tocmain2.html

Web app: twc.texas.gov/tbcapp

1-800-832-9394; 1-512-463-2967

State Unemployment Tax

- This is the only payroll tax in Texas
- It is paid by employers - no deduction from employees' wages for the state UI tax
- The state UI tax is based on unemployment claim experience
- New employers pay at 2.70% for approximately the first six quarters
- Employers are eligible for an experience-based rate thereafter
- No chargebacks during the past 3 years = minimum rate
- Chargebacks during the past 3 years = a calculated tax rate above the minimum

Replenishment of the UI Trust Fund

- Half of a shortfall is recovered through the replenishment tax
- The other half is recovered through the replenishment ratio
- The tax rate calculation formula is illustrated in detail at <https://twc.texas.gov/businesses/unemployment-insurance-tax-rates>.

Tax Rate Impacts

- Texas has always had some of the lowest UI tax rates in the country
- Taxes can be imposed or increased to replenish the UI Trust Fund or repay federal loans used to pay UI benefits in a deficit situation:
 - Replenishment tax – this is the “minimum tax” on all employers
 - Replenishment ratio – for employers w/ CBs within last 3 years
 - Deficit tax – only if there is a deficit in the UI Trust Fund
 - Obligation assessment tax – only if Texas must pay interest on a federal loan or is repaying bonds
- Tax rate notices for 2021 were delayed until July of that year, and for 2022 were delayed over a month, but will be on time for 2023
- Minimum and maximum tax rates are the same in 2022 as they were in 2020 and 2021 (0.31% and 6.31%, respectively)

UI Tax Rates in Texas

- Three-year chargeback total / three-year taxable wage total = benefit ratio
- Benefit ratio x replenishment ratio = general tax rate
- General tax rate + replenishment tax + deficit tax + obligation assessment rate + ETIA (employment and training investment assessment) of 0.1% = effective tax rate
- The effective tax rate is what an employer applies to the first \$9000 of each employee's wages in a calendar year when determining how much UI tax to pay to TWC
- The main variable that is potentially controllable by an employer is the three-year chargeback total, which can be influenced via a voluntary contribution once each year after the new tax rates have been published

Minimizing UI Tax Problems

- Report wages and pay all taxes on time - deadlines can be extended for good cause shown - set up a payment plan if necessary - timely payment of taxes enables the wages to be used to compute the tax rate, which serves to keep the tax rate lower.
- Main tax rate component is the benefit ratio: three-year chargeback total divided by the three-year taxable wage total.
- Take the potential cost of a transfer of compensation experience into account when negotiating the sale or purchase of another business.
- A successor entity is liable for the unemployment tax debt of its predecessor.
- The election to be a reimbursing employer must be timely and lasts two years.
- Any Tax Department determination may be appealed under Commission Rule 815.113.

Appealing a Tax Department Determination

- Any ruling of the Tax Department may be appealed
- An account examiner's ruling on employment status or other issue is subject to second-level review, if requested
- Such a determination may also be appealed to the three-member Commission via Commission Rule 40 T.A.C. § 815.113
- TWC guidance for Rule 13 appeals is online at <https://twc.texas.gov/businesses/tax-liability-appeals-process>
- Additional commentary is in the *Texas Guidebook for Employers* at https://twc.texas.gov/news/efte/appx_b_tax_audits_rule_13s.html
- A motion for reconsideration may also be filed with the Commission if the initial appeal is unsuccessful
- Court appeals: refuse to pay and wait for TWC to sue, or pay, ask for refund, and sue upon denial of the refund request

Independent Contractors - Red Flags

- Terms such as "1099 employees" or "contract labor"
- Having contractors fill out job applications
- Having contractors wear company badges or uniforms, or carry company business cards, indicating their affiliation with the company
- Giving contractors a company e-mail address
- Inviting contractors to company parties and other events using the same invitation that goes to regular employees
- Giving contractors company benefits or wage advances
- Having contractors sign company policy handbooks
- Restrictions on hours and outside work activities
- Non-competition agreements

What TWC Looks For In Independent Contractor Cases

- Corporate status
- FEIN
- Registration with Texas Secretary of State
- TWC tax account number
- Reporting wages of their own employees
- Their own business cards
- Invoices on their own stationery
- Advertising / websites
- Written contracts
- E-mails, letters, or other documentation relating to negotiating the parameters of the work
- Substantial investment in their own business

Independent Contractor Court Case

- *Critical Health Connection, Inc. v. Texas Workforce Commission*, 338 S.W.3d 758 (Tex. App. - Austin, 2011)
- Nurse staffing company – providers/nurses were treated as independent contractors
- Their work was directly integrated into the only service provided by the employer, creating a presumption of control (also relevant, although not in the decision: the law provides that the work of nurses is subject to oversight by others)
- Also, they could not delegate the work, and they had no investment in a business beyond their own time
- Court held that direction and control can be delegated by a staffing company / registry to its clients
- Court agreed with TWC that the staffing company was a "temporary help firm"

Corporate Officers / Members of LLCs

- Corporate officers and members of LLCs who perform services for pay for their entities are employees of those entities.
- *Texas Carbonate v. Phinney*, 307 F.2d 289 (5th Cir. 1962), *cert. denied*, 371 U.S. 940 (1962): a corporate officer is employed by his or her own corporate entity.
- Legal presumption: a corporate officer who performs services for their corporation for compensation does so for the benefit of the corporation, and each such officer directs and controls their own work on behalf of the corporation.
- LLCs: <https://twc.texas.gov/tax-law-manual-chapter-1-employing-unit-3#1.5.3> ("All remuneration paid to ... members, managers, and officers, for services rendered, will be considered wages ..., except for those distributions of profits taken by percentage ownership.")

Payrolling

- "Common paymaster": separate, related companies establish an entity solely for the purpose of handling personnel and payroll matters for the members of that group, or else allow one of the members of the group to handle payroll matters for the rest of the group's members, either for an administrative fee or as a matter of convenience.
- Section 201.046 of the Act provides that the employer is the employing unit that receives the benefit of the work performed, regardless of whether the employees are hired and paid by the employing unit or its agent.

Payrolling - 2

- In a payrolling situation involving a common paymaster, each separate employing unit receives the benefit of the services provided by the employees working at each location.
- Employing units with separate identities, i.e., separate corporate charters and the like, are separate business entities and thus separate employing units.
- TWC's position is that "payrolling companies" are not single employing units for the purposes of reporting wages and paying state UI tax.
- The only exceptions to that general rule are for licensed PEOs and their clients' employees and, pursuant to 26 U.S.C. § 3306(p) of FUTA and Section 201.011(11) of the Texas Labor Code, any employees who are ***concurrently employed*** by two or more related corporations, one of which is acting as the common paymaster for the other(s).

Transfers of Compensation Experience

- A successor in an acquisition of one business by another acquires the UI compensation experience of the predecessor, if:
 - the successor acquires all or part of the organization, trade, or business of the predecessor, and
 - there is shared ownership or officer-level management between the two entities.
- A partial transfer is possible within two years of an acquisition if:
 - the acquired portion is separately identifiable and segregable,
 - the predecessor and successor jointly apply, and
 - they submit up to four years' worth of wage records.

Total / Partial Unemployment

- Totally unemployed: wages between \$0.00 and 25% of the weekly benefit amount (WBA)
- Partially unemployed: wages between 25% - 125% of the WBA
- Not on paid leave of any kind

Monetary Eligibility

- Claimant must have earned at least 37 times the weekly benefit amount during the base period
- “base period” is the first four of the last five completed calendar quarters prior to the date of the initial claim:

Base Period Quarter 1 ✓	Base Period Quarter 2 ✓	Base Period Quarter 3 ✓	Base Period Quarter 4 ✓	Lag Quarter ✗	Quarter In Progress When Claim Is Filed ✗
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- the weekly benefit amount is the high quarter wage amount divided by 25
- minimum WBA = \$71; maximum WBA = \$549

Chargeback Protection - General

- Chargeback protection is possible if an employer responds in a timely manner to a chargeback or claim notice and explains that the work separation resulted from: a legal requirement; misconduct; quit for personal reasons; natural disaster; medical problems of the claimant or the claimant's minor child, including care for a terminally-ill spouse; quitting a part-time job to get higher pay; military service of the claimant, the claimant's spouse, or the claimant's employer; documented sexual assault, stalking, or domestic violence against the claimant; no work separation due to the claimant continuing to work the same part-time schedule; quit after trying out a new job that was "unsuitable"; entering Commission-approved training; and compelling, urgent, and necessary circumstances related to the work.
- Details *really* matter – call 800-832-9394 if you have a question.

Pandemic-Related Chargeback Protection

- All Covid-19 / pandemic-related UI cases qualify a private taxed employer for chargeback protection, but the employer must respond in a timely manner to claim notices and explain the circumstances
- Under the CARES Act and other federal pandemic relief legislation, the federal UI benefits were paid out of federal funds and were not charged or billed to any employer

Exceptions to Normal Deadlines

- Late responses or appeals during the height of the pandemic could be held timely if a party explained whatever circumstances made it impossible to file on time
- Failure to respond to chargeback notices may be subject to an exception if the employer appeals adverse chargeback determinations on time and explains how the employer was misled by early announcements from TWC regarding pandemic-related claims and chargeback protection
- In general, always respond to any TWC notice in a timely manner according to the instructions on the notice, and keep documentation of the timely response

Work Refusals

- Send an e-mail to twc.fraud@twc.state.tx.us (allows attachments).
- Online: https://apps.twc.state.tx.us/EBS_REF/ewrd/employeeWorkRefusalDoc.
- Report should include the claimant's full name, last four digits of the SSN, the initial claim date, the name of the company along with its TWC account number, and information about the work refusal, such as the job description, the hours, pay, and benefits, the work location, and basically whether it would have been a return to the same job that the claimant had before.
- Mention any health and safety precautions the company is taking to minimize any risks to workers (CDC / OSHA guidelines followed, PPE supplied, social distancing practices, and so on).
- Finally, include any documentation regarding the work refusal that might be available, such as text messages, e-mails, or witness statements from those who dealt directly with the claimant about the job offer.
- High-risk situations may excuse certain work refusals.

Work Refusals – Certain Exceptions Allowed

- The job poses a risk to health, safety, or morals, including workplaces that fail to follow CDC guidelines regarding pandemic safety precautions
- The job is vacant due to a labor dispute, or is based on membership in a union
- Substandard pay, benefits, or working conditions compared to similar jobs in the area
- Better job offer (subject to verification)
- Other situations will be assessed on a case-by-case basis.

Eligibility Issues

- medically able to work
- actively searching for full-time work
- authorized to work in the U.S. (claimant has to be able to fulfill I-9 requirements)
- file claim forms on time
- engage in reemployment activities as directed

Work Separations

- Voluntary
 - Resignation
 - Walking off the job
 - Job abandonment
 - Retirement
 - Suspension w/o pay for three days or less
- Involuntary
 - Layoff / RIF
 - Temporary assignment / PRN / on-call, as-needed
 - Discharge / termination
 - Mutual agreement
 - Resignation in lieu of discharge
 - Unpaid suspension of four days or more

Fraud

Claimants must report:

- All work and earnings during claim weeks
- Any work separations
- Any job offer that was not accepted
- Any eligibility condition that is not satisfied during a claim period
- Failure to report such facts can lead to a fraud investigation

Employers can report suspected fraud, including identity theft, to:

1. Online: <https://apps.twc.state.tx.us/UiFraudSubmission/uifs/uifraud>
2. E-mail: twc.fraud@twc.texas.gov

Reductions in Hours or Pay

- Hours – 20% or more reduction = good cause to quit and file an unemployment claim
- Pay – same 20% rule applies
- Both – 20% rule applied to the bottom-line pay outcome
- Cuts in benefits with monetary value can be combined with other cuts to see whether the total decrease in compensation is 20% or more
- Partial unemployment benefits – if weekly pay goes below 125% of the weekly benefit amount, claimant can receive the difference in partial UI benefits

Handle UI Claims Properly

- Respond adequately and on time
- Always ask for chargeback protection if it is available (COVID-19!)
- Adequate response = factual basis for the work separation, including relevant adverse facts
- Return investigators' phone calls
- Furnish relevant information:
 - Firsthand witnesses are critically important
 - Documentation (policies, warnings, logs, etc.)
- Be specific as to the circumstances of the work separation
- Appeal on time at all levels of the process

What Does An Employer Need to Show?

- Voluntary work separation
 - Show how a reasonable employee would not have quit for such a reason
- Involuntary work separation
 - Show that the discharge resulted from a specific act of misconduct connected with the work that happened close in time to the discharge, and
 - That the claimant either knew or should have known that discharge could occur for such a reason.
- Evidence needed: documentation of problems, and firsthand testimony from eyewitnesses

Severance Pay

- Severance pay is disqualifying just like wages in lieu of notice
- Dates of coverage should be specified in the payment documentation and in the unemployment claim response
- Exceptions to disqualification:
 - Payment made to settle a claim or lawsuit that has been filed
 - Payment made to release a claim of liability under the Civil Rights Act of 1991
 - Payment made pursuant to a written contract or collective bargaining agreement that was negotiated prior to the work separation
- Disqualification merely delays the date on which UI benefits can start

Vaccinations

- Texas Governor Abbott issued an executive order (GA-40) on October 11, 2021 prohibiting all employers from requiring employees to be vaccinated
- Information is on the TWC website at <https://twc.texas.gov/news/report-vaccine-job-loss>
- Complaints from employees about vaccination mandates at workplaces can be sent to vaccine_job_loss@twc.texas.gov
- Complaints may also be submitted via phone at 1-800-939-6631 (option 3)
- A vaccination policy exemption form that employers can use for employees is at <https://twc.texas.gov/files/news/covid-19-vaccine-exemption-form-twc.pdf>
- TWC's letter to employers explaining about the hotline is at <https://twc.texas.gov/files/businesses/commissioner-letter-covid19-vac-mandate-120821-twc.pdf>

Vaccination Issues in Unemployment Claims

- TWC press releases have indicated that claimants who were fired for failing to get vaccinated are “unlikely” to be disqualified
- Very few cases so far, but the ones that have been decided by the Commissioners have fallen into three categories:
 - Both the employer and the claimant had valid reasons for their positions, so the work separation was “urgent, compelling, and necessary”, allowing chargeback protection for the employer
 - The work separation was for medical reasons (medical exemption request was not granted due to undue hardship), which also allows chargeback protection
 - The claimant refused to apply for an exemption or accept accommodations offered in lieu of vaccination, so was disqualified for misconduct
- Any claim response should explain why the employer required vaccinations and could not grant an exemption, or other relevant issues

Minimizing the Risk of Texas Payday Law Wage Claims

- Have all employees sign clear written wage agreements
- Follow the wage agreement as it is written (“So let it be written – so let it be done”)
- Take special care with commission and bonus agreements
- Get written authorization for any deduction from pay that is not ordered by a court or required or specifically authorized by a law
- Do not hold paychecks pending return of company property
- Do not hold paychecks pending submission of documentation, unless its absence renders calculation of pay impossible
- Apply the FLSA and DOL regulations to any situation involving minimum wage and overtime pay

New Texas Legislation from 2021

- HB 21 - deadline for sexual harassment claims extended from 180 days to 300 days
- SB 45 - extends coverage of sexual harassment laws to employers with only one employee and to any supervisor whose action or inaction contributed to the problem
- HB 3529 - employers need parents' permission to obtain PII from minor applicants and employees
- SB 766 - sexually-oriented businesses must use E-verify when hiring to confirm that no one younger than 21 is hired
- SB 315 - no one younger than 21 may work for or be on the premises of a sexually-oriented business

New Texas Legislation from 2021 (cont'd)

- HB 867 - spousal and child support payments may include retirement, pension, and other employee benefits payable to the obligor
- SB 424 - first-time violators that are small businesses (for-profit, independently owned and operated, and fewer than 100 employees or less than \$6 million in annual gross receipts) must be given a chance to remedy the violation prior to a penalty being imposed
- ★ HB 7 - excludes benefits ineffectively charged due to the pandemic from the computation of the replenishment ratio – without this law, the replenishment ratio for 2021 would have been 2.66 instead of 1.36!
- ★ SB 8 (3rd special session) – allocated over \$6 billion to the UI Trust Fund to replenish it and allow TWC to avoid a deficit tax

Shared Work Plans

- A shared work plan can enable a company to have partial reductions in work hours and keep the employees close to the company.
- Employees whose hours are reduced by a standard amount between 10 – 40% can receive a corresponding percentage of their unemployment benefits if certain conditions are met. Their income each week would be higher than it would be with total UI benefits.
- Link: <https://twc.texas.gov/businesses/shared-work>.
- Shared work plan benefits paid as a result of the Covid-19 disaster are not charged back to an employer's account.
- Work search waivers are automatic for claimants who file under a shared work plan.

Mass Claims

- An employer can help a large set of laid-off employees file UI claims using the mass claim process
- Expedited processing of UI benefits for most participants
- Some delays might occur, such as if a particular claimant has an unusual situation with a prior claim or an SSN issue, but most problems are ironed out quickly
- CB protection depends upon the reason for the mass layoff (if due to the pandemic, be sure to explain that fact and give whatever details are available)
- See <https://twc.texas.gov/businesses/mass-claims-unemployment-benefits> for all of the forms and steps

Thanks!

Thanks for your attendance
and
Good Luck!

Remember the toll-free hotline for employers:
1-800-832-9394

tommy.simmons@twc.texas.gov
twc.texas.gov/news/efte/tocmain2.html
Web app: twc.texas.gov/tbcapp

Revealing Survey Findings on Health Costs

Blake Hutson

Director of Public Affairs
Texas Association of
Health Plans

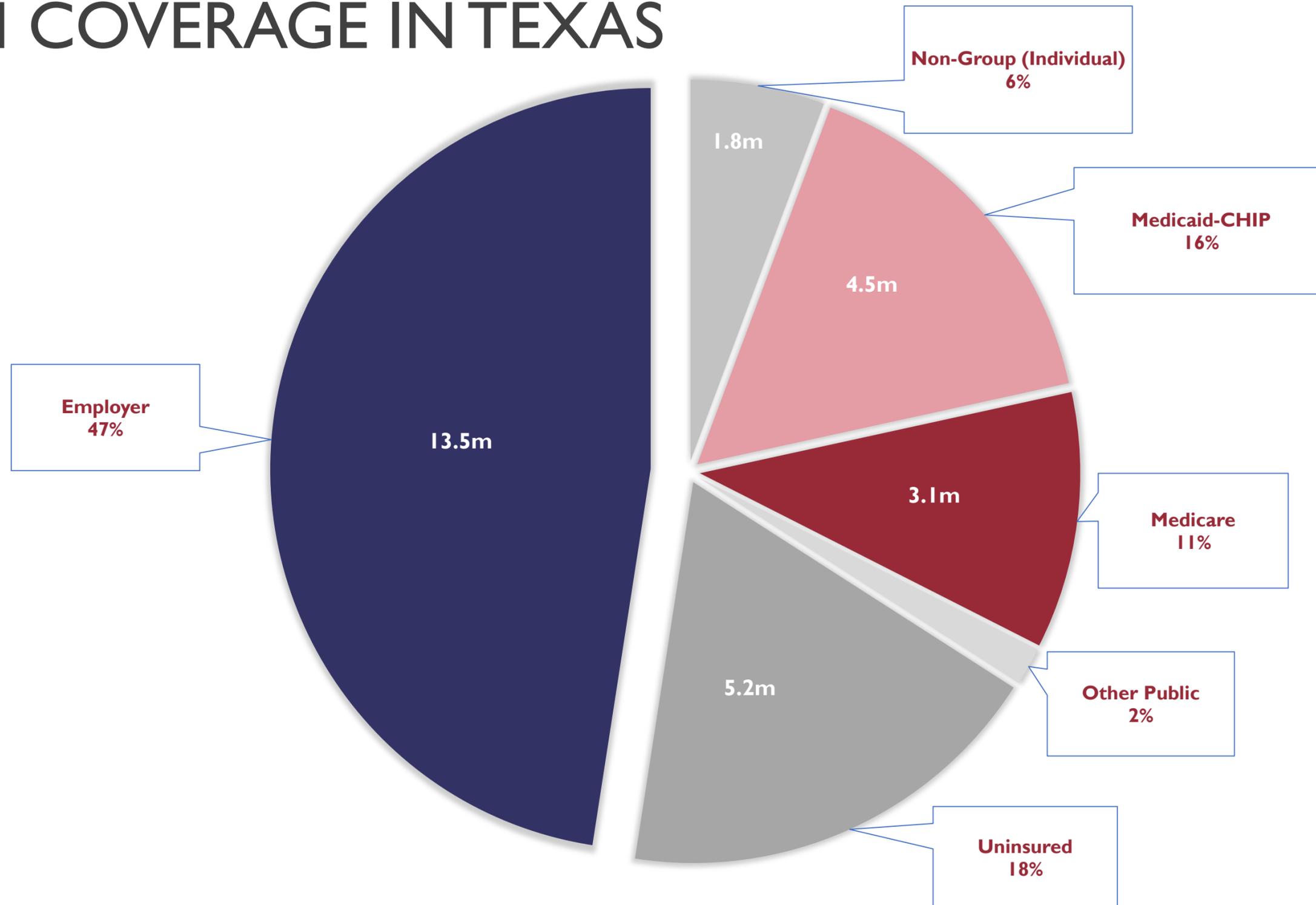


Glenn Hamer

President & CEO
Texas Association
of Business



HEALTH COVERAGE IN TEXAS



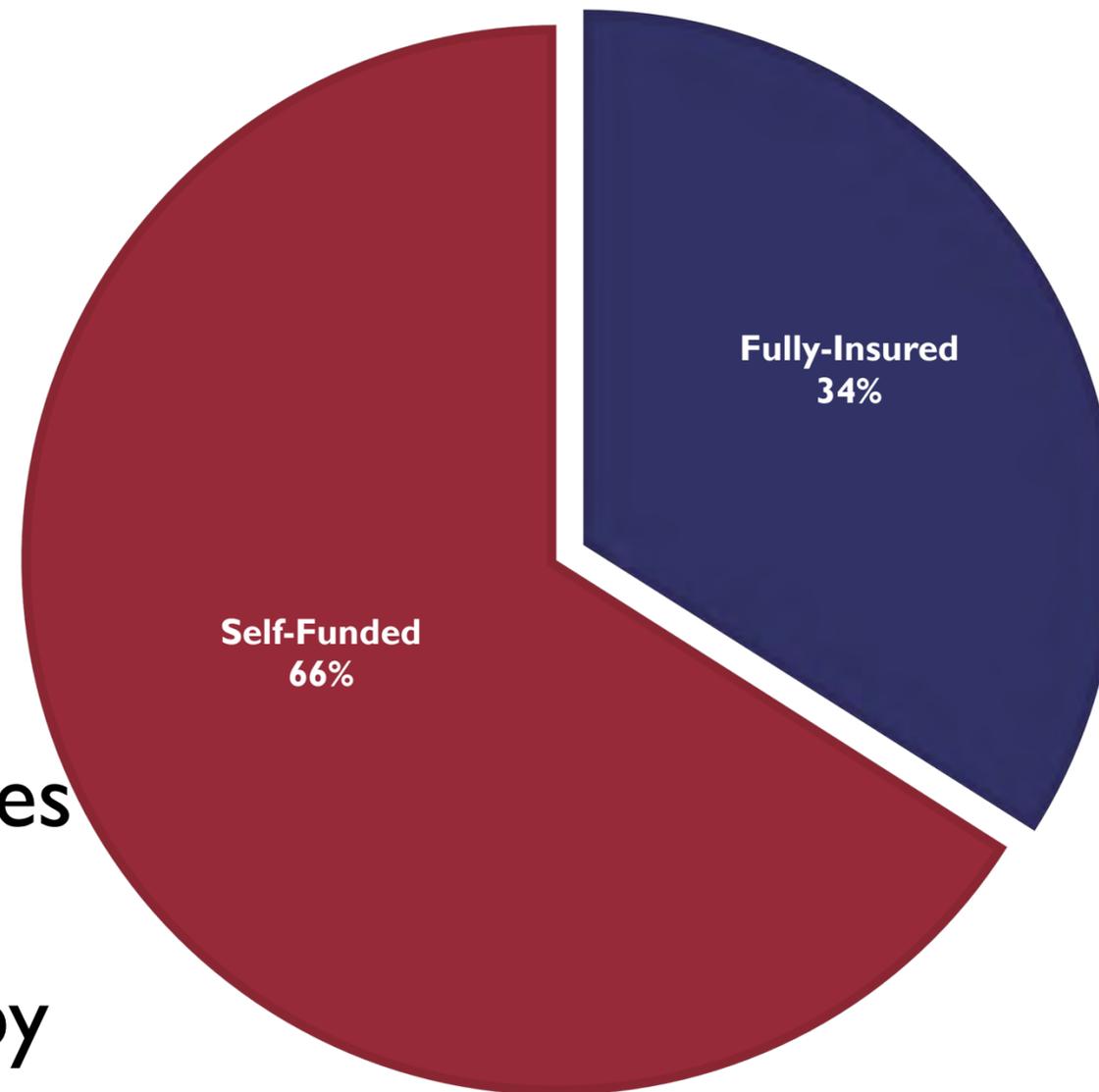
HEALTHCARE COST TREND

Average Annual Premiums for Covered Workers With Family Coverage, by Firm Size, 1999-2021



[Source: KFF Employer Health Benefits Survey, 2021; Kaiser/HRET Survey of Employer Sponsored Health Benefits, 2011 & 2016](#)

EMPLOYER BASED COVERAGE



Self-Funded

- Usually, larger companies
- Employer bears all risk
- Historically, regulated by federal government

Fully-Insured

- Traditionally, smaller companies (<500 employees)
- Employer bears no risk
- Regulated by:
 - Federal Government
 - State Government



TEXAS EMPLOYERS SURVEY

June 3 – July 5, 2022

N = 349 respondents

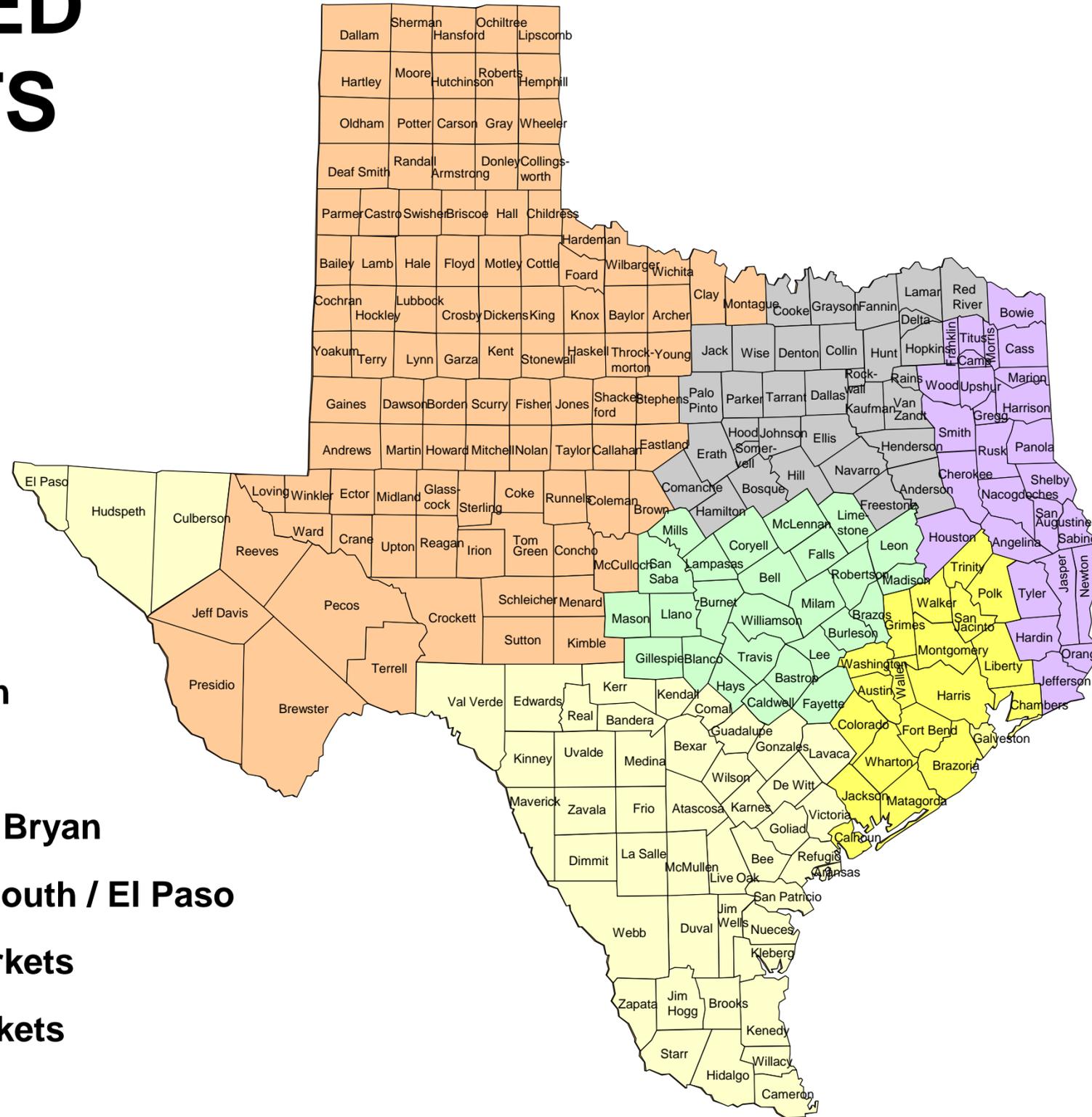
margin of error: $\pm 5.2\%$



TEXAS COMBINED MEDIA MARKETS

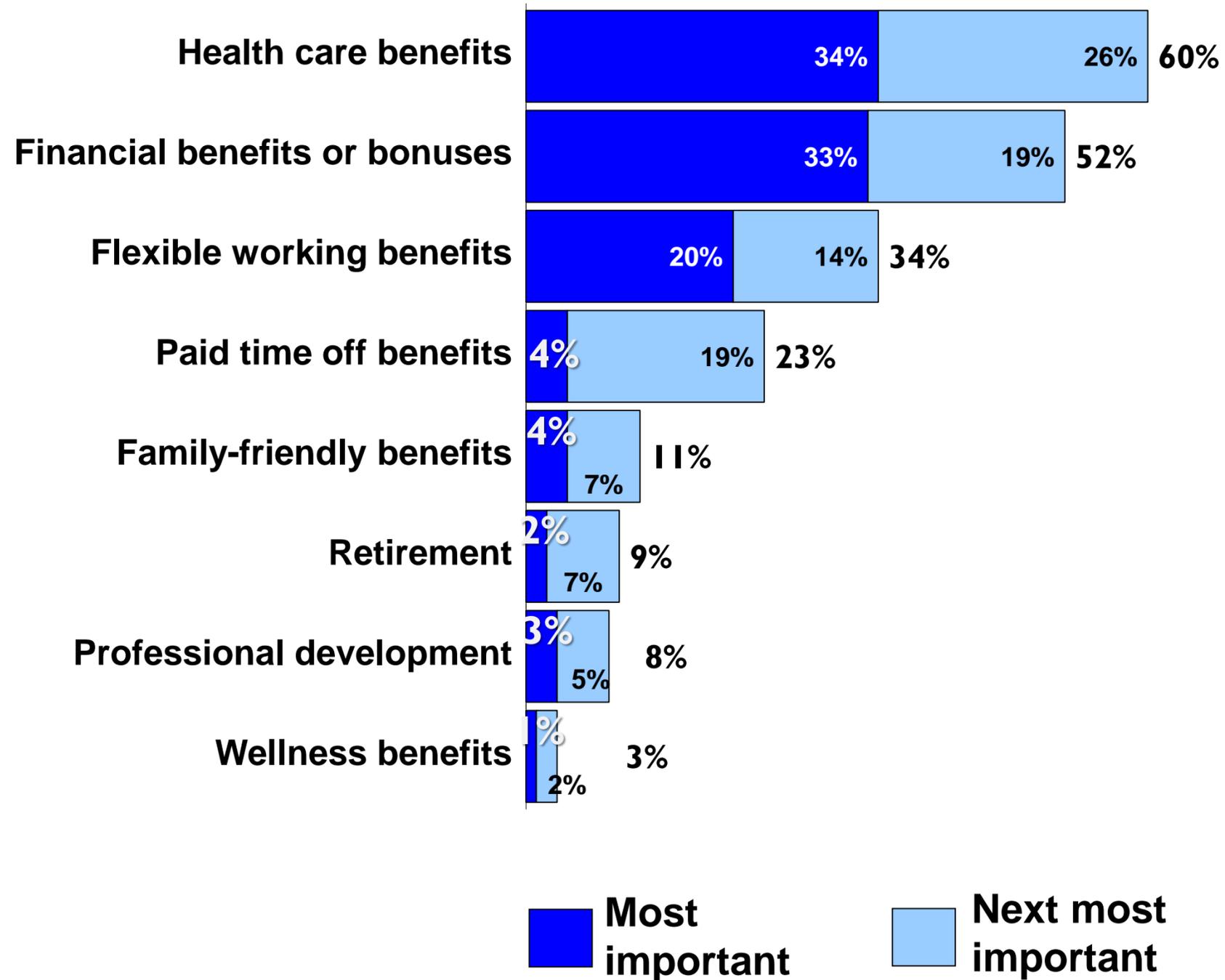
Percent of Interviews

- 28% **Dallas-Ft. Worth**
- 17% **Houston**
- 21% **Austin / Waco / Bryan**
- 9% **San Antonio / South / El Paso**
- 16% **West Texas Markets**
- 9% **East Texas Markets**

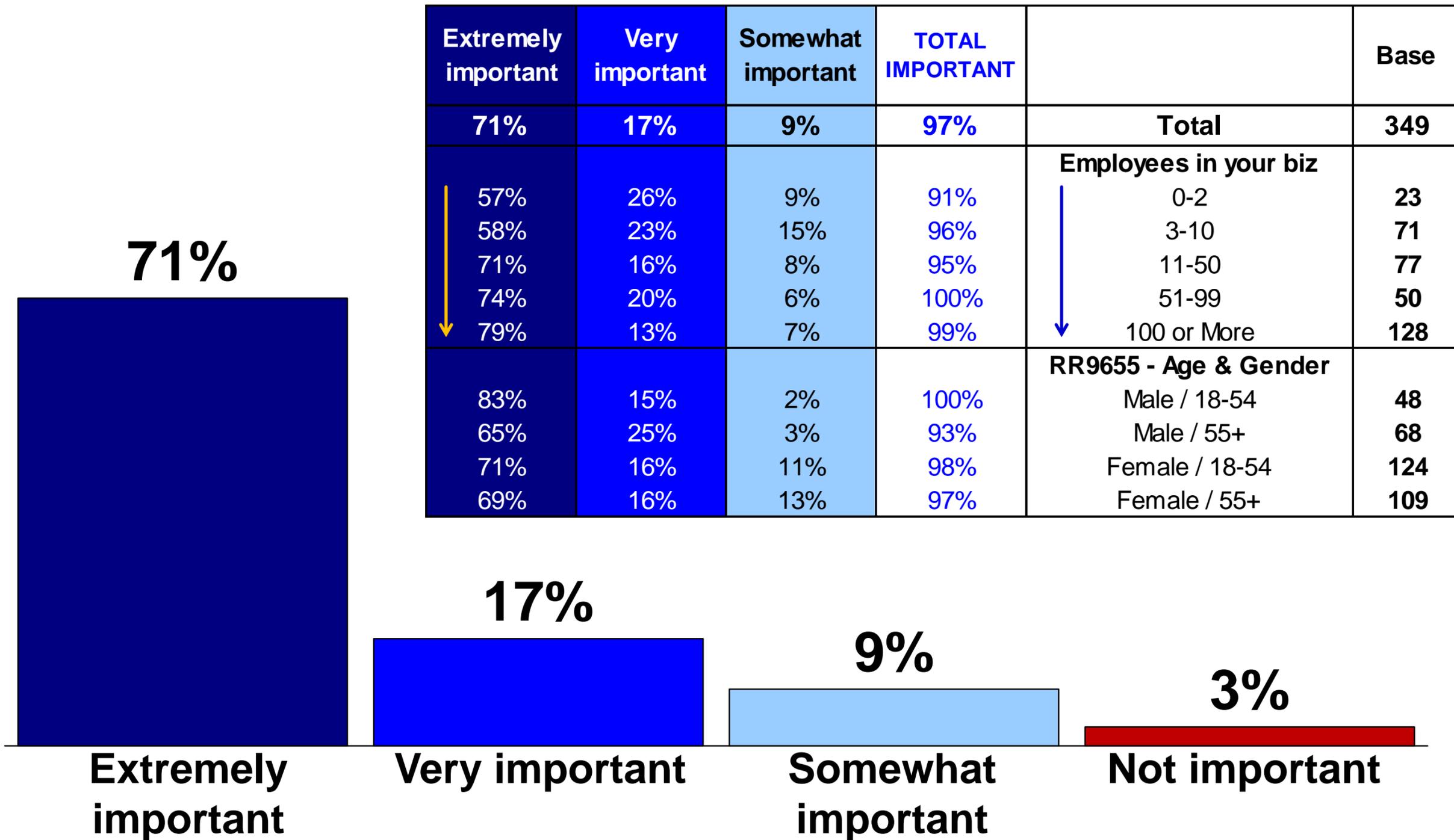


THE TEXAS STATE CHAMBER

Which of the following benefits is most important for attracting and retaining employees?

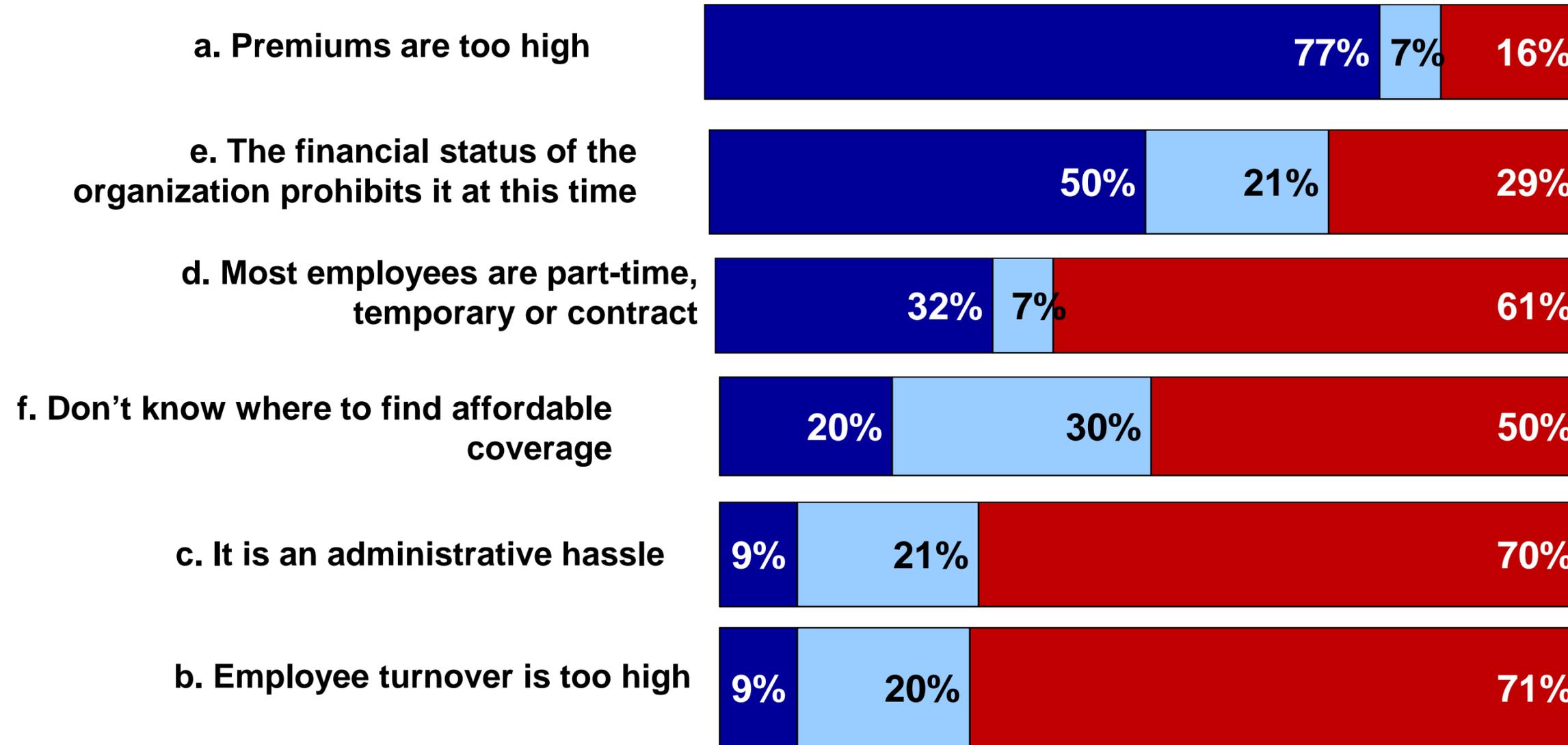


How important is offering health care coverage for hiring and retaining employees?

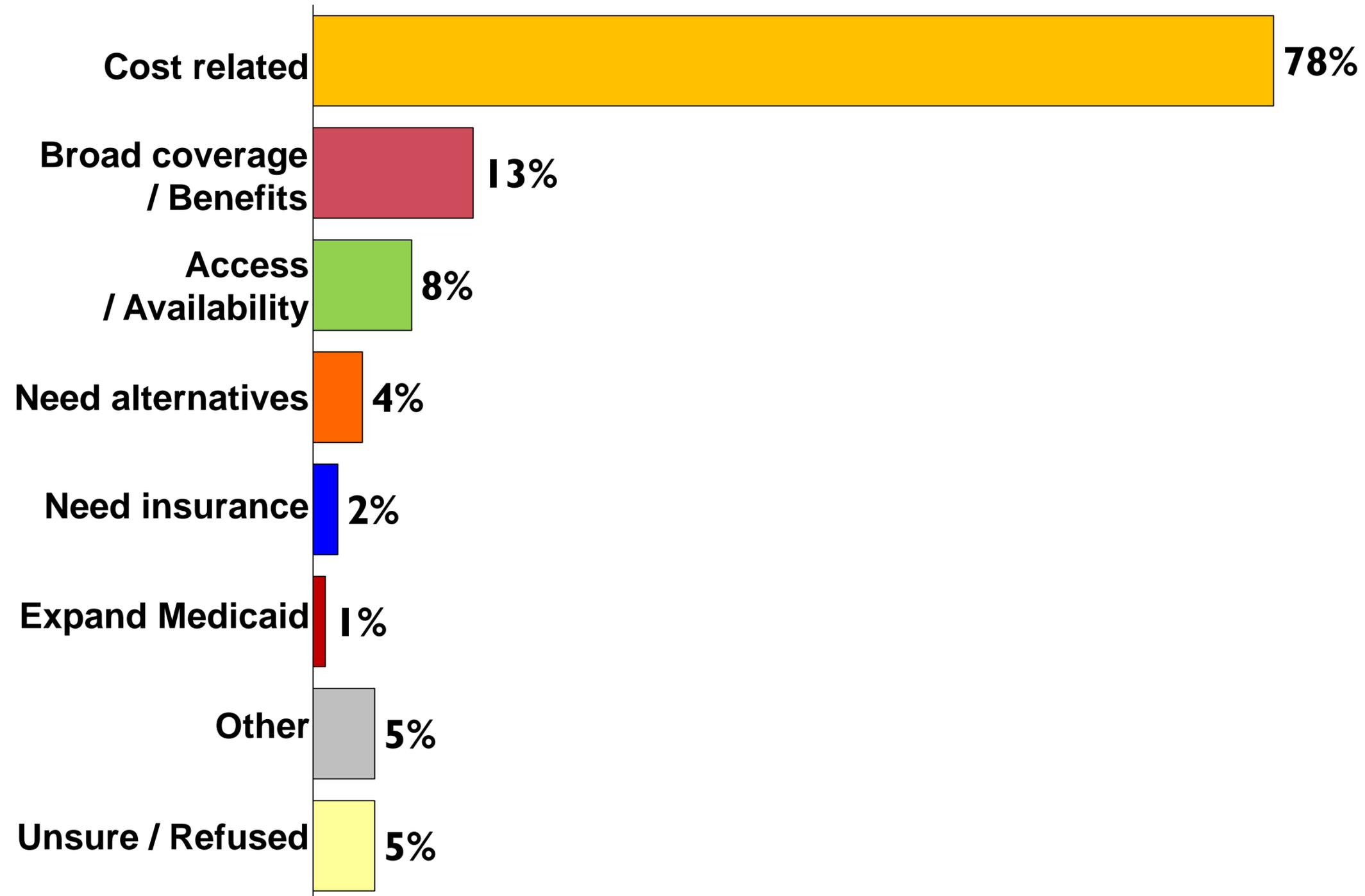


IF NOT PROVIDE HEALTH COVERAGE: Please indicate if each of the following is a major reason, minor reason or not a reason for not offering health coverage at your business/company?

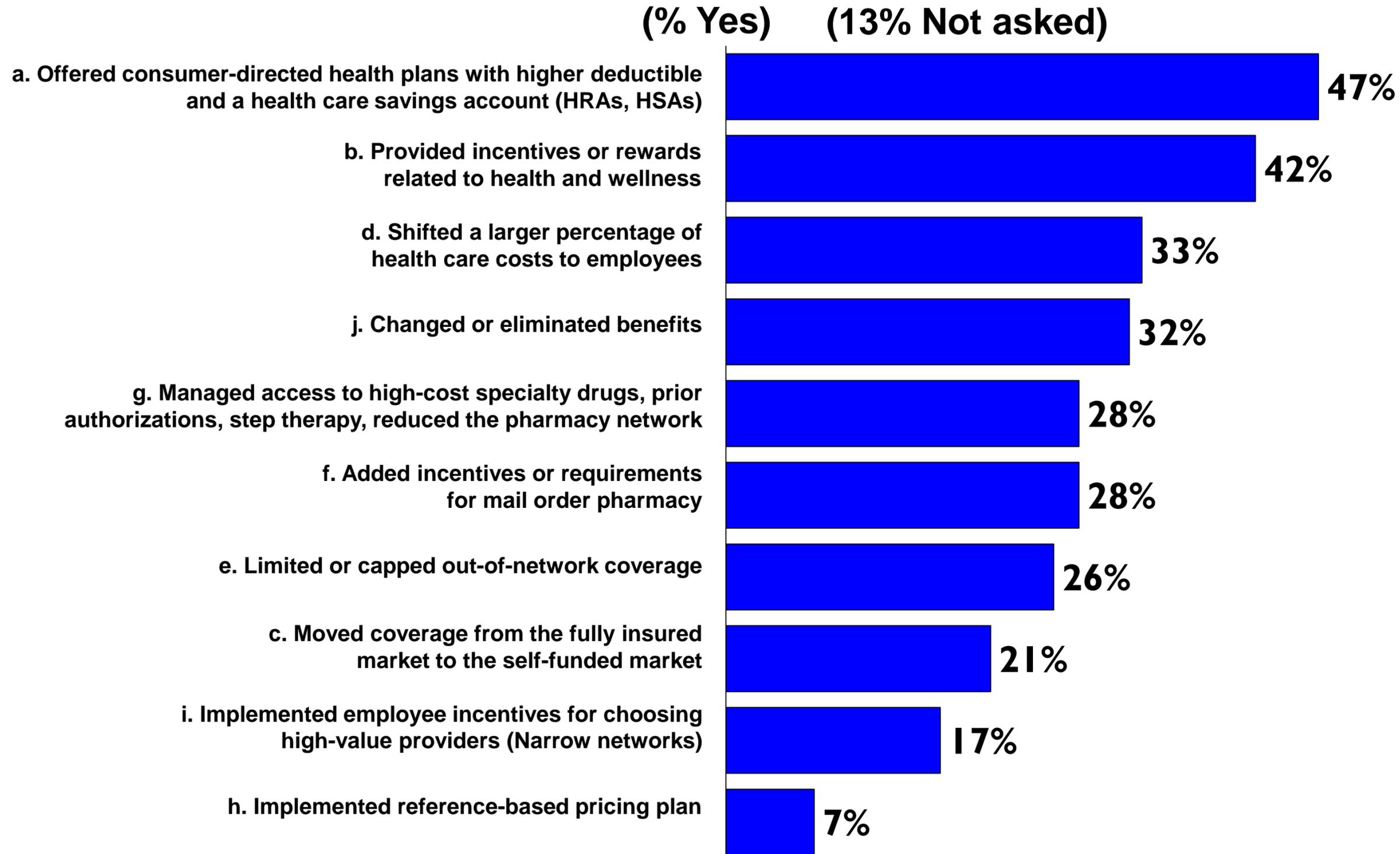
(n=56 respondents)



In your own words, please indicate the most important concern you have about health care that you would like Texas Association of Business to help do something about for your industry.



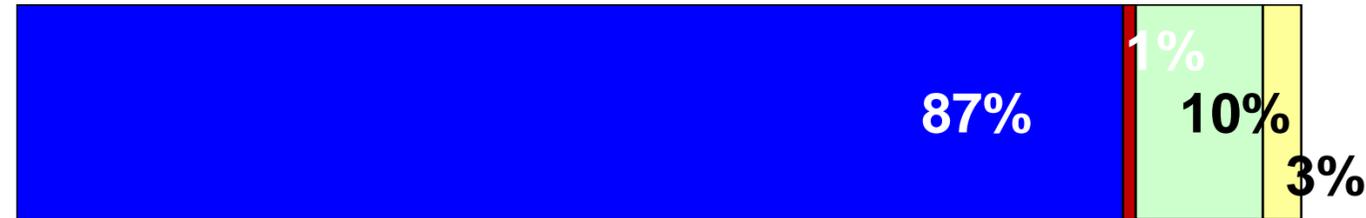
IF PROVIDE OR CONTRIBUTE TO HEALTH COVERAGE: Has your organization engaged in, or planning to engage in, any of the following for the purposes of containing health care costs or the cost of coverage?



POSITION STATEMENTS

■ Agree
 ■ Disagree
 ■ Neutral / Depends
 ■ Unsure
 Net Impact

Texas businesses should stand together against legislation that attempts to increase the cost of employer paid health care coverage.



+86%

Healthcare costs are rising at an unsustainable rate.



+86%

The state legislature should prevent health care providers and insurers from engaging in business practices that reduce competition among providers and lead to higher prices.



+85%

The state legislature should hold health care providers accountable for charging significantly more than the market price.



+84%

The state legislature should require all providers to disclose their prices publicly.



+83%

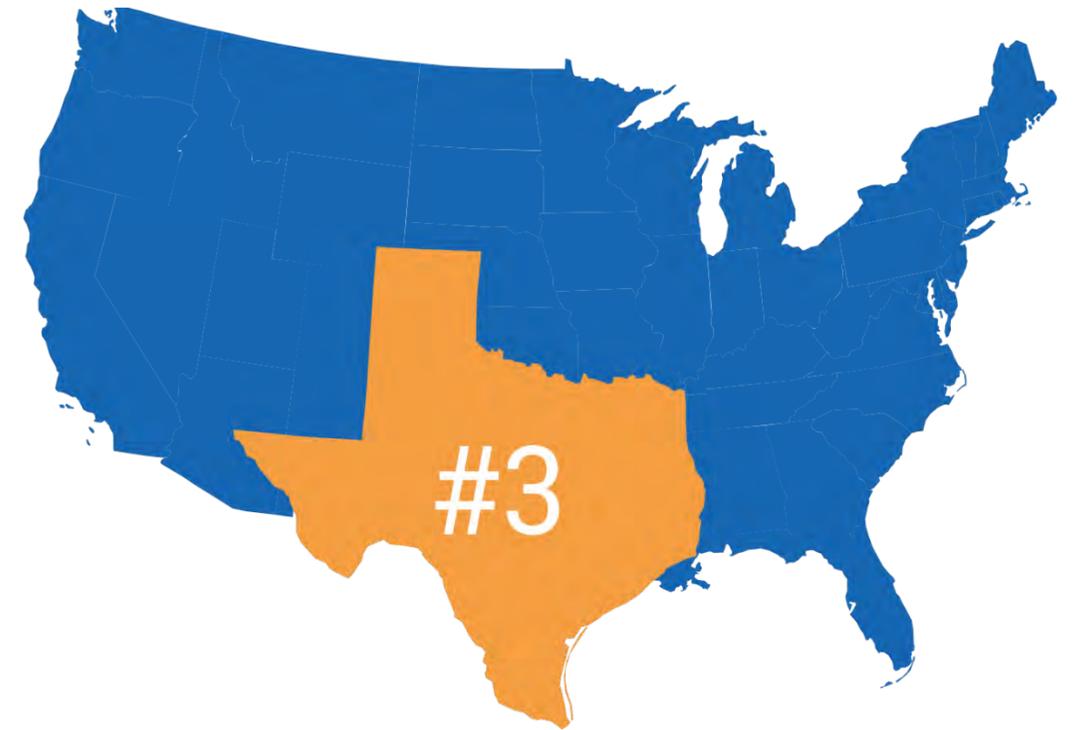
MANDATES DRIVE UP HEALTH CARE COSTS

New government mandates related to provider payments, provider contracting, and new benefits **drive up health care costs and prices.**

Mandates:

- Increase health care costs
- Create a hidden tax on Texas employers
- Put the state at financial risk to pay costs to the federal government

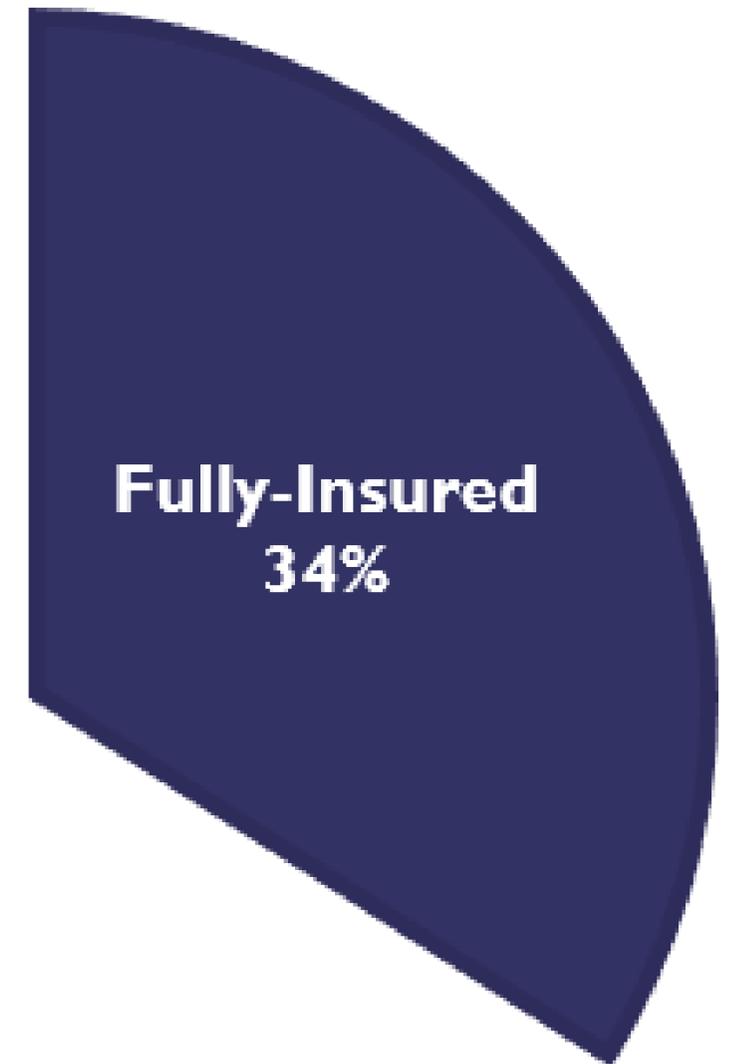
Mandates are state-based legislation that require Texas employers and individuals to pay more for their health insurance coverage by forcing insurance companies and PBMs to pay for extra benefits, regulations, or higher prices.



Texas is ranked
3rd in the nation
for the most health care
mandates

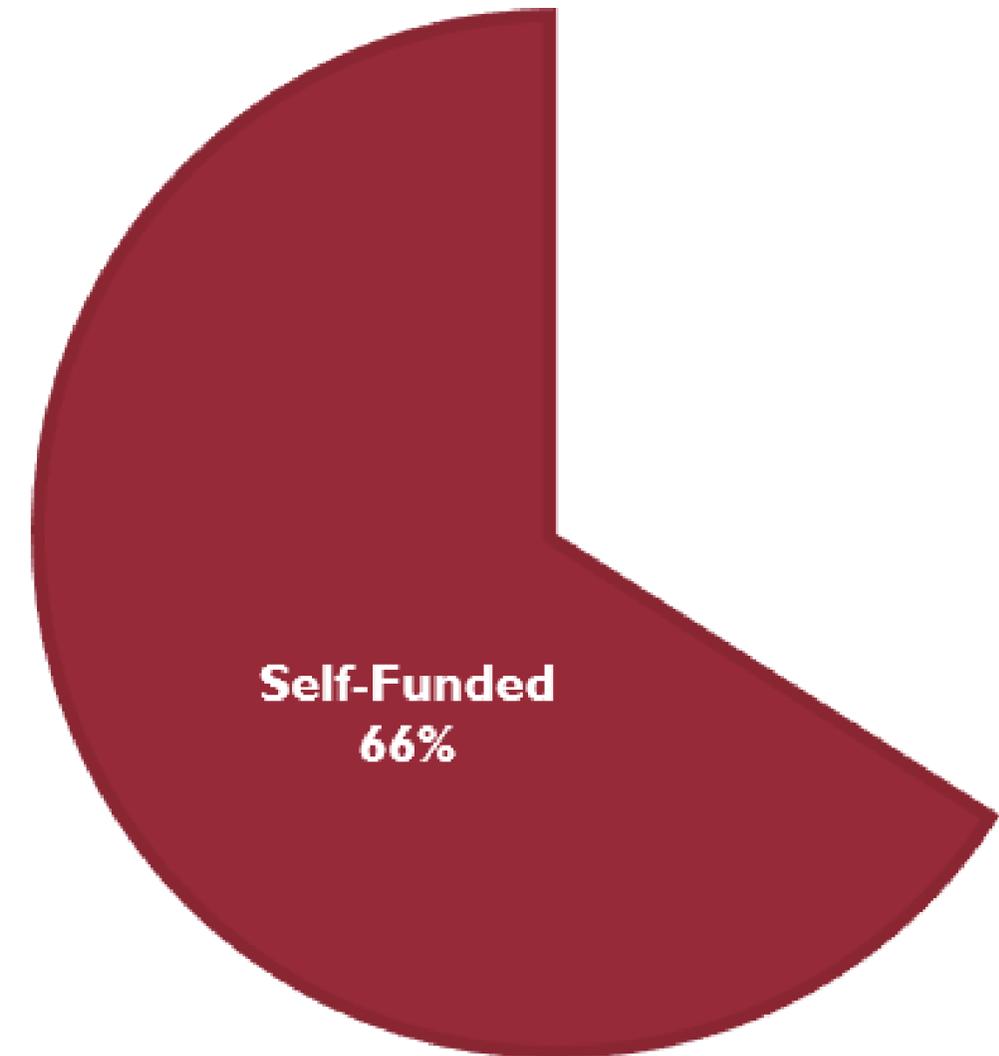
ON THE HORIZON: FULLY-INSURED EMPLOYERS

- Revitalize the **“Consumer Choice Benefit of Plans”**
 - Insurance plans for individuals and small businesses that remove all contract, benefit, and regulatory mandates that exceed federal requirements
- Businesses will be given an additional option when purchasing health benefits:
 - Current “mandate filled” option
 - Consumer Choice Benefit Plan (“mandate-lite”) option
- Continue to offer most competitive and bene



ON THE HORIZON: SELF-INSURED EMPLOYERS

- Historically, federal law (ERISA) preempts the state from regulating self-funded health plans
- Enter Rutledge v PCMA
 - U.S. Supreme Court Case – December 2020
 - Allows state legislatures to mandate certain cost requirements on employers (via self-funded plans)
- **TAB** advocating against any new regulations or policies that could weaken employers' ability to offer affordable healthcare coverage



THE TEXAS STATE CHAMBER



The Texas Association of Health Plans

QUESTIONS?



THE TEXAS STATE CHAMBER

Glenn Hamer

President & CEO

Texas Association of Business



The Texas Association of Health Plans

Blake Hutson

Director of Public Affairs

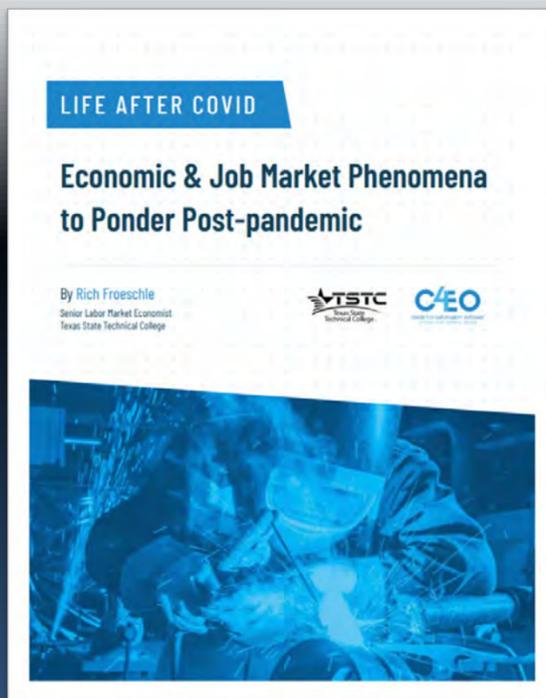
Texas Association of Health Plans

Life After COVID: Labor Shortages and other Considerations in the Post-Pandemic Period



Rich Froeschle

Chief Economist & Consultant,
Texas State Technical College



The State of the Texas Labor Market

Labor Shortages and Other Considerations in
the Post-pandemic Economy

TAB/SHRM

Texas Employment Relations Symposium

August 11, 2022



CENTER FOR EMPLOYABILITY OUTCOMES
AT TEXAS STATE TECHNICAL COLLEGE

Richard Froeschle
rich.froeschle@tstc.edu
(512) 585-8231

Why did God create Economists?

To make weather forecasters look smart

The Good News ... We had a recovery in the Money economy e.g., GDP, wealth, personal savings, stocks all bounced back strongly

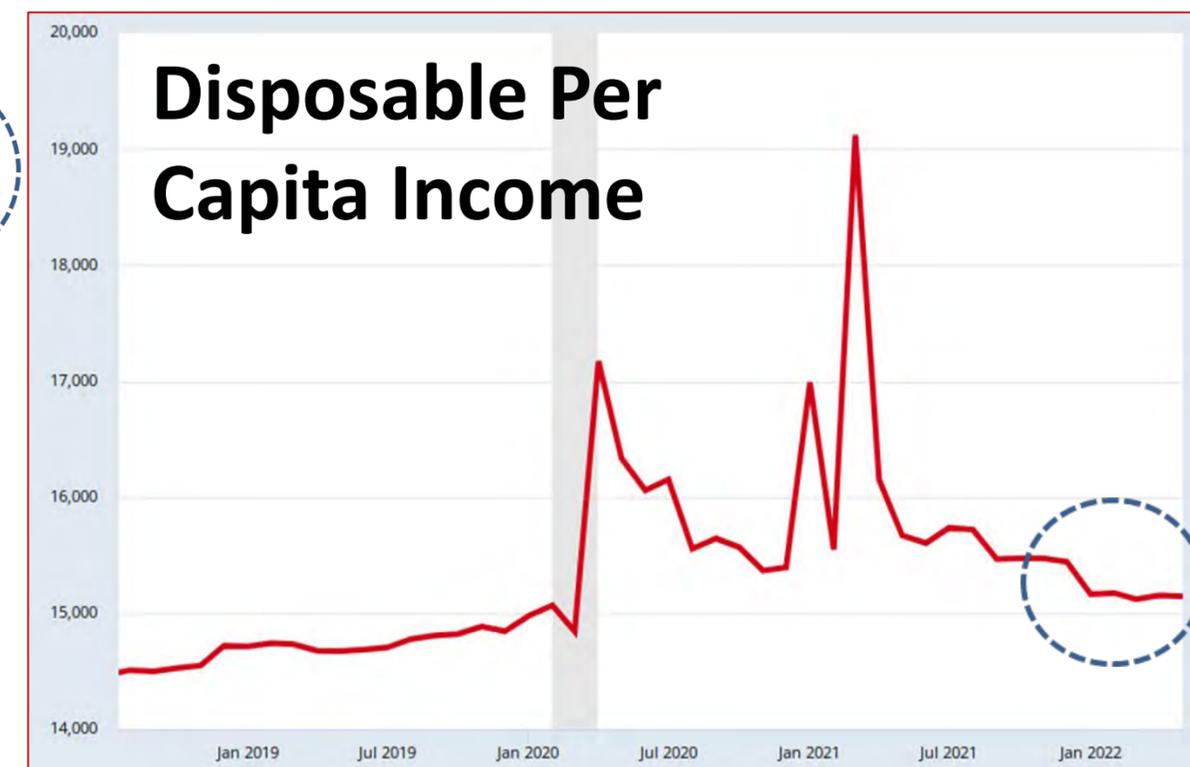
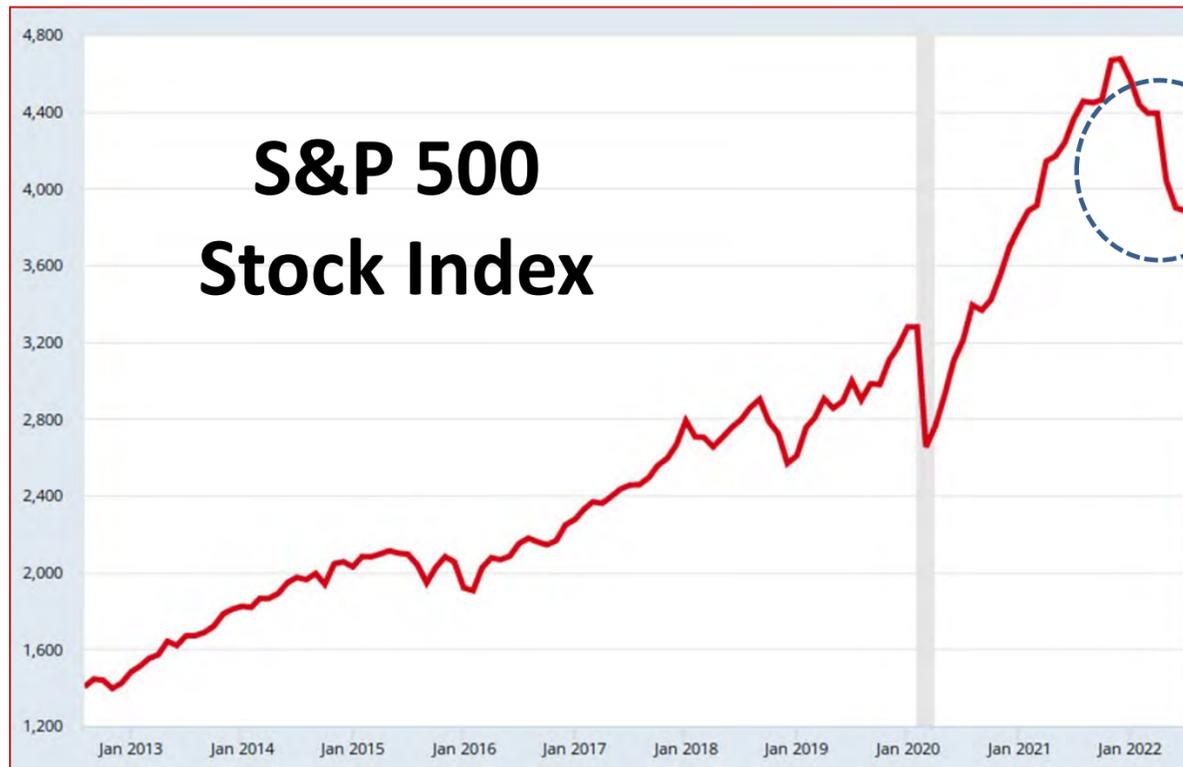
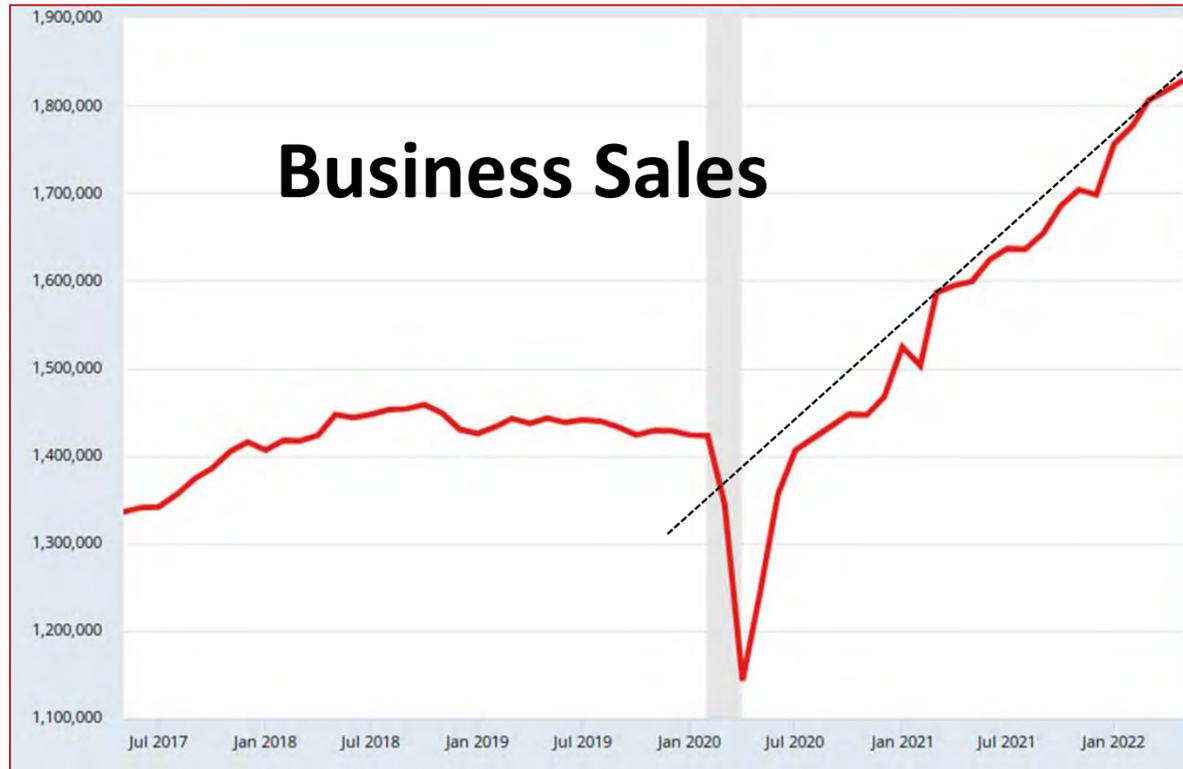


The Challenging News ...

- 1) The Money economy is now technically in recession, but**
- 2) the Money economy and Job Market are 2 very different birds**

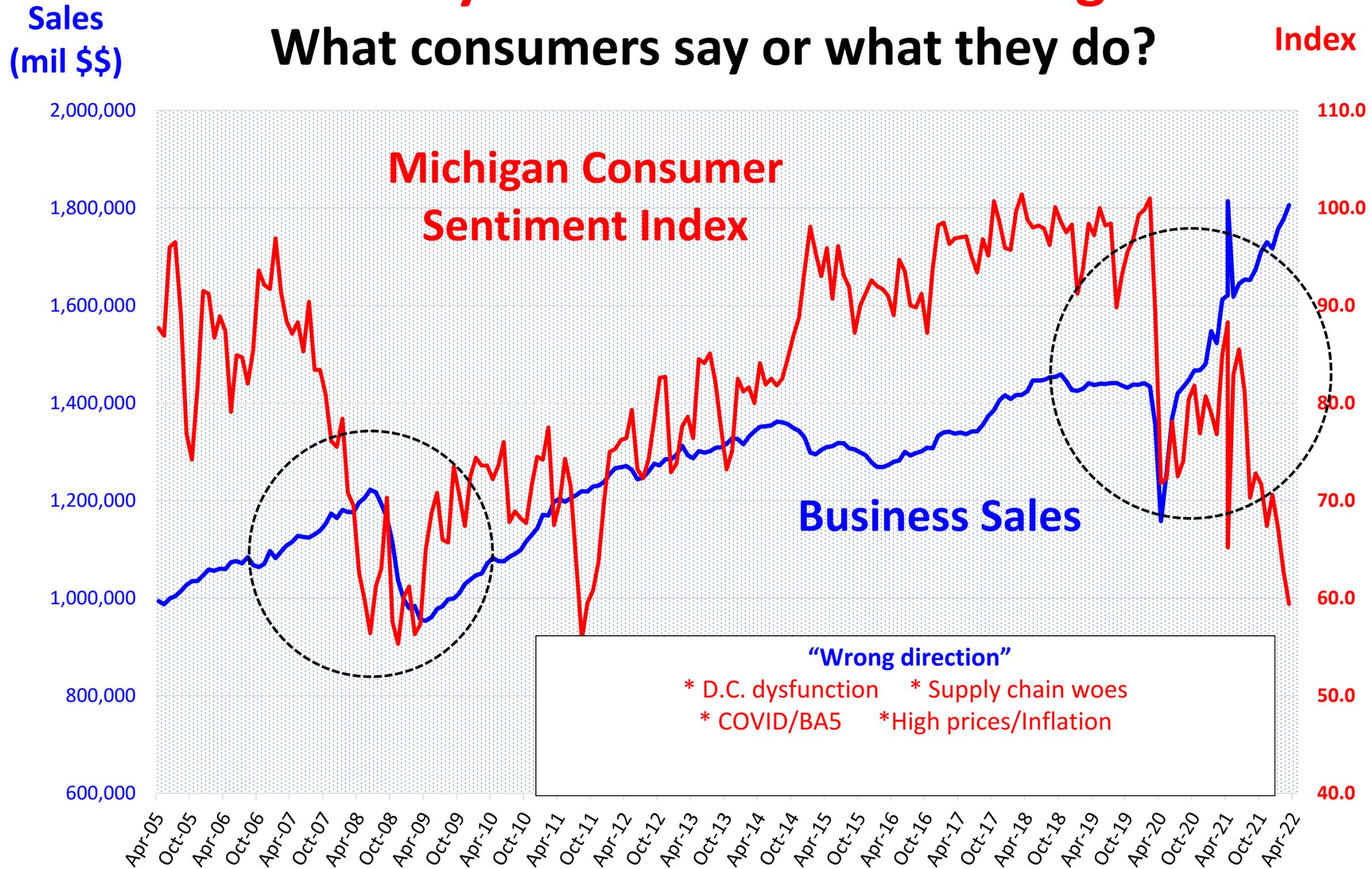


The Money Economy Recovered, with Emerging Weakness



Is it Really a Recession? Mixed Signals

What consumers say or what they do?



A “Recession” or Economic Contraction?

Components of GDP Change			
	4thQTR2021	1stQTR2022	2ndQTR2022
Total GDP Growth	6.90%	-1.40%	-0.90%
Inventories	4.9 points	-0.8 points	-2.0% points
Consumers	2.3 points	1.8 points	0.7% points
Fixed investment	0.2 points	1.3 points	-0.7% points
Govt Spending	-0.5 points	-0.5 points	-0.3% points
Net Exports	0.0 points	-3.2 points	1.4% points

Real Gross Domestic Product: Two quarters of contracting/negative GDP

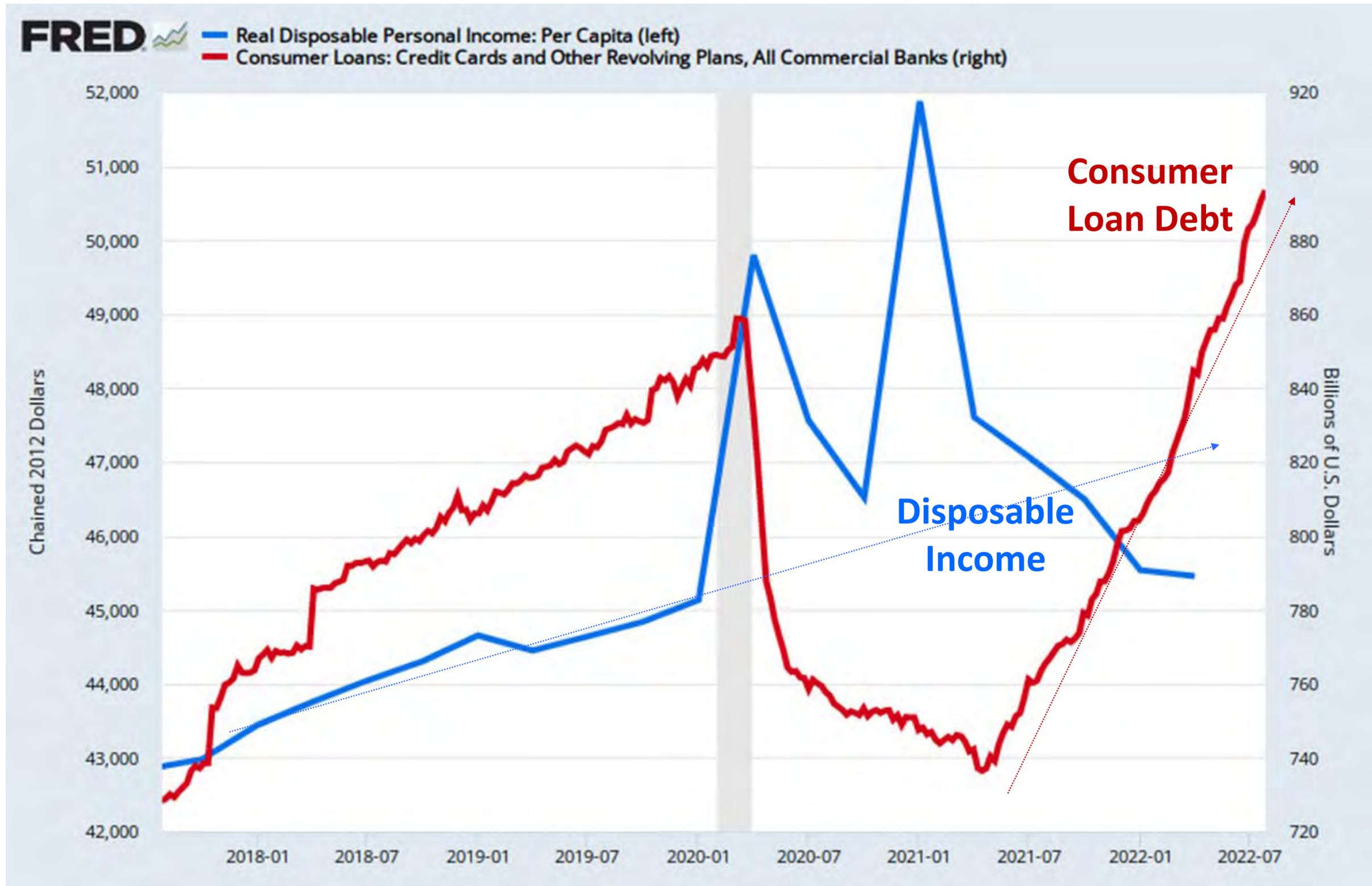
Real Income: Personal income (not including Govt. payment) adjusted for inflation. As real income declines, so do consumer purchases and demand.

Employment: Slowing job growth, rising unemployment, rising jobless claims

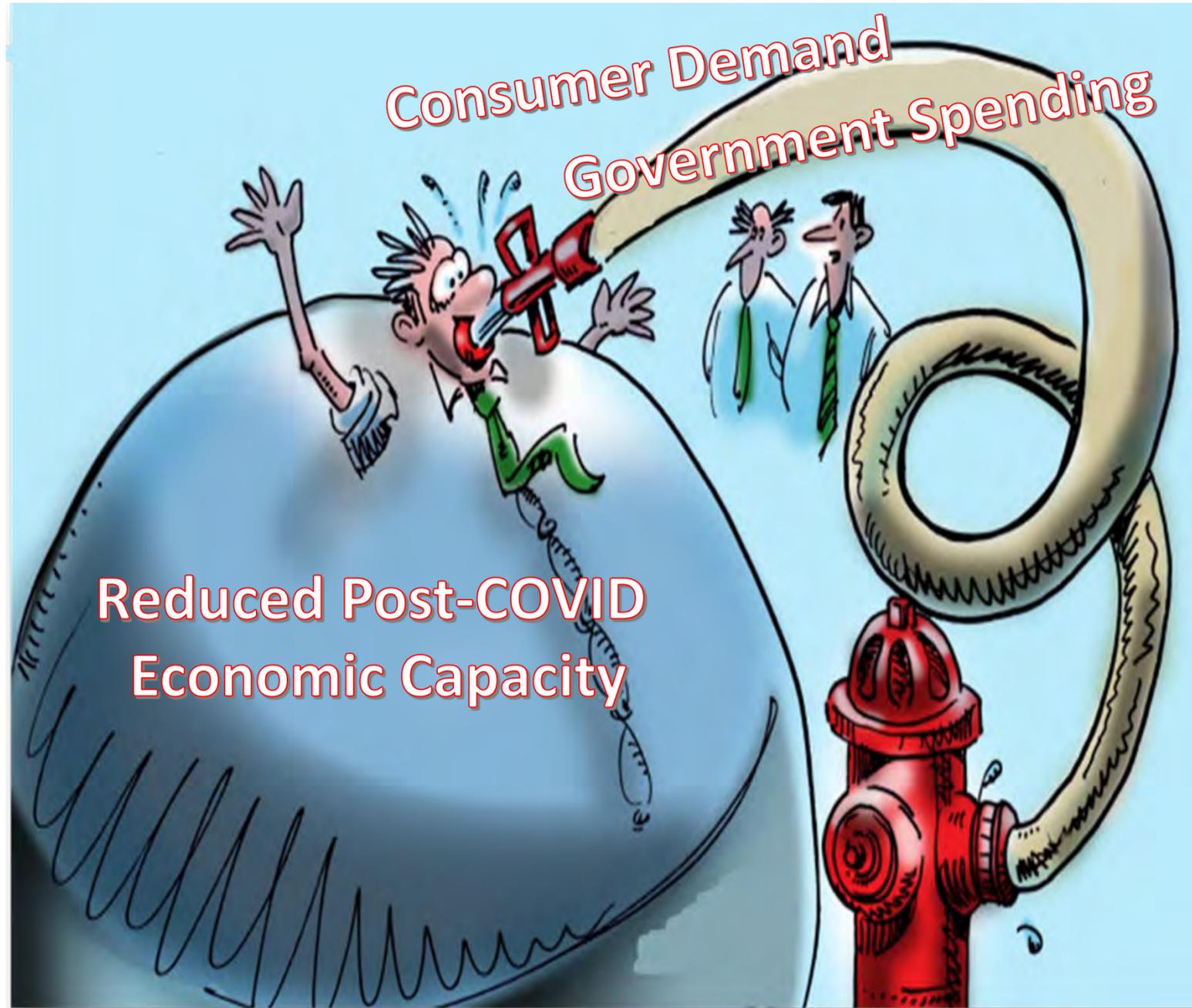
Manufacturing Output: Health of the manufacturing sector based on industrial production, orders for durable goods, manufacturing employment

Retail Sales: How firms will respond to consumer demand. Consumer sentiment

Consumer Deteriorating: Rising Loan Debt and Shrinking Income



Wage Growth Lags Price Inflation



CPI June 2022 YOY

→ All Items	9.1%
Food	10.4%
Meat, Poultry, Eggs	11.7%
Food Not at Home	7.7%
Shelter	5.6%
Energy	41.6%
Home Energy Gas	38.4%
Home Electricity	13.7%
Gasoline	59.9%
Medical Care	48.0%
Airline Fares	34.1%
Alcohol	40.0%
New Vehicles	11.4%
→ Wage Increase	5.1%

The Past Combines With the Present

There's no present.
There's only the
immediate future
and the recent
past.

– *George Carlin*

“The Immediate Future”

Both general labor and specific skill shortages are inevitable. Many of the same occupation and skill shortages that existed prior to the pandemic will return as the economy recovers

- **Skilled construction trades, manufacturing technicians, and logistics and sales occupations.**
- It also includes increasing numbers of **information technology skills** (cloud, robotics, AI, cyber).
- **Health care occupations, especially nursing and a variety of health technicians,** driven by demographic trends that will persist after the pandemic.”

Texas Employment Change: From Feb. Peak & Y-O-Y

Industry	EMP June 2022	CHG June 21 to June 22	CHG Feb 20 - June 22	% CHG from Peak
Total Nonfarm	13,431,100	778,700	464,900	3.6%
Goods Producing	1,915,600	136,300	-9,800	-0.5%
Service-Providing	11,515,500	642,400	474,700	4.3%
Professional/Business Services	2,016,400	137,200	177,100	9.6%
Trade, Transportation, Utilities	2,697,500	134,500	171,200	6.8%
Financial Activities	894,400	67,600	76,600	9.4%
Leisure and Hospitality	1,446,400	151,000	30,900	2.2%
Information	234,600	27,800	22,400	10.6%
Educational Services	244,700	25,700	22,200	10.0%
Manufacturing	922,600	51,300	13,000	1.4%
Health Care/Social Assistance	1,560,500	48,700	5,700	0.4%
Construction	779,900	50,100	-1,200	-0.2%
Other Services	445,500	33,000	-7,700	-1.7%
Mining and Logging	213,100	34,900	-21,600	-9.2%
Government (losses in Local & State)	1,975,500	16,900	-23,700	-1.2%

Hot Jobs: Texas Job Postings Feb 2020 & June 2022

Occupation	2020	Occupation	2022
Total Across All Occupations	827,104	Total Across All Occupations	1,392,525
Registered Nurses	37,041	Registered Nurses	66,784
Software Developers	33,341	Software Developers	63,024
Non-tech Sales Reps, WH/Manuf.	30,110	Non-tech Sales Rep, WH/Manuf	36,325
Retail Salespersons	25,045	Retail Salespersons	30,484
Customer Service Reps	19,996	Customer Service Reps	28,649
Supervisors, Retail Sales Workers	16,992	Computer Occupations, Misc.	25,514
Computer Occupations, Misc.	14,053	Fast Food & Counter Workers	25,161
Personal Service/Project Mgrs.	12,836	Personal /Project Managers, AO	24,638
Heavy Truck Drivers	12,815	Heavy Truck Drivers	23,949
Fast Food & Counter Workers	10,879	Supervisor, Retail Sales Workers	21,623
Maintenance & Repair Workers	9,844	Manual Laborer & Stock Movers	18,831
Accountants and Auditors	9,733	Maintenance & Repair Workers	17,006
Sales Managers	9,637	Food Service Managers	16,565
Secretaries & Admin Assistants	9,619	Accountants and Auditors	16,053
Medical Dosimetrists, E-HIT	9,609	Medical/Health Services Mgrs.	15,157

HOT 30: “Excess” Job Postings by Occupation April 2022

Occupations with greater current demand than their existence in the Texas economy

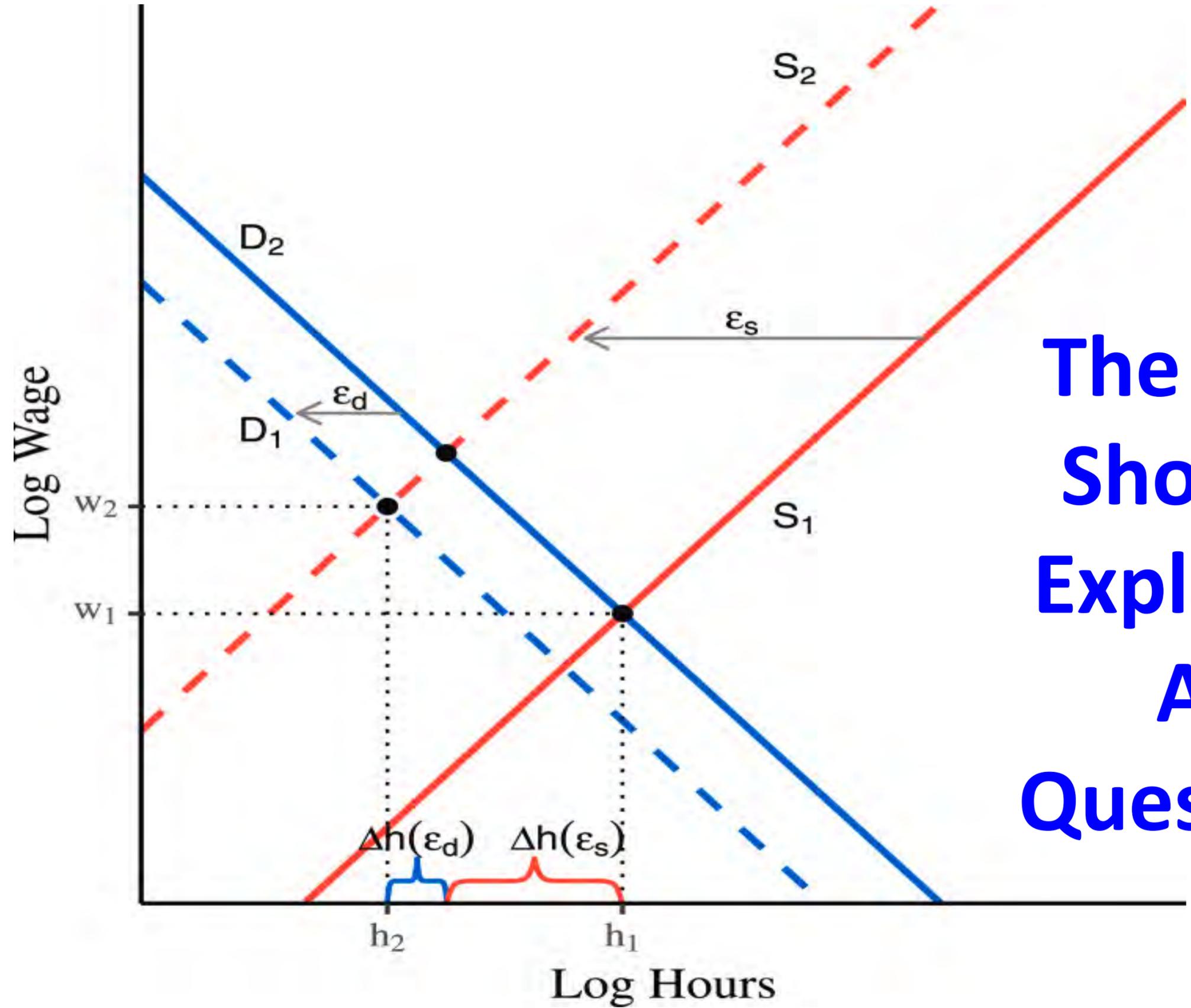
Occupation	L.Q.	Occupation	L.Q.
Computer/Info. Research Scientists	12.4	Manufacturing Production Workers	4.1
Computer/Information Systems Mgrs.	10.4	Network System Administrators	3.9
Food Prep & Serving Workers, MISC	9.4	Data Scientists, MISC	3.9
Dietetic Technicians	8.7	Supervisors, Food Prep Workers	3.8
Occupational Therapy Assistants	8.0	Mental Health/Abuse Social Workers	3.7
CTE/Tech ED Teachers, College	6.7	Supervisors, Retail Sales Workers	3.7
Architectural/Engineering Mgrs.	6.3	Marketing Managers	3.7
Social/Human Service Assistants	6.3	Diagnostic Medical Sonographers	3.6
Computer Occupations, All Other	5.8	Driver/Sales Workers	3.4
Cardiovascular Technologists/Techs	5.7	Medical Scientist, Ex. Epidemiologist	3.3
Medical/Health Services Managers	5.6	Supervisor, Housekeeping/Janitorial	3.3
Operations Research Analysts	5.6	Computer User Support Specialists	3.2
Public Relations Managers	4.5	Speech-Language Pathologists	3.2
Surgical Technologists	4.2	Natural Sciences Managers	3.1
Health Information Techs, E-HIT	4.1	Radiologic Technologists/Techs	3.0

Most Growth Feb 2020 to Today: Texas Job Postings (part 1)

Occupation (1-16)	Advertised Salary	June 2022 Postings	CHG from Feb 2020
Total Across All Occupations	\$40,640	1,392,525	553,676
1. Software Developers & Q/A Testers	\$115,072	63,024	29,596
2. Registered Nurses	\$83,200	66,784	28,935
3. Fast Food & Counter Workers	\$23,872	25,161	14,273
4. Personal Service & Project Managers, MISC	\$76,672	24,638	11,746
5. Computer Occupations, All Other	\$107,392	25,514	11,429
6. Heavy Truck Drivers	\$68,480	23,949	11,123
7. Manual Laborers & Freight Movers	\$30,144	18,831	9,573
8. Customer Service Representatives	\$31,168	28,649	8,471
9. Marketing Managers	\$102,272	13,577	8,257
10. Food Service Managers	\$44,928	16,565	7,897
11. Human Resources Specialists	\$52,096	14,659	7,763
12. Waiters and Waitresses	\$26,048	15,108	7,759
13. Cooks, Restaurant	\$27,072	13,196	7,414
14. Maintenance & Repair Workers, General	\$37,568	17,006	7,126
15. General and Operations Managers	\$61,568	14,781	6,462
16. Licensed Practical/Vocational Nurses	\$53,888	11,597	6,400

Most Growth Feb 2020 to Today: Texas Job Postings (part 2)

Occupation (17-33)	Advertised Salary	June 2022 Postings	CHG from Feb 2020
17. Web Developers & GUI Interface Designers	\$107,392	11,194	6,330
18. Accountants and Auditors	\$67,968	16,053	6,280
19. Financial Managers	\$104,704	12,535	6,092
20. Non-tech Sales Reps. WH & Man	\$61,632	36,325	6,033
21. Medical & Health Services Managers	\$74,112	15,157	5,967
22. Retail Salespersons	\$28,096	30,484	5,302
23. Janitors and Cleaners, Ex. Maids	\$26,944	11,454	5,155
24. Cashiers	\$22,976	10,348	5,122
25. Home Health & Personal Care Aides	\$23,872	10,200	4,890
26. Stockers and Order Fillers	\$31,168	10,904	4,764
27. Medical Dosimetrists, E-HIT Specialists	\$35,456	14,362	4,726
28. Supervisors, Retail Sales Workers	\$37,504	21,623	4,601
29. Supervisors, Food Prep & Serving Workers	\$29,120	9,505	4,533
30. Driver/Sales Workers	\$34,496	8,192	4,393
31. Secretaries & Admin Assistants, Ex. Legal	\$33,984	13,985	4,322
32. Database Administrators and Architects	\$110,464	10,041	4,063
33. Data & Math Science Occupations, MISC	\$89,984	8,894	4,033



**The Labor Shortage Explained:
Any Questions?**

LIFE AFTER COVID

Economic & Job Market Phenomena to Ponder Post-pandemic

By Rich Froeschle
Senior Labor Market Economist
Texas State Technical College



“It’s unrealistic to presume that an economy and a society, which have endured unprecedented structural and psychological hardships, will emerge on the other side unscathed and unchanged”.

Are more people really quitting than ever before?

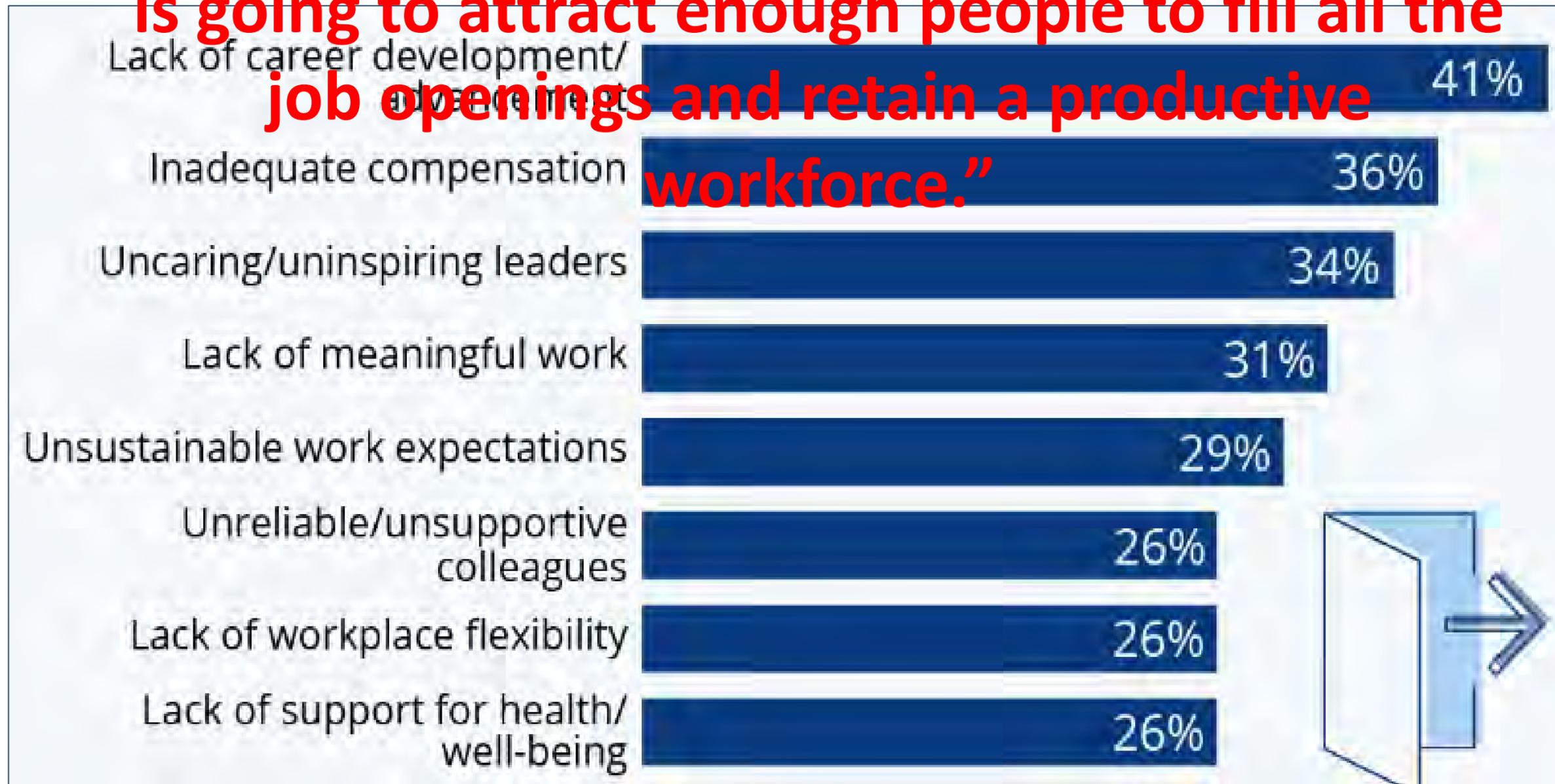


Research suggests the quit rate is the best indicator of future

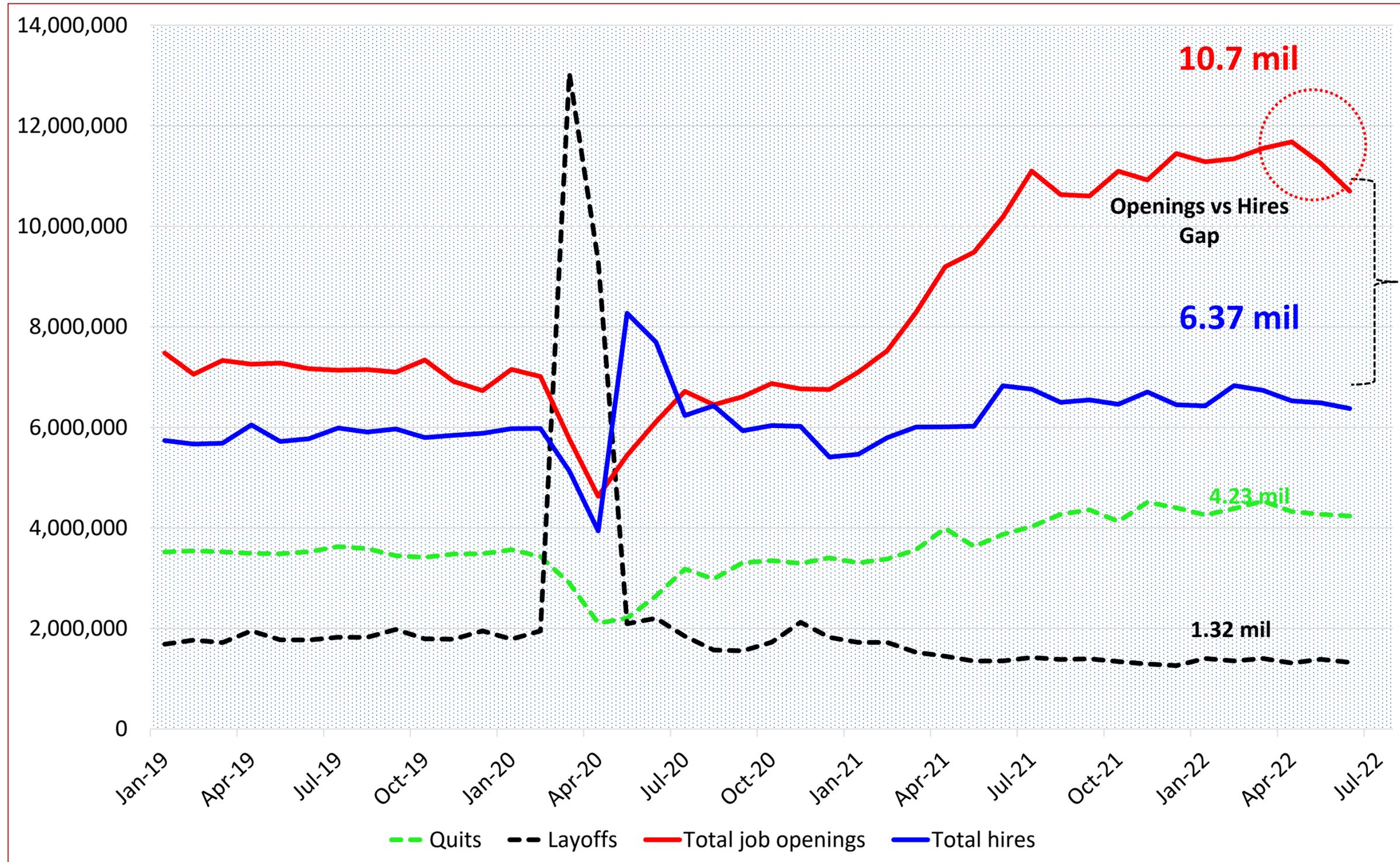
Why People Are Quitting Their Jobs

Most common reasons given for quitting previous job (April 2021-April 2022)

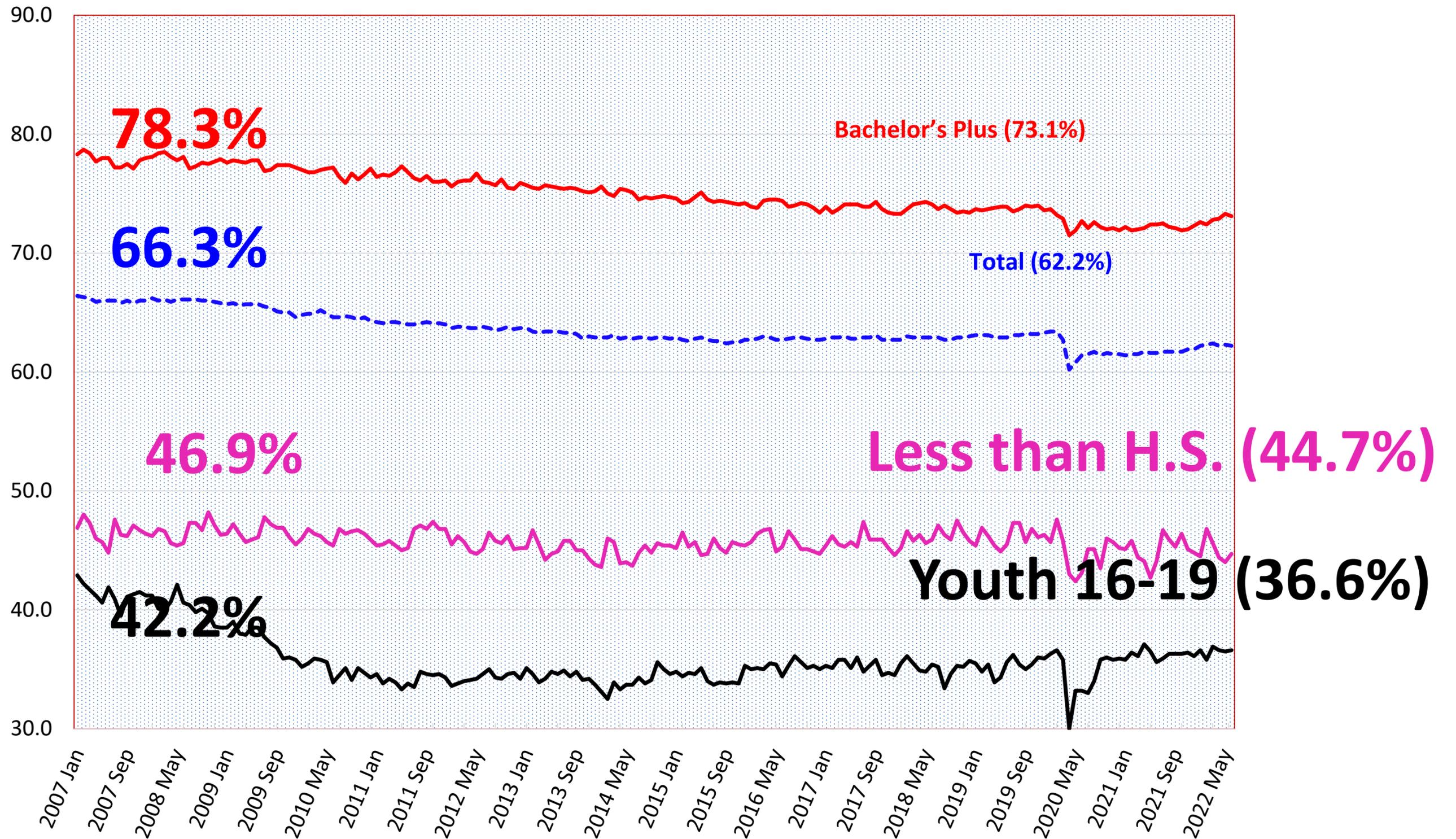
“These differences show that no single solution is going to attract enough people to fill all the job openings and retain a productive workforce.”



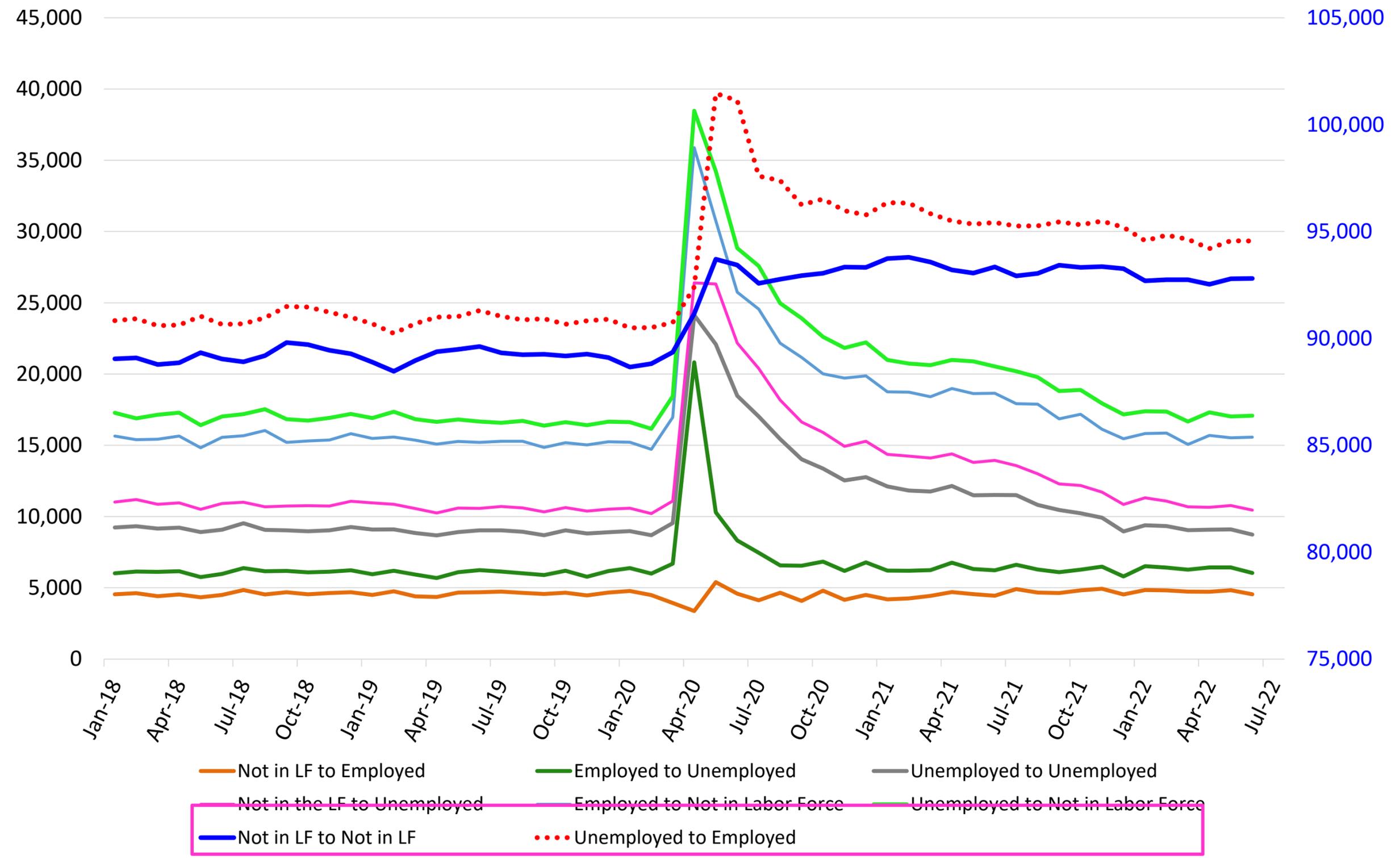
The Hiring Gap? Quits, Hires & Job Openings Trends



Lagging U.S. Labor Force Participation Rates



People Changing Labor Force Status (June 2022)



Job Flows Update Between June 2021 and June 2022

Started as Employed

Slightly higher percent of employed persons stayed employed	Positive
Slightly lower percent of employed persons became unemployed	Positive
Slightly higher percent of employed persons dropped out of the CLF	Negative

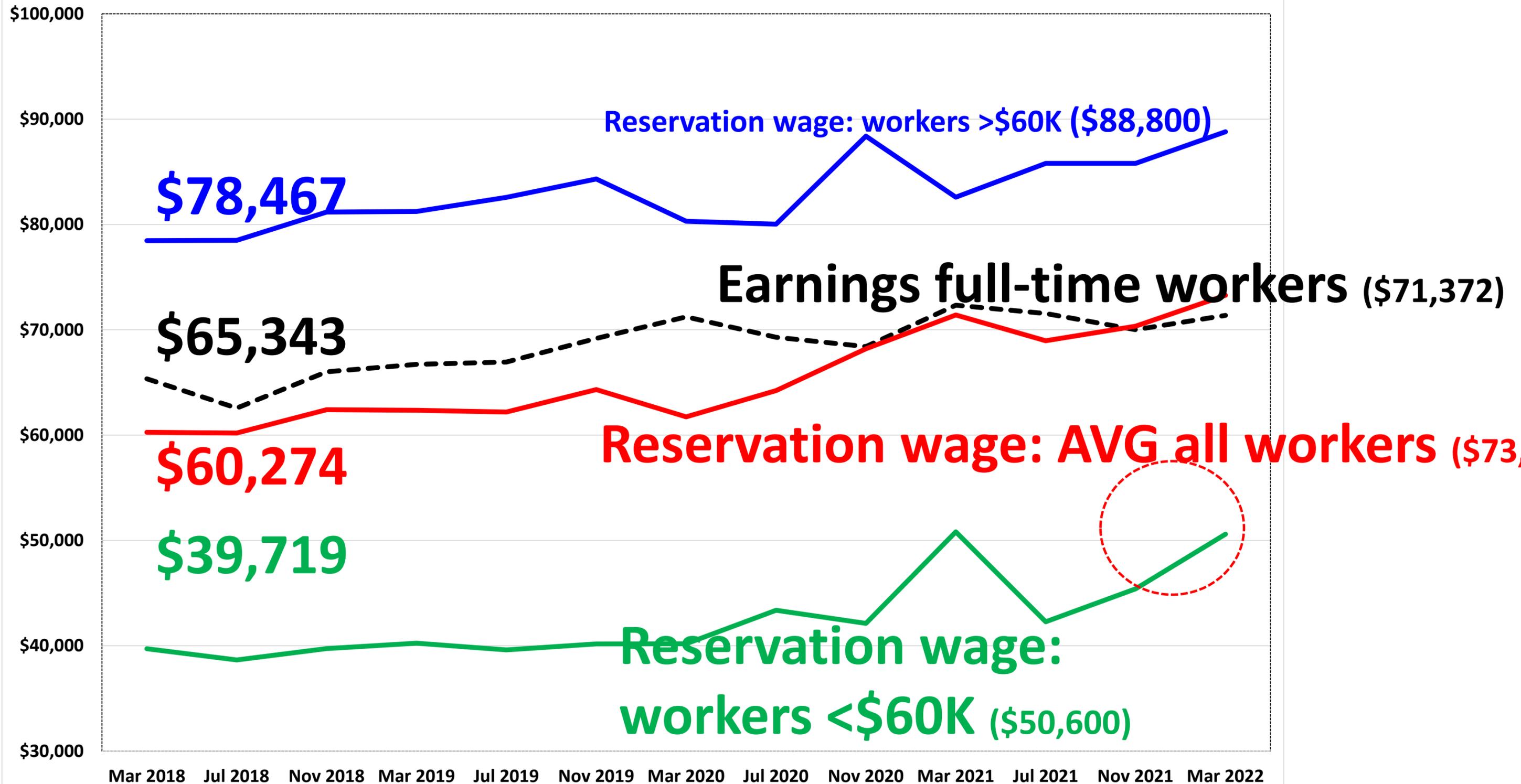
Started as Unemployed

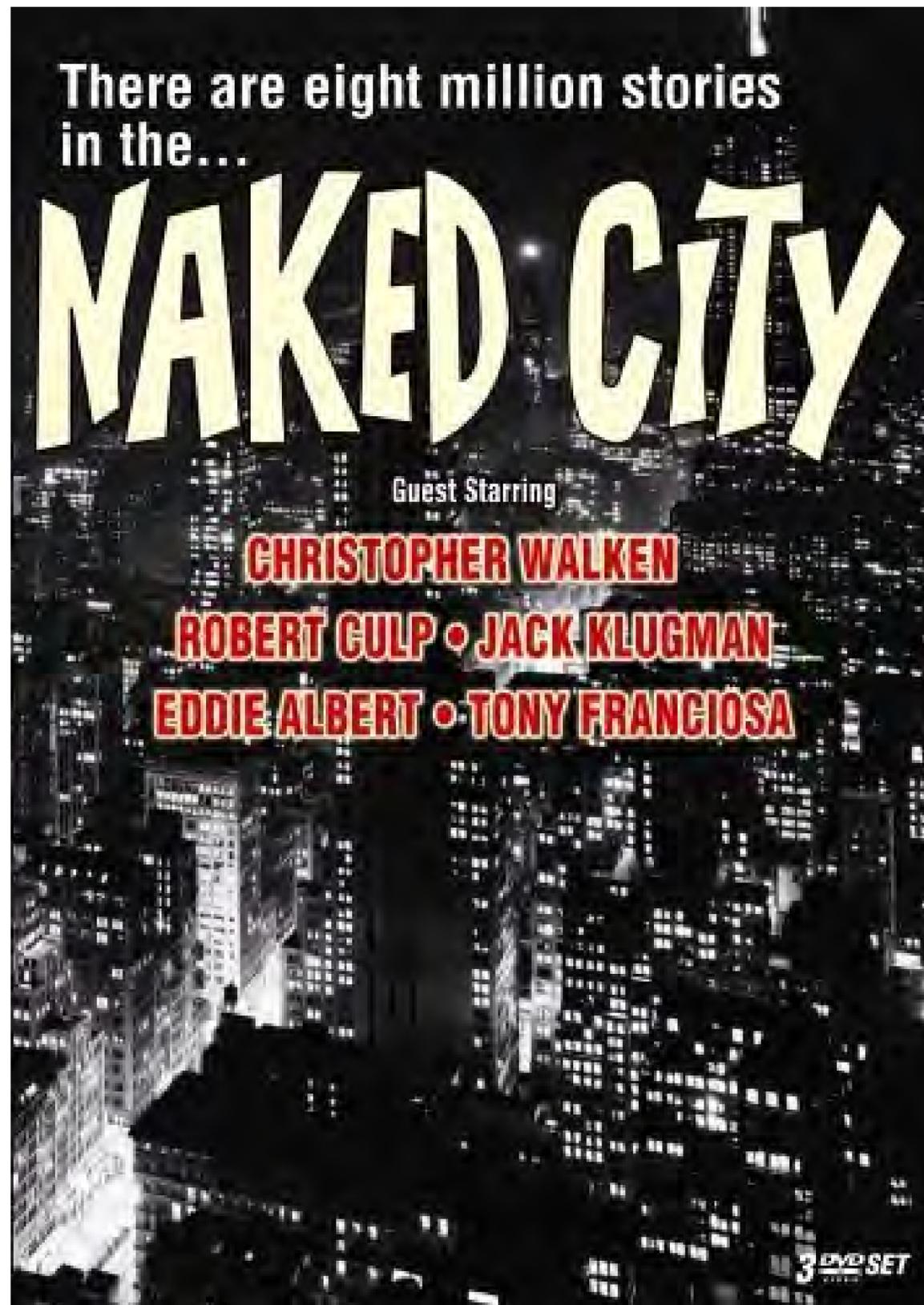
A much higher percent of unemployed people became employed	Positive
A lower percent of unemployed people stay unemployed	Positive
A higher percent of unemployed persons left the labor force	Negative

Started Not in the Civilian Labor Force

Slightly higher percent who were not in the CLF became employed	Positive
Lower percent who were not in the CLF became unemployed	Negative
Same percent who were not in the CLF stayed out of the CLF	Negative

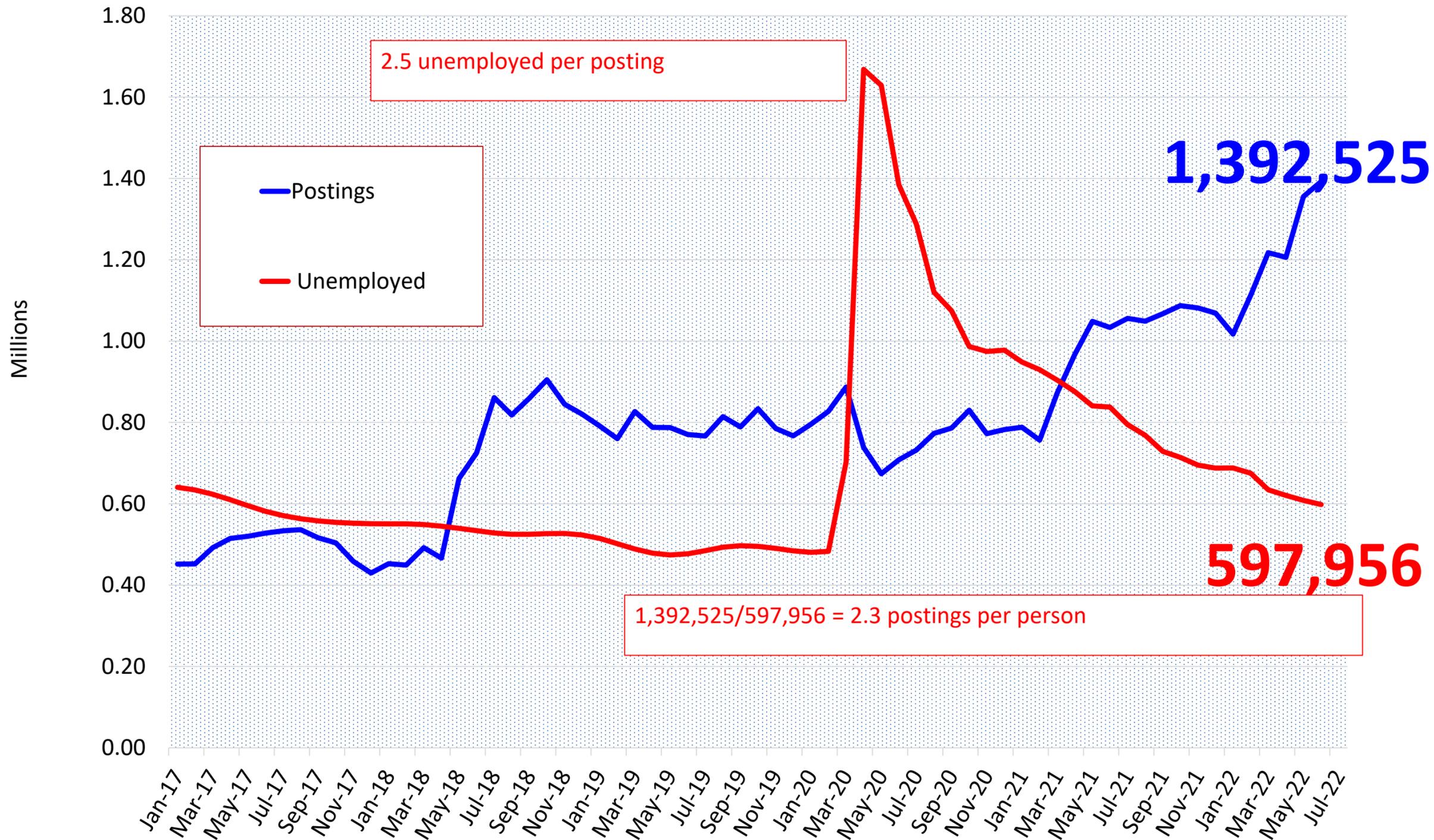
What Would it Take to Get Me Off the Couch? Rise in Post-pandemic Reservation Wage





“There are eight million stories in the naked city, you are about to see one of them”

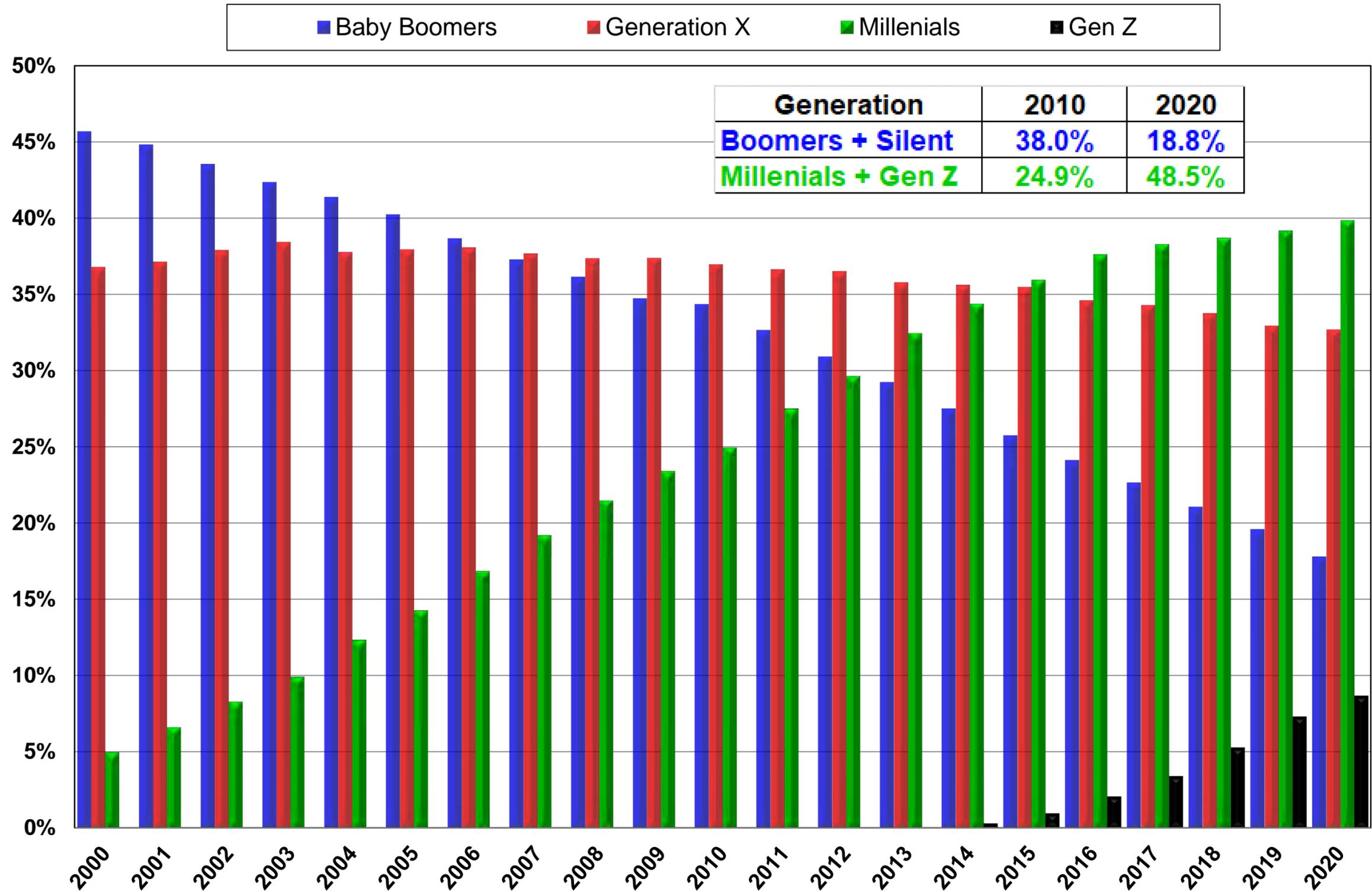
Texas Labor Shortage: Postings Outstrip Unemployed



Causes of Labor Shortage: Influences on Labor Supply

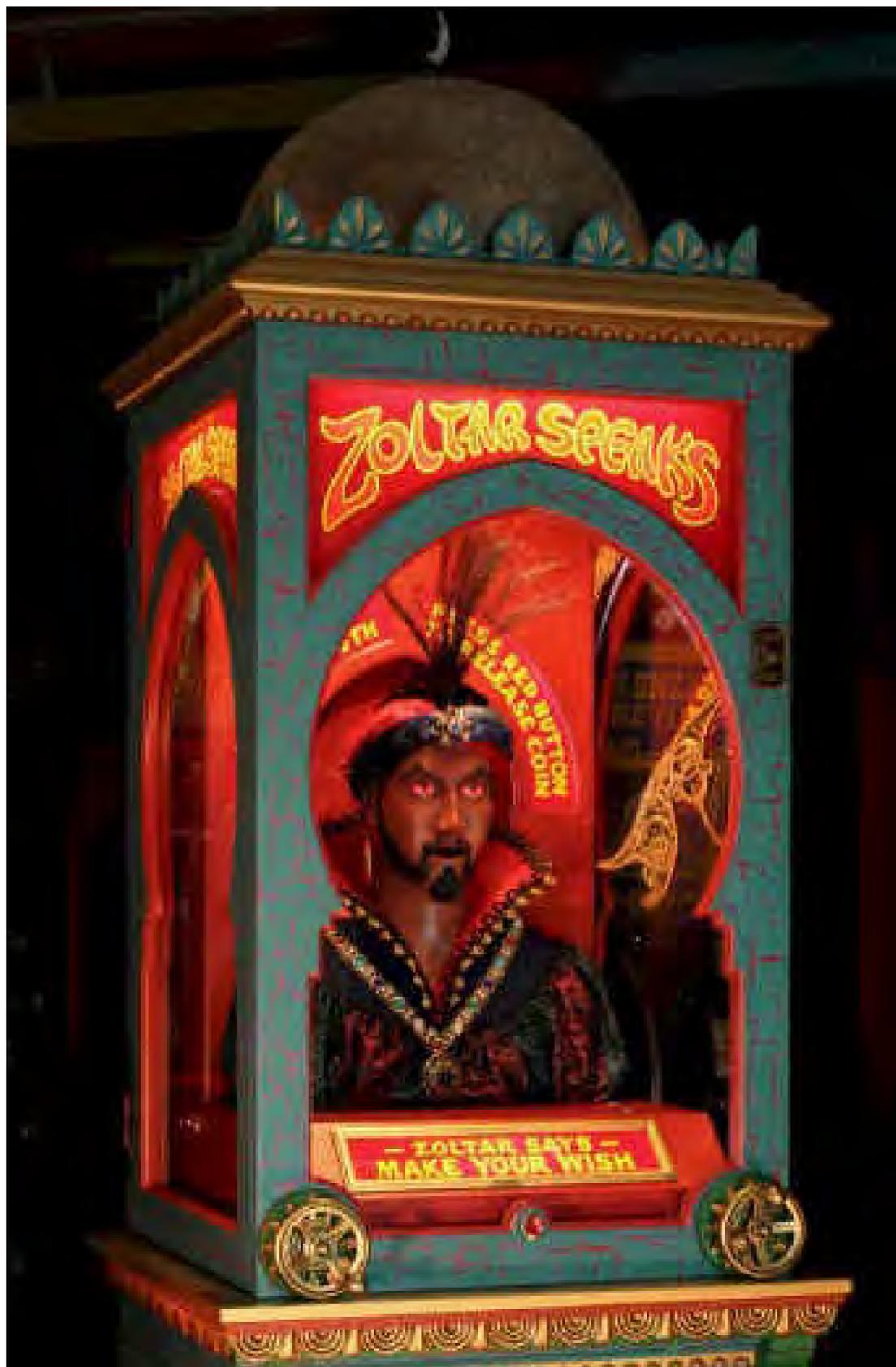
1. **Govt. incentives remove urgency** – expanded UI, student debt relief, rent postponement, other subsidies
2. **Minding the kids:** in-home schooling, childcare!, eldercare
3. **Declining Labor Force Participation Rates** (esp. Mothers)
4. **Demographics** – baby boomer retirement, low birth rates
5. **Reduction of foreign workers**, fewer student & work visas
6. **Workplace safety issues** (lost hours out sick, virus-based hesitancy)
7. **Change in cultural values:** Millennials/Gen Z have different work/life (\$\$\$/flexibility) priorities, value of work, brand/culture
8. **The Great Reshuffle:** Career reflection & ‘Burnout’, quits/job hopping to increase pay, self-employment, Reservation Wage
9. **Small business can’t compete on wages** (Amazon effect)
10. **Skill mismatch:** Worker skills don’t match job openings, student choice doesn't match high demand jobs

Generational Percentages of Texas Employment 2000 - 2020



Texas Labor Force Pandemic Peak to Trough to Today

	CLF**	EMP***	Postings*	UnEMP**	Urate
Feb 2020 (peak)	13.95 mil	12.97 mil	827,104	483,015	3.5%
April 2020 (trough)	13.19 mil	11.52 mil	738,324	1,668,137	12.6%
June 2022 (today)	14.55 mil	13.43 mil	1,392,525	597,956	4.1%
CHG Trough April 2020 to Today	1.36	1,912,400	654,201	-1,070,181	
PCT CHG	10.3%	16.6%	88.6%	-64.2%	
CHG Pre-pandemic Peak to Today	606,694	464,900	565,421	114,941	
PCT CHG	4.3%	3.6%	68.4%	23.8%	
* Job Openings (Openings) from EMSI/Burning Glass Online Postings					
**Civilian Labor Force (CLF), Unemployed (UnEMP) from BLS LAUS/TWC (adjusted) (77%)					
***Employed persons (EMP) from TWC CES (adjusted)					



The Future:

“The only function of economic forecasting is to make astrology look respectable.”

John Kenneth Galbraith

Ten Trends to Ponder in the Post-pandemic Economy

#1 - Supply chains have been seriously disrupted. They will be reoriented with greater emphasis on local markets

#2 - Online retailing will accelerate: Decline in retail store jobs. E-commerce capturing a growing share of the market. Logistics!

#3 - School may never be the same: back to campus or cyberspace? Hybrid Learning? Questions about college costs/value proposition?

#4 - Teleworking or work from home arrangements become more common: Fewer commuters and a virtual workplace

#5 - It's all about skills! - Degrees still matter, but it's skills that count. Hard & soft skills, socioemotional & digital skills



It's all about skills! - Degrees still matter, but it's skills that count. Emergence of skill-based hiring practices!

A 'skill' is something that has a positive effect on worker productivity

- 1. Technical skills:** a.k.a. hard skills. The ability or the knowledge one needs to perform a specific task, i.e., the ability to weld metal structures or analyze medical health records data.
- 2. Employability skills:** a.k.a. soft skills. Attitudes & behaviors critical to success on the job, i.e., communication, trainable, work ethic
- 3. Socioemotional skills:** a.k.a. coping, personal development, or human interaction skills. Includes conscientiousness, emotional stability, conflict resolution, and the concern for others.
- 4. Digital skills:** a.k.a. digital literacy. The ability to manipulate and apply digital data for productive purposes, i.e., locate and retrieve digital information, generate new digital content.

#6 - Digital acceptance – Pandemic speeds up digital transformation. Digital technologies become commonplace (AI, Cyber, Blockchain)

#7 - Are Robots the Answer? Human frailty, technology progress, labor shortages increase demand for robotic solutions/personnel

#8 - Building the new infrastructure: Rethinking transportation needs. Investments in physical infrastructure. Demand for workers that build and fix things. Includes Telecomm!



#9 - Small business suffers while the gig economy grows – Big Tech and Big Box stores flourished. Will the little guys survive?

#10 – The world has been in recession too! – Limited business travel, fewer exports hurts Texas, oil & food shortages, Ukraine

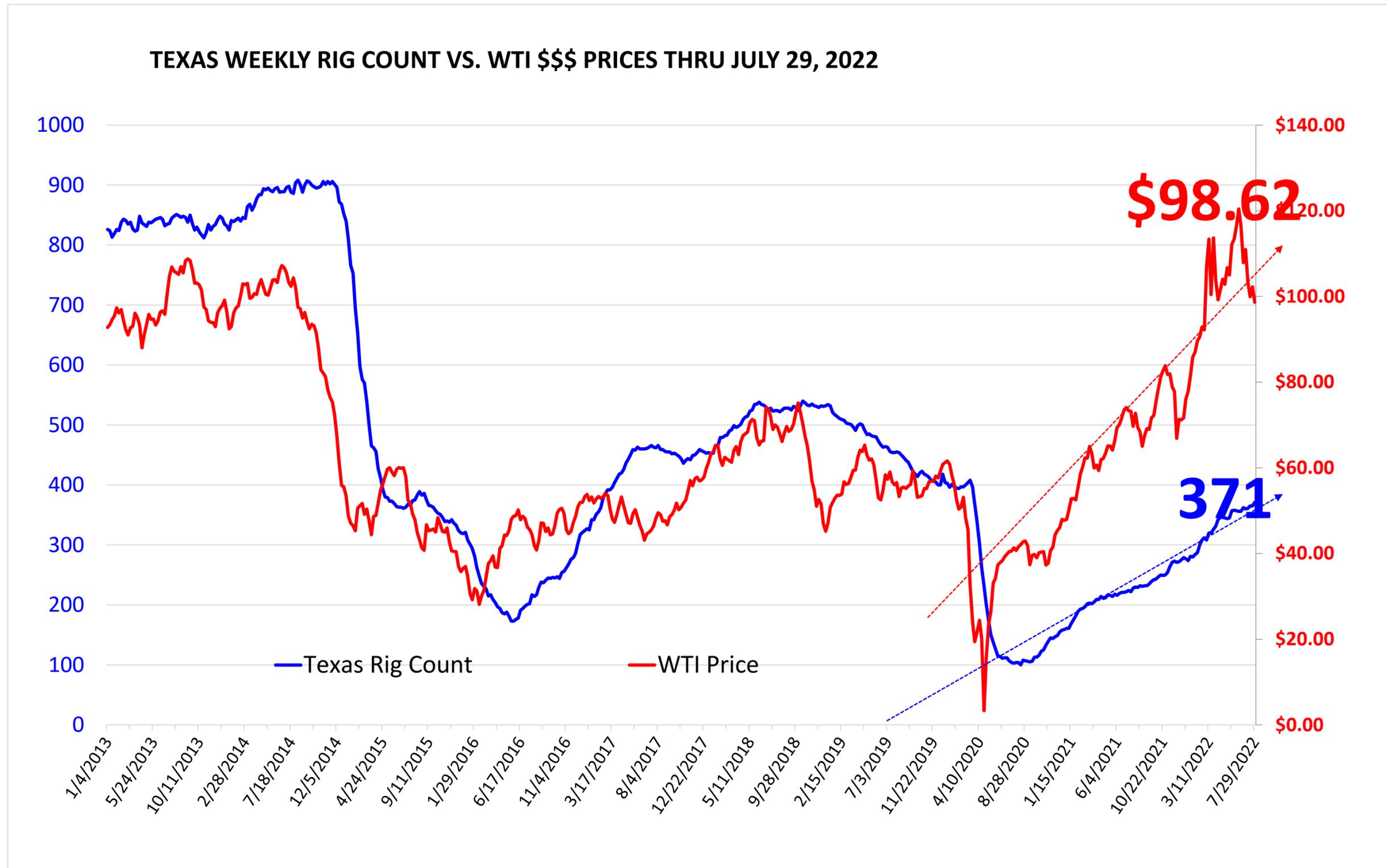
Texas Industry Growth Leaders 2020Q1 – 2021Q4

Industry	EMP 2021Q4	EMP ABS CHG	AWW 2021Q4	AWW PCT CHG
Total, All Industries	12,863,295	296,193	\$1,374	11.7%
Employment Services	358,720	66,417	\$1,184	42.1%
Warehousing and Storage	160,918	56,760	\$889	10.7%
Computer Systems Design	252,565	46,105	\$2,662	15.6%
Couriers & Express Delivery Services	86,876	30,438	\$830	2.9%
General Merch Stores (Big Box, Supercenters)	204,214	29,952	\$576	9.3%
Management & Technical Consulting Services	185,465	24,227	\$2,298	14.6%
Grocery Stores	236,513	18,335	\$595	9.2%
Offices of Physicians	253,886	16,338	\$2,136	22.1%
Insurance Agencies & Brokerages	127,056	15,135	\$1,674	-1.9%
Business Support Services (Customer Contact Ctrs)	107,622	12,353	\$957	4.8%
Department Stores	109,723	10,548	\$558	6.3%
Residential Building Construction	67,616	9,659	\$2,003	23.6%
Electronic Shopping, Mail & Non-store Retail	32,139	9,102	\$1,981	30.6%
Scientific R & D Services (nano/bio tech)	32,941	8,135	\$2,609	8.7%
Software Publishers (content creation)	33,474	8,039	\$3,348	22.5%
Corporate HQ/Enterprise Management	155,159	7,883	\$2,938	-11.7%

Texas Industry Growth **Laggards** 2020Q1 – 2021Q4

Industry	EMP 2021Q4	EMP ABS CHG	AWW 2021Q4	AWW PCT CHG
Support Activities for Mining	112,539	-34,008	\$2,097	-0.9%
Traveler Accommodation (hotel/motel)	104,658	-20,254	\$729	20.3%
Utility System Construction	98,184	-17,984	\$1,688	11.4%
Oil and Gas Extraction	59,432	-13,285	\$3,984	-31.6%
Clothing Stores	76,332	-10,970	\$493	31.5%
Ag, Construction, & Mining Mach Manuf.	34,085	-10,528	\$2,138	-4.3%
Nonresidential Building Construction	94,341	-10,057	\$1,898	11.1%
Skilled Nursing Care Facilities	90,782	-9,112	\$803	17.4%
Child Day Care Services	74,668	-8,146	\$518	25.1%
Machinery & Equipment Wholesalers	88,976	-6,760	\$1,878	12.2%
General Medical and Surgical Hospitals	404,513	-6,282	\$1,551	22.4%
Commercial Equipt & Supply Wholesalers	87,295	-6,223	\$2,748	12.3%
Assisted Living Facilities for the Elderly	49,017	-5,988	\$673	17.9%
Justice, Public Order & Safety Activities	220,821	-5,470	\$1,555	18.4%
Special Food Services (food trucks)	52,800	-4,867	\$686	24.1%
Building Finishing Contractors	61,035	-4,247	\$1,248	25.9%
Civic & Social Organizations, Lodge/Club	17,369	-4,149	\$579	19.1%

Recovery in the Texas Oil & Gas Sector



Texas Occupational Projections Requiring Postsecondary 2021-2030

Occupation (1-16)	Total Job Openings	Mean Wages	Education
Total - All Occupations	18,444,054	\$53,000	
Heavy Truck Drivers	282,960	\$47,400	REC IND CRED
General and Operations Managers	256,511	\$118,900	Bachelor's
Software Developers & Q.A. Testers	197,203	\$109,600	Bachelor's
Registered Nurses	170,862	\$76,800	Bachelor's
Project Mgmt./Business Ops Specialists, Misc.	149,295	\$85,900	Bachelor's
Services Sales Rep, ex. Advertising, Insurance	141,666	\$61,300	Bachelor's
Accountants and Auditors	140,047	\$80,200	Bachelor's
Elementary School Teachers, Ex. Special ED	122,042	\$56,800	Bachelor's
Nursing Assistants	118,933	\$29,000	REC IND CRED
Medical Assistants	111,780	\$33,700	REC IND CRED
Substitute Teachers, Short-Term	110,546	\$34,700	Bachelor's
Electricians	91,081	\$51,400	REC IND CRED
Farmers, Ranchers, Agricultural Managers	90,722	\$85,900	Bachelor's
High School Teachers, Ex. Special ED & CTE	86,404	\$58,000	Bachelor's
Management Analysts	82,189	\$95,700	Master's
Hairdressers, Hairstylists, and Cosmetologists	82,121	\$26,400	REC IND CRED

Texas Occupational Projections Requiring Postsecondary 2021-2030

Occupation (17-33)	Total Job Openings	Mean Wages	Education
Carpenters	76,038	\$42,200	REC IND CRED
Market Research Analyst & Marketing Specialist	70,733	\$76,800	Bachelor's
Human Resources Specialists	70,667	\$69,200	Bachelor's
Licensed Practical & Vocational Nurses	67,860	\$48,400	REC IND CRED
Automotive Service Techs & Mechanics	67,715	\$47,500	REC IND CRED
Computer User Support Specialists	64,578	\$50,700	REC IND CRED
Welders, Cutters, Solderers & Brazers	60,321	\$48,100	REC IND CRED
Plumbers, Pipefitters, and Steamfitters	57,823	\$50,800	REC IND CRED
Computer Systems Analysts	57,313	\$104,700	Bachelor's
Construction Managers	57,292	\$94,700	Bachelor's
Financial Managers	57,195	\$148,900	Bachelor's
Middle School Teachers, Ex. Special Ed & CTE	56,874	\$57,000	Bachelor's
Exercise Trainers & Group Fitness Instructors	55,992	\$43,200	REC IND CRED
Police and Sheriffs Patrol Officers	55,018	\$65,600	Associate's
Insurance Sales Agents	54,129	\$68,200	REC IND CRED
Industrial Machinery Mechanics	51,582	\$58,600	REC IND CRED
Preschool Teachers, Ex. Special Education	47,788	\$41,700	Associate's

Next Generation of Supply

Highest Earning Bachelor's Programs 2020 (4D CIP)

Bachelor's Graduates by Major (TX) (100 plus grads)	Grads	Earnings
1. Registered Nursing, Nursing Administration	9,504	\$74,163
2. Petroleum Engineering	344	\$71,760
3. Electrical, Electronics and Communications Engineering	1,502	\$70,718
4. Computer Engineering	665	\$69,991
5. Industrial Production Technologies/Technicians	325	\$67,516
6. Construction Engineering Technology/Technician	762	\$67,195
7. Electrical/Electronic Engineering Technologies/Technicians	112	\$66,852
8. Chemical Engineering	725	\$65,437
9. Civil Engineering	1,078	\$63,403
10. Allied Health Diagnostic & Treatment Professions	506	\$62,962
11. Computer Science	791	\$62,648
12. Computer and Information Sciences, General	2,802	\$61,499
13. Dental Support Services and Allied Professions	162	\$60,022
14. Aerospace, Aeronautical, Astronautical/Space Engineering	372	\$58,402
15. Mechanical Engineering	2,738	\$56,450
16. Computer Systems Analysis	165	\$55,761

Next Generation of Supply

Most Graduates: Bachelor's Programs 2020 (4D CIP)

Bachelor's Graduates by Major (TX)	Grads	Earnings
1. Multi-/Interdisciplinary Studies, Other	9,613	\$48,588
2. Registered Nursing & Nurse Administration	9,504	\$74,163
3. Psychology, General	6,288	\$29,013
4. Biology, General	5,428	\$26,326
5. Sports, Kinesiology, and Physical Education/Fitness	4,955	\$27,376
6. Business Admin, Management & Operations	4,775	\$44,049
7. Criminal Justice and Corrections	4,020	\$36,499
8. Accounting and Related Services	3,240	\$41,959
9. Finance and Financial Management Services	3,205	\$49,842
10. Liberal Arts and Sciences & Humanities	2,896	\$38,950
11. Computer and Information Sciences, General	2,802	\$61,499
12. Mechanical Engineering	2,738	\$56,450
13. Marketing	2,606	\$38,714

Next Generation of Supply

Highest Earning Associate's Programs 2020 (4D CIP)

CIP Program (4D) (50+ completers)	Grads	Earnings
1. Fire Protection	224	\$94,277
2. Quality Control and Safety Technologies/Technicians	148	\$67,889
3. Registered Nursing, Nursing Administration	5,350	\$63,979
4. Electrical and Power Transmission Installers	212	\$59,139
5. Electrical/Electronic Engineering Technologies/Technicians	179	\$56,895
6. Physical Science Technologies/Technicians	1,066	\$53,208
7. Electromechanical Technologies/Technicians	690	\$52,468
8. Construction Engineering Technology/Technician	152	\$50,847
9. Allied Health Diagnostic & Treatment Professions	1,956	\$49,414
10. Dental Support Services and Allied Professions	297	\$48,099
11. Industrial Production Technologies/Technicians	251	\$47,082
12. Heating, Air Conditioning, Ventilation (HVAC) Technician	136	\$43,301
13. Environmental Control Technologies/Technicians	153	\$41,817
14. Computer/Info Technology Administration & Management	389	\$40,530
15. Computer Systems Networking and Telecommunications	333	\$40,474
16. Precision Metal Working/Welding	585	\$38,566

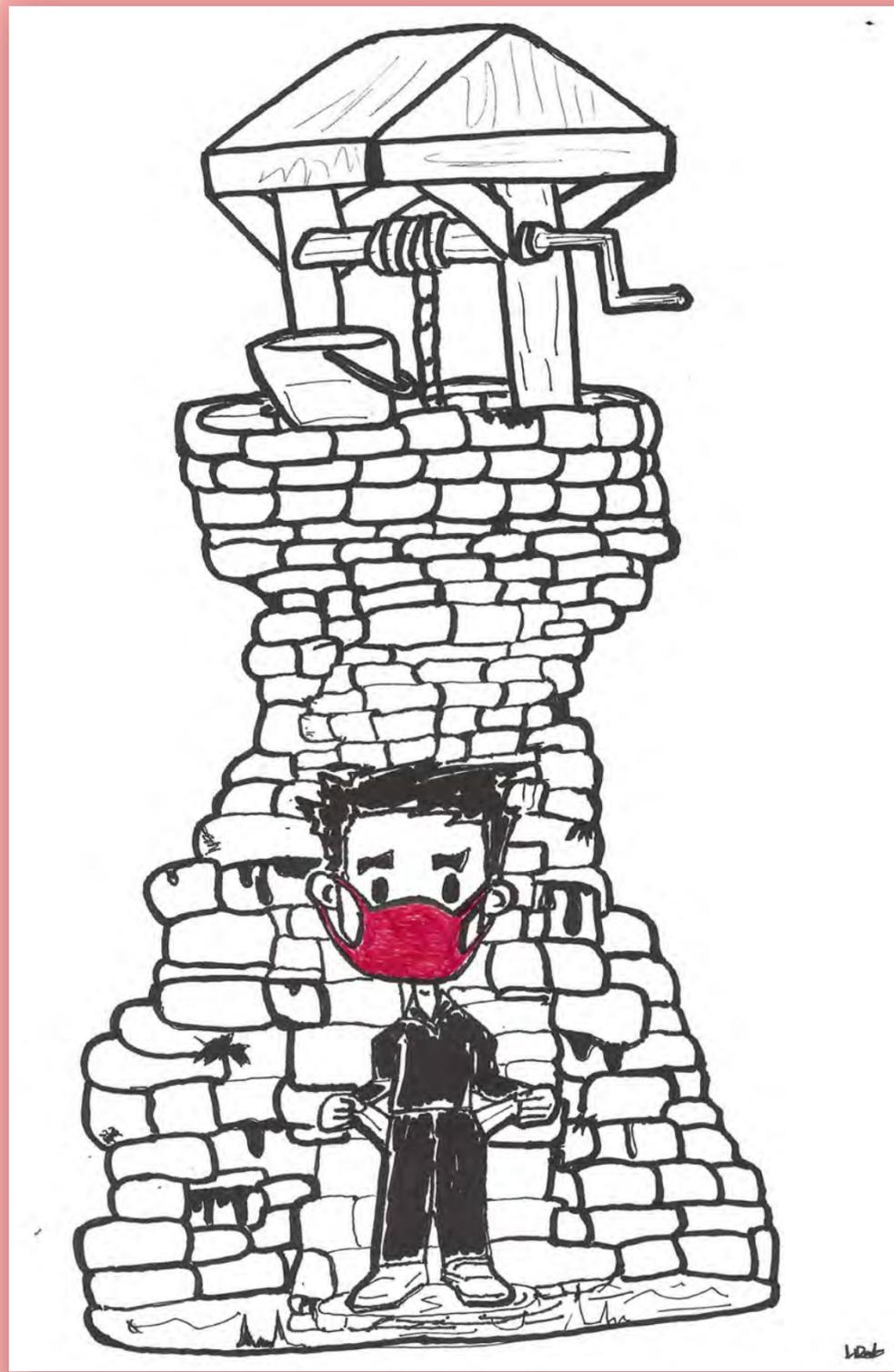
TSTC Target Training: Texas Most Projected Demand 2021-2030

Target Occupation (demand, \$\$, ED)	2030 Jobs	ABS CHG	PCT CHG	Median \$\$
Texas Statewide Total	887,342	107,806	14%	\$65,181
Software Developers	137,412	29,810	28%	\$106,537
Computer Systems Analysts	61,503	8,366	16%	\$92,006
Automotive Service Technicians	73,848	5,987	9%	\$39,795
Welders, Cutters, Solderers, and Brazers	59,594	5,853	11%	\$43,863
Supervisors, Mechanics/Installers	50,085	5,767	13%	\$65,466
Network Systems Administrators	39,241	4,154	12%	\$83,588
Bus/Truck Diesel Mechanics	32,603	3,934	14%	\$47,192
Information Security Analysts	14,324	3,786	36%	\$104,248
Web Developers/GUI Designers	15,409	2,879	23%	\$64,970
Computer Network Support Specialists	18,707	2,494	15%	\$65,861
Database Administrators/Architects	13,495	1,990	17%	\$99,077
Electrical Power-Line Installers	12,720	1,902	18%	\$58,076
Computer Network Architects	14,580	1,755	14%	\$118,124
Security/Fire Alarm Systems Installers	10,020	1,321	15%	\$46,059
Telecommunications Line Installers	16,240	1,124	7%	\$51,897
Electrical/Electronic Engineering Techs	12,409	981	9%	\$67,306
Calibration/Engineering Techs	11,032	938	9%	\$55,399

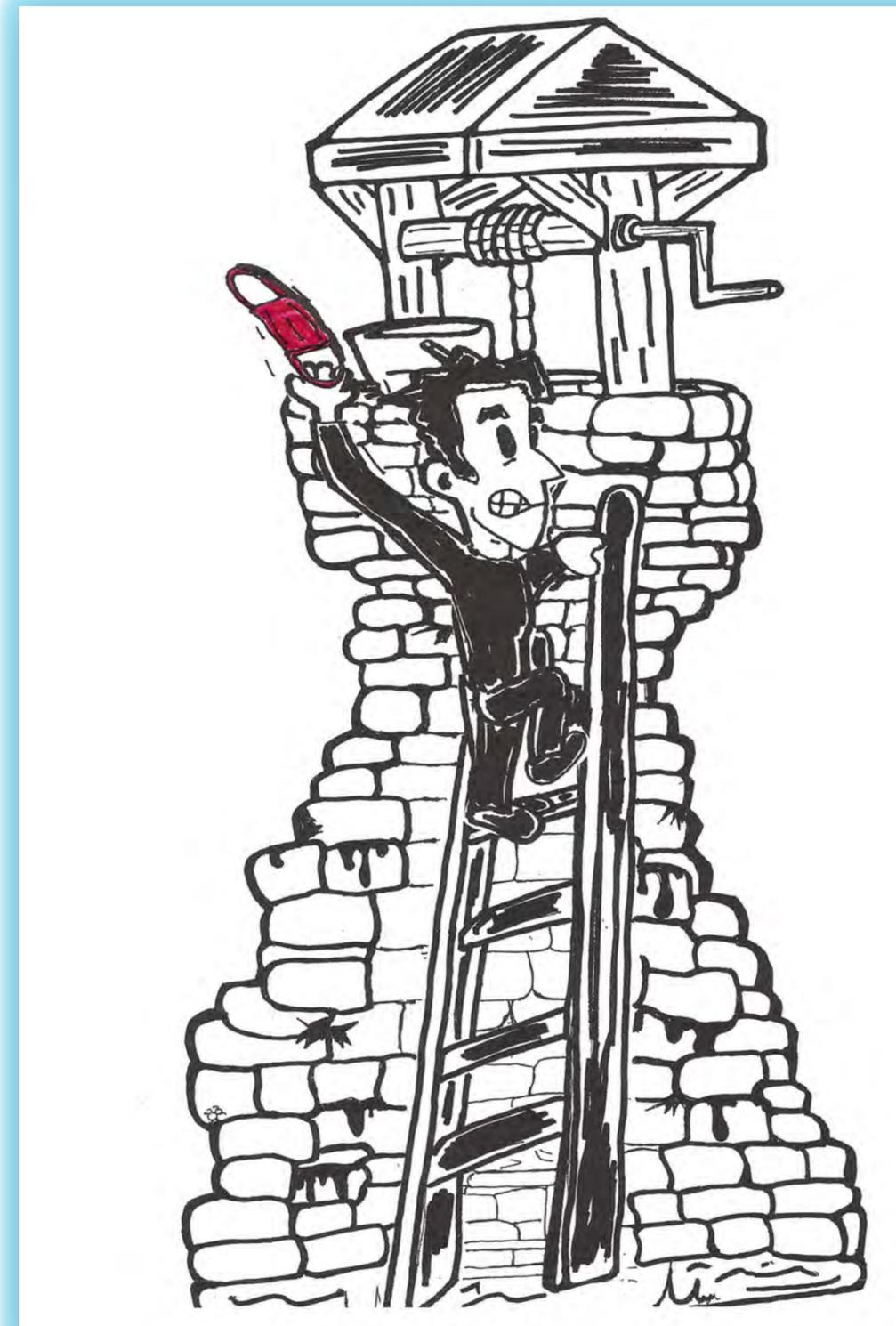
Staffing Model



August 2022



April 2020



Thank you!

There is much more labor market story to tell, but this version is over!



Perspective, Fact, Opinion: What's 2 + 2?

Mathematician: “Statistically, the answer lies between 3.98 and 4.02, depending on your confidence level”

Property Appraiser: “What do you need it to be to qualify for your loan?”

Therapist: “I don't know the answer, but I'm glad we discussed this important question.”

Average Citizen: “It's supposed to be 4, it used to be 4, but these days it's hard to be sure”

Economic Consultant: It really depends, what do you want it to be?

NAVIGATING THE PRICE OF TALENT ACQUISITION AND THE POTENTIAL FOR AN IMPENDING TRAIN WRECK



Bob Cartwright

President & CEO
Intelligent Compensation, LLC



Mike Kahn

Executive Senior Partner
Korn Ferry



Sarah Glaser

Attorney and Principal
Lloyd, Gosselink,
Rochelle,
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LaTonya McElroy

Chief People Officer
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SVP, Policy & Advocacy
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Business



Catherine Clifton

Attorney
Ross | Gannaway |
Clifton, PLLC



Cheri Garcia

Founder
Cornbread Hustle



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Manager of Strategic
Partnerships
Union Pacific Railroad

Heightened Antitrust Risks Related to Labor Markets

Bradley C. Weber
Partner
Locke Lord LLP



Paul Coggins
Partner
Locke Lord LLP

Recent Increased Focus On Competition in Labor Markets

- Historically, Antitrust Law has focused on maintaining competition in markets for the sale of consumer goods and services.
- Over the past six years, antitrust enforcement agencies and plaintiffs' lawyers have focused significant attention on competition in labor and employment markets.

Antitrust Law's Intersection with Employment Law

As a result of this heightened focus on competition in labor markets, Antitrust Law and Employment Law have become more intertwined with each other, especially in regards to:

- No-Poach Agreements
- Wage-Fixing Agreements
- Covenants Not to Compete
- Compensation Benchmarking Surveys

Criminal Liability for Antitrust Violations

- Section 1 of the Sherman Act (15 U.S.C. § 1) declares “illegal” every agreement “in restraint of trade or commerce” and authorizes both civil actions and criminal prosecutions.
- *Per se* violations = certain agreements between competitors that are so “pernicious” and “manifestly anticompetitive” they are deemed to be *per se* unlawful.
- Long-standing DOJ Policy: Only *per se* violations are prosecuted criminally.

The *Per Se* Rule and Criminal Prosecution

- Traditional categories of *per se* conduct:
 - Price-Fixing
 - Bid Rigging
 - Market Allocation (geographic or product)
 - Certain Group Boycotts involving competitors
- The *per se* categories have been determined by the courts through decades of experience with these types of conduct.
- Until....

October 2016 DOJ/FTC Guidance for HR Professionals



ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

- “Naked” no-poach and wage-fixing agreements are *per se* unlawful.
 - Going forward, they will be subject to **criminal** felony prosecution.

Wage-Fixing & No-Poach Agreements

- A "**Wage-Fixing**" agreement occurs when two or more employers agree to suppress, stabilize, or maintain the salaries, wages, or other types of compensation or benefits for their employees.
- A "**No-Poach**" agreement occurs when two or more employers agree to not solicit or hire each other's employees.

October 2016 DOJ/FTC Guidance for HR Professionals

- According to the 2016 HR Guidance, "***naked***" wage-fixing or no-poach agreements among employers, whether entered into directly or through a third-party intermediary, are *per se* illegal under the antitrust laws.
- Naked agreement = one that is "separate from or not reasonably necessary to a larger legitimate collaboration" between the two employers.
 - To avoid characterization as "naked," there must be a legitimate ancillary agreement.

Recent Criminal Enforcement Efforts

- **Wage-Fixing Cases**
 - *United States v. Jindal, et al.*, (E.D. Texas), filed in December 2020 – alleged that the former owner of physical therapy staffing company entered into agreements with other therapist staffing companies to adjust rates for physical therapists – acquitted on antitrust claims.
 - *United States v. Hee, et al.*, (D. Nevada), filed in March 2021 – alleges that a nurse staffing company agreed with another staffing company to refuse to negotiate wage increases and not to recruit nurses from each other – defendants may be nearing a plea deal with the DOJ.
 - *United States v. Manahe, et al.*, (D. Maine), filed January 2022 – alleges that four owners of different home healthcare agencies agreed on rates of pay for personal support specialists who provide care for ill, disabled, or elderly – defendants filed motion to dismiss.

Recent Criminal Enforcement Efforts

- **No-Poach Cases**

- *United States v. Surgical Care Affiliates, et al.*, (N.D. Texas) filed in January 2021 – alleges that SCA and another outpatient medical care facility (DaVita) entered into a conspiracy to suppress competition between them by agreeing not to solicit each other's senior-level employees – defendants filed motion to dismiss.
- *United States v. DaVita, Inc., et al.*, (D. Colorado) filed in July 2021 – alleged that Davita and its CEO agreed with SCA not to hire or solicit each other's senior-level employees – defendants were acquitted by a jury in April 2022.
- *United States v. Patel, et al.*, (D. Connecticut) filed in December 2021 – alleges that there was a long-running conspiracy among aerospace companies not to hire or recruit each other's skilled employees.

Jindal - FTC Investigation

- The FTC can bring civil actions to enforce the antitrust laws, including the Sherman Act and the FTC Act.
 - Under FTC Act, it can punish “invitations to collude” even if there’s no actual agreement, which is required under the Sherman Act.
- In 2017, the FTC conducted a preliminary investigation into text messages between Neeraj Jindal (owner of Integrity Home Therapy), his employee John Rodgers, and Integrity’s competitors regarding physical therapist rates. The FTC:
 - obtained text messages through voluntary access letters and civil investigative demands,
 - held investigative hearings and obtained testimony from witnesses, and
 - entered into a 20-year consent decree with Mr. Jindal, Sheri Yarbray, and their companies.

Jindal – DOJ Investigation

- Following the conclusion of the FTC's civil case, the DOJ's Antitrust Division requested the FTC's preliminary investigation file.
- The DOJ entered into a corporate leniency agreement with Sheri Yarbray's company (party to the consent decree), which provided immunity to its employees (including Ms. Yarbray).
- There was no substantial Grand Jury investigation.
 - This is true for other labor market cases as well.

United States v. Jindal

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA

v.

NEERAJ JINDAL

§
§
§
§
§

No.

4:20cr358

Mazzant

INDICTMENT

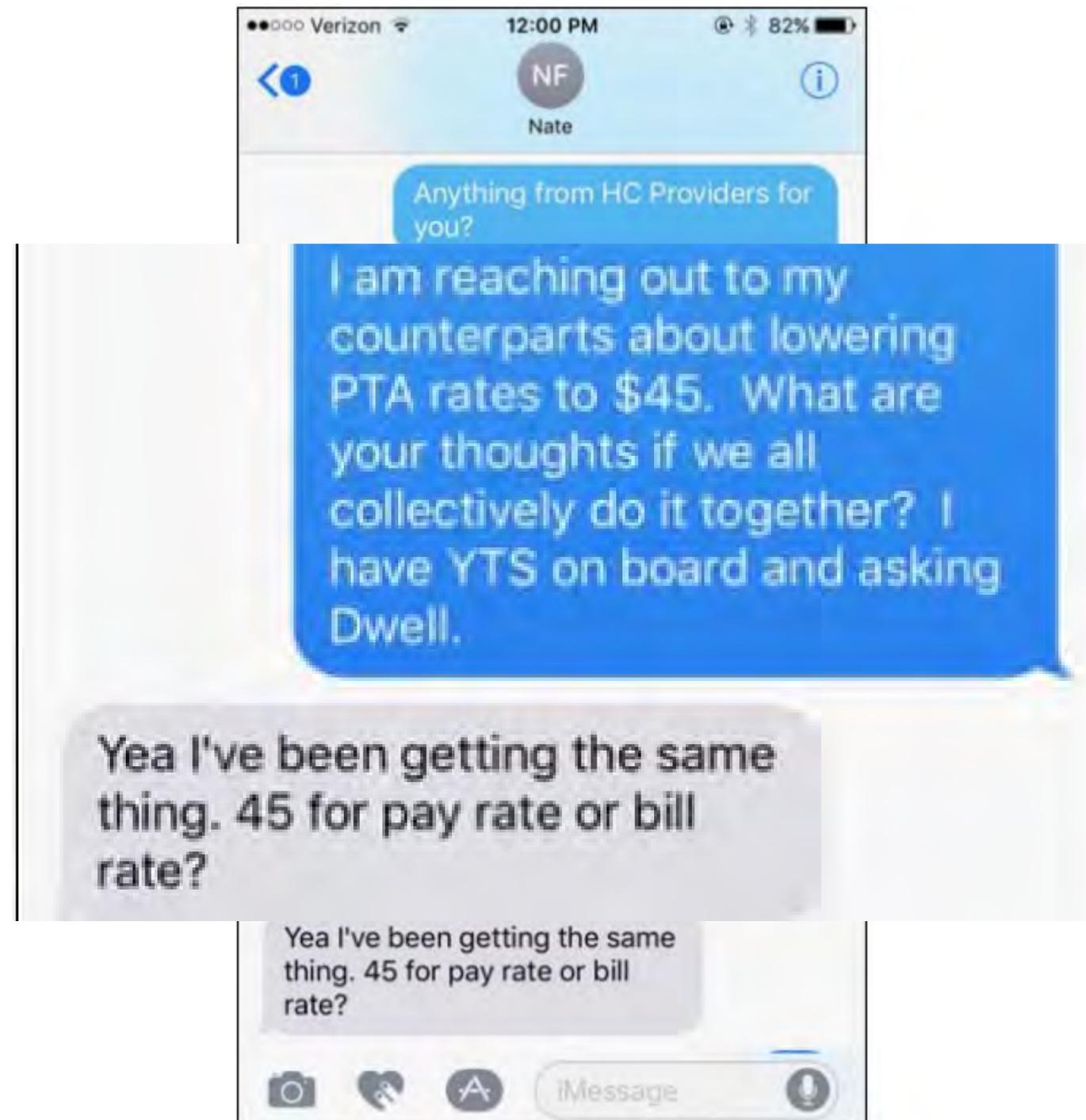
FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEX

- The DOJ issued an Indictment against only Mr. Jindal, then added Mr. Rodgers in a Superseding Indictment.
- This was the first-ever criminal prosecution of an alleged wage-fixing or no-poach agreement.

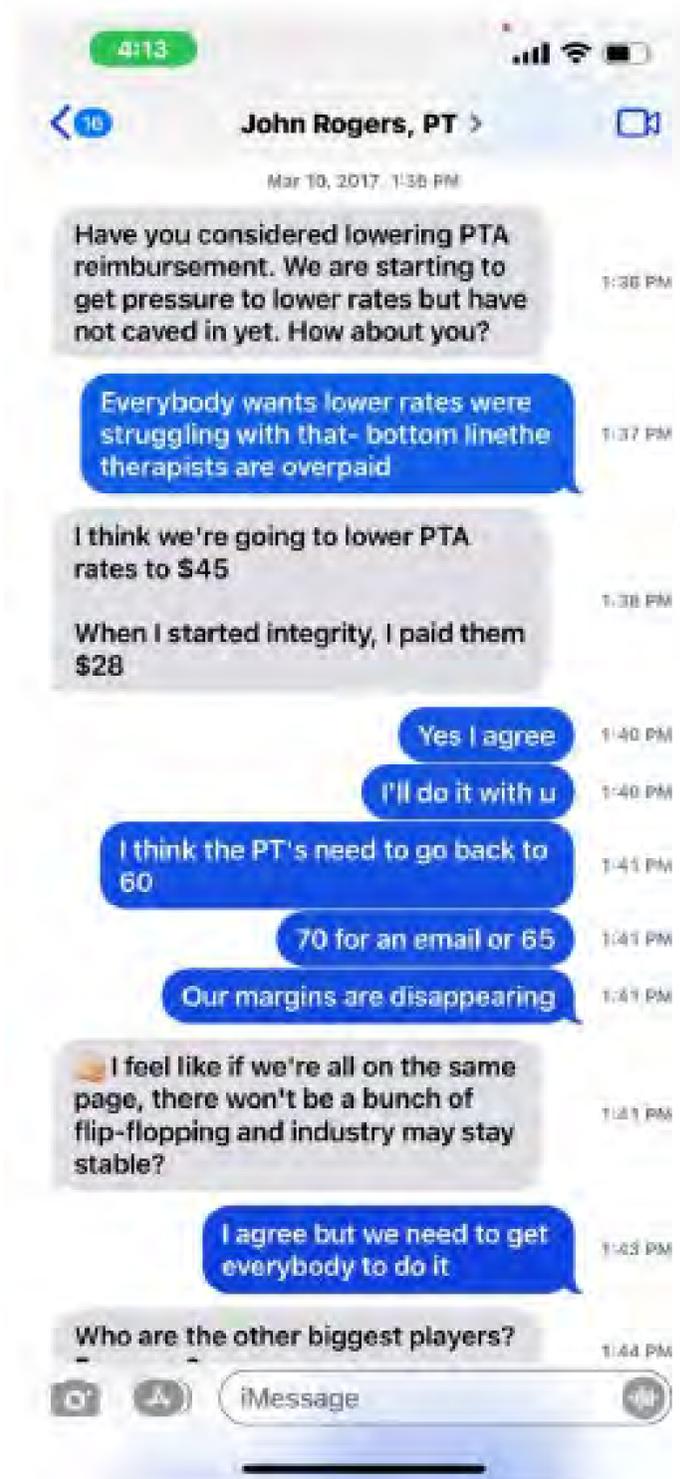
Jindal – The Motion to Dismiss

- Mr. Jindal filed a Motion to Dismiss, which challenged the *per se* classification for wage-fixing and raised Due Process violations.
 - The Motion to Dismiss was denied in November 2021.
 - Multiple courts have now denied similar motions to dismiss on these grounds.
- Traditionally, *per se* criminal liability has become more limited rather than expansive over time.
- Expansion of *per se* criminal liability presents potential Constitutional and Due Process issues.

Jindal – DOJ Trial Exhibit



Jindal – DOJ Trial Exhibit



The Jury's Verdict in *Jindal*

- Following a 6-day trial, the jury in *Jindal* issued a verdict on April 14, 2022 that:
 - acquitted Mr. Jindal and Mr. Rodgers on the antitrust claims, but
 - found that Mr. Jindal obstructed the prior FTC investigation in which he entered into the civil consent decree.
- Mr. Jindal filed a Motion for Acquittal or for New Trial on the obstruction of justice charge, which is still pending.

“Ancillary” No-Poach Provisions in Contracts

- The 2016 HR Guidelines provide that No-Poach agreements are still permissible if they are “ancillary” to a legitimate business transaction and contain reasonable limitations with respect to scope and duration.
- The DOJ has stated that No-Poach provisions in franchise agreements should be analyzed under the “rule of reason” instead of the *per se* rule.
- The rule of reason requires enforcers and courts to consider both the competitive harms and any potential offsetting benefits in a relevant market when weighing the legality of the provisions.

No-Poach Provisions in Franchise Agreements

- In many franchise systems, No-Poach clauses are standard provisions that restrict franchisees from soliciting or hiring employees of another franchisee in the same franchise system.
- No-Poach clauses in franchise agreements historically were enforced by courts as legitimate efforts to prevent one franchisee from cannibalizing employees from another.
- They were justified as strengthening inter-brand competition, and promoting a uniform, non-competitive environment among the franchisees.

Private Plaintiff Actions Involving No-Poach Agreements

- Now, however, No-Poach clauses in franchise agreements are the subject of class actions by plaintiff employees in several different federal court cases.
- Franchise-system defendants in these various cases include Jiffy Lube, Burger King, McDonald's, Domino's Pizza, and Papa John's.
- Just last month, Jiffy Lube paid \$2 million and Papa John's paid \$5 million to end separate class action cases filed against them by employees.

State AG Actions Involving No-Poach Agreements

- No-Poach clauses in franchise agreements also are the subject of scrutiny by at least 16 states, including the state of Washington.
- So far, the Washington AG's office has investigated and extracted binding settlements from more than 100 companies to drop the use of No-Poach provisions in their franchise agreements.
- Businesses that entered into these settlements to avoid litigation include Edible Arrangements, H&R Block, and The UPS Store.

No-Poach Provisions in Franchise Agreements

- The DOJ's position on No-Poach agreements in the franchise setting is different than the positions taken by several state AGs and some courts, which view the restrictions as *per se* illegal.
- Considering the current uncertainty involving ancillary No-Poach provisions, employers should review their existing contracts for No-Poach clauses and evaluate whether to remove them, especially if they have business operations in states that view these clauses as *per se* illegal.

No-Poach Provisions in Other Types of Business Contracts

- No-Poach and Non-Solicit provisions also are included in many other types of business contracts, including joint venture agreements, corporate due diligence agreements, and contractor/sub-contractor agreements.
- There have been a number of cases from different jurisdictions that discuss the legality and enforceability of these provisions under both federal and state antitrust laws.

Drafting Legal and Enforceable Non-Solicit Provisions

- Based on a review of a number of these cases, the best advice is to:
 - ensure that the non-solicit provision is ancillary and subordinate to a legitimate business agreement,
 - articulate the "legitimate business interest" of the agreement and how the provision is "reasonably necessary" to achieving that interest,
 - narrowly tailor the provision to ensure that it is not overbroad as to the scope of employees who are covered, the duration, or the effect on employees, and
 - consider whether employee consent and consideration issues are addressed through employment agreements between the employer and the employee.

Covenants Not to Compete/Non-Compete Agreements

- Covenants Not to Compete, also known as “Non-Competes,” typically impose restrictions that prevent workers from accepting employment with an employer’s competitors during a specified period of time and/or in a defined geographic region.
- These clauses usually are found in employment agreements or as part of a services contract.
- They also can be part of a business transaction, preventing the seller of a business from competing with the purchaser for a period of time following the sale.

Benefits of Non-Competes

- Non-Competes are integral in regard to employees who have knowledge of trade secrets and other proprietary information that, if disclosed, could jeopardize a company's business.
- Non-Competes also can incentivize companies to invest in the training of employees who are restricted from jumping to another competing employer.

Non-Competes: Primarily Governed by the States

- Currently, the enforceability of Non-Competes is primarily governed by state laws – both under the common law and state antitrust statutes.
- In some states, such as California, Non-Competes are entirely or largely unenforceable.
- Other states limit the use of Non-Competes for certain occupations, such as attorneys, physicians, and the financial industry.
- In a growing number of states, employers are prohibited from using Non-Competes with low-wage workers.

Non-Competes: Primarily Governed by the States

- States that do enforce Non-Competes, such as Texas, generally follow the principle that the restrictions on employees must not be any greater than necessary to protect the employer's legitimate business interests.
- These states typically evaluate whether the restrictions contained in a Non-Compete are reasonable in both duration and scope, although the interpretation of what constitutes "reasonableness" varies among jurisdictions.

Non-Competes: FTC Workshop

- In January 2020, the FTC held a public workshop to examine whether it should issue a rule to restrict the use of Non-Competes in employment contracts.
- Commissioner Slaughter (D) called on the FTC to adopt a rule restricting “unjustified and anticompetitive non-compete clauses” in employment contracts.
- Commissioner Phillips (R) took a different position – he:
 - stated that although non-competes may harm workers in some situations, they also benefit them in other contexts, and
 - questioned the legal basis for the FTC to regulate non-competes through rulemaking.

President Biden's Executive Order on Competition

- On July 9, 2021, President Biden issued an Executive Order that, among other things, encourages:
 - the FTC to curtail the unfair use of Non-Competes, and
 - the FTC and DOJ to prevent employers from collaborating to suppress wages or reduce benefits by sharing wage and benefit information with one another.

Federal Regulation of Non-Competes

- The FTC has not yet issued any rules regarding the enforceability of Non-Competes.
- President Biden's Executive Order "encourages" the FTC to exercise its statutory rulemaking authority under the FTC Act "to curtail the unfair use of non-compete clauses" and other agreements that may limit worker mobility.
- The FTC now has three Democrat-appointed Commissioners, including the new FTC Chair Lina Khan, and seems likely to follow President Biden's directive.

Federal Regulation of Non-Competes

- If the FTC does decide to issue new rules regulating Non-Competes, this would be a significant development in an area traditionally governed by state law.
- It also seems likely that any new FTC rules attempting to curtail the use of Non-Competes would be challenged in the courts for the reasons articulated by Commissioner Phillips during the FTC Workshop and based on the Supreme Court's recent decision in *West Virginia v. EPA*.

Benchmarking Surveys

- Employers often engage in “bench-marking” surveys to determine whether the salaries, compensation, and benefits paid to their employees are competitive.
- Benchmarking surveys can provide pro-competitive benefits for employees.
- An agreement among competitors to exchange employee compensation information is not itself illegal, but proof that competitors have shared this information sometimes has served as evidence of a wage-fixing conspiracy.

Benchmarking Surveys

- The 2016 HR Guidelines state that it is possible to design and carry out benchmarking surveys in ways that conform with the antitrust laws if:
 - a neutral third party manages the survey,
 - the survey involves information that is relatively old,
 - the information is aggregated to protect the identity of the sources, and
 - enough sources are aggregated to prevent competitors from linking particular data to an individual source.

The Executive Order's Impact on Benchmarking Surveys

- President Biden's Executive Order encourages the DOJ and FTC to consider whether the 2016 HR Guidelines should be revised.
- The Executive Order specifically encourages the DOJ/FTC "to strengthen antitrust guidance to prevent employers from collaborating to suppress wages or reduce benefits by sharing wage and benefit information with one another."

The Executive Order's Impact on Benchmarking Surveys

- In a Fact Sheet that was released with the Executive Order, the President said:
 - workers may be harmed by existing guidance provided by the DOJ/FTC to HR personnel “that allows third parties to make wage data available to employers—but not to workers—in certain circumstances without triggering antitrust scrutiny, and
 - this may be used through employer collaboration to suppress employee wages and benefits.

Employers Should Take Care if Using Benchmarking Surveys

- For now, the DOJ/FTC guidance regarding benchmarking surveys has not been rescinded.
- It remains to be seen whether the agencies will issue new rules that ban benchmarking surveys or require that the results be made available to employees.
- If employers do choose to participate in a benchmarking survey, they should make sure that the survey complies with the existing DOJ/FTC guidelines.

Questions

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August 11, 2022

Texas Employment Relations Symposium



Year Two of the Pandemic – A Legal Update



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What A Long Strange Trip It's Been!

The Legal Update



- Topics to cover:
 - (1) How do employment laws apply in a pandemic?
 - (2) Emerging Issues
 - (3) Bold predictions . . .



How do employment laws apply in a pandemic?

The Americans With Disabilities Act



- What does COVID mean for the ADA?
- When, if ever, is COVID a “disability”?
- If COVID is a “disability,” how can it be accommodated?

The Family and Medical Leave Act



- What does COVID mean for the FMLA?
- Is COVID a “serious health condition”?
- What leave obligations might exist for long COVID?

The Worker Adjustment and Retraining Notification Act



- Will companies face WARN liability for COVID-related layoffs?
- Is COVID a “natural disaster” under WARN?

Vaccine Mandates



- What remains of the federal vaccination mandates?
- How have public employer vaccination mandates held up?
- What about private employers?

Vaccination Exemption/Accommodation Issues



- What have we learned about vaccination accommodation requests?
- What may come of these cases?

Other Legal Issues



- “Take-home” COVID liability?
- Liability for work-from-home expenses?
- Overtime liability for pandemic-related bonuses?



Emerging Issues

Federal Action



- July 7, 2022 – OSHA extends COVID-19 National Emphasis Program
- New rules from OSHA on the way?

State Action



- Some state agencies remain active
 - CAL-OSH has proposed permanent COVID worker safety rule.
- Will emergency state-law measures be renewed?
 - E.g., California Supplemental Paid Sick Leave for COVID

Rollback of Mandates



- Some employers are rolling back vaccination mandates.
- Things to think about:
 - Employee reaction (both positive and negative)?
 - Effect on pending or threatened litigation?
 - Recall former employees?
 - How to go about doing so.

Work From Home



- Be thoughtful, be deliberate.
- Don't neglect legal compliance.



Bold Predictions

Bold Predictions



- Federal Paid Leave
- Further state regulation of non-competes
- Unionization



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What You Put on Paper Can and Will Be
Held Against You



Gilbert L. Sanchez

Partner

Kemp Smith LLP



EVIDENCE

- What is evidence?
 - “Anything” that is used to prove or disprove something at trial
 - Testimony –saw, heard
 - ✦ Personal experience v. hearsay
 - Photographs and video
 - Objects
 - Documents
 - ✦ Communications, memos, contracts, texts, emails, social media postings
- Inadmissible v. Admissible
- Weak v. Strong



TWO TYPES OF EVIDENCE

- Direct Evidence

- Evidence that, if believed, directly proves a fact without inference
- Example: Termination form states “Company is terminating Kathy because she is pregnant.”
- Rare

- Circumstantial Evidence

- Indirect evidence that requires the factfinder to logically infer a proposed fact
- Example: “Kathy, we have to lay you off because there is not enough work to justify your position.”
 - ✦ Kathy told her supervisor she was pregnant last week.
 - ✦ Day after termination, company posts a job advertisement for Kathy’s former position.
- More common

BURDEN OF PROOF



- In a typical discrimination case based on circumstantial evidence, plaintiff must prove employer's decision was motivated by unlawful discrimination
- How?
 - By poking holes in the employer's reason to show that it isn't the real reason, but rather a cover up for discrimination
 - Inconsistent reasons, false or inaccurate info, deviation from policies etc. = pretext
 - This is where employer's documentation can be used and held against it

POLICIES



- Not having an employee handbook with typical anti-discrimination policies is a huge risk
 - Allows plaintiff's attorney to argue that the company doesn't take EEO issues seriously
 - Even worse than no policies at all is when companies promulgate policies of lesser importance, but not discrimination or harassment policies
- Bare minimum: EEO policy, anti-discrimination, anti-harassment, anti-retaliation, and how to make a complaint

DISCIPLINE & EVALUATIONS



- Document, document, document
 - Even verbal warnings should be documented
 - Creates a record to justify future actions
 - Thoroughness and accuracy are critical
 - ✦ Incomplete or poorly stated facts can appear to be a pretext
 - ✦ Too many facts make it appear that the company is “out to get the employee”
 - Reference past disciplinary history and/or performance issues
 - Supervisors must follow through

DISCIPLINE & EVALUATIONS



- Centralize the handling of disciplinary actions to ensure consistency
 - ✦ “Similarly-situated” employees who engage in the same misconduct must be treated the same unless documentation justifies disparate treatment
- Make sure all required signatures are on the document
 - ✦ Note “refused to sign”
- Stick to the facts!
 - ✦ Document will be read to a jury
 - ✦ If you’re not proud to read it out loud, don’t write it

STICK TO THE FACTS



- Be objective
 - “Joe didn’t fit in” is subjective and hard to prove
- Don’t characterize
 - “Mike is unreliable” vs. “Mike has been absent 5 times in the last 30 days”
 - “Accident prone” vs. number of accidents
 - Dan was fired for sexually harassing females vs. Dan was fired for violating anti-harassment policy

DISCIPLINE & EVALUATIONS



- Performance Write-Ups/PIPs
 - Avoid vague language – “do a better job of achieving interdepartmental synergy”
 - Provide specific examples
 - Unattainable goals will seem like a “set up”
 - Set forth a clear and fair timeline for achieving the goals
 - ✦ Terminating before the deadline can seem like a pretext

DISCIPLINE & EVALUATIONS



- Suspicious or Inadequate Documentation = Pretext
 - Evidence of fabricated documents
 - Sudden papering of the file prior to termination
 - Inconsistent documents
 - Post-decision documents to justify termination
- Shifting explanations
 - Telling the EEOC one thing and telling the court another
 - Run the EEOC position statement by a L&E lawyer!

EMPLOYEE COMPLAINTS



- Retaliation cases: Did employee engage in a protected activity?
 - No magic words or legalese needed
 - Did employee put employer on notice that he or she complained about unlawful discrimination?
- Important to maintain accurate records of complaint
- Ask employee to write it down
 - If employee refuses, then take notes, summarize, and ask employee to initial

INVESTIGATIONS



- Same rules apply
 - Be thorough
 - Be objective
 - Stick to the facts
 - Address why certain witnesses were not interviewed
 - Address timing issues, if any
 - Look at personnel files for past history of misconduct

ATTORNEY-CLIENT PRIVILEGE



- Protects “confidential communications” between client and attorney
- Communication is confidential if made privately and not intended for further disclosure
- Limited to communications providing or seeking legal advice
- Myth: Copying my attorney on an email or having attorney on phone protects entire communication
- Crime-Fraud Exception

HANDBOOKS



- Employment-at-will must be mentioned
 - Limit how at-will employment can be modified
 - ✦ E.g. “Only the CEO can modify the at-will relationship in writing.”
- *Montgomery Cty. Hosp. Dist. v. Brown* (Tex. 1998)
 - Issue: Whether at-will employment can be modified by employer’s oral assurance that an employee won’t be terminated without good cause
 - Tex. Sup. Ct. held that an employer’s statements don’t modify the at-will doctrine absent a definite, stated intention to the contrary

ARE HANDBOOKS CONTRACTS?



- *Matagorda Cty. Hosp. Dist. v. Burwell*, 189 S.W.3d 738 (Tex. 2006)
 - Personnel manual provided: “employees may be dismissed for cause such as insubordination, serious misconduct, or for inability to perform the duties of their job satisfactorily.”
 - This language did not unequivocally manifest an intent by the employer to limit its right to terminate.
 - Had the language been that dismissal could “only” be for cause, result may have been different

HANDBOOKS



- *Federal Express v. Dutschmann*, 846 S.W.2d (Tex. 1993)
 - Handbook contained a disclaimer that the policies in the handbook could be changed unilaterally by the employer at any time and that the handbook was not contractual in nature
 - Handbook acknowledgment confirmed same
 - Such disclaimers, at a matter of law, negate that the handbook can be a contract of employment

HANDBOOKS



- Progressive Discipline Policy
 - Not required
 - Employees and juries expect it because it is fair
 - Helps employer "build" a case and defend a claim later
 - But don't tie yourselves down – make sure policy allows employers to skip steps based on severity

HANDBOOKS



- Automatic termination policies
 - “If an employee fails to return to work after one year, his or her employment will be terminated.”
 - Potential defense against worker’s comp retaliation claims
 - TX. Sup. Court: If employee is terminated pursuant to the uniform enforcement of a reasonable absence control policy, then the termination does not constitute a retaliatory discharge for filing a w/c claim.
 - Use caution: EEOC states that automatic termination policies can violate the ADA

OFFER LETTERS



- Again, mention that offer of employment is on at-will basis
- Conditional offer
 - Passing drug test, background check, reference check,, etc.
 - Easier to revoke if conditions aren't met
- Avoid characterizing compensation on annual basis
 - Gives rise to argument that intent is for 1yr contract
 - Use payroll periods instead
- Probationary period?

SEVERANCE/SETTLEMENT AGREEMENTS



- Key terms for an enforceable contract
 - Define the dispute so there is no ambiguity about what is being released
 - ✦ Identify the EEOC Charge or case number if lawsuit filed
 - Also negotiate a comprehensive release so that “any and all claims, known or unknown” are released
 - ✦ Be overly inclusive
 - Determine the character of the payment for tax treatment
 - ✦ Wages, compensatory, attorney’s fees, if applicable

SEVERANCE/SETTLEMENT AGREEMENTS



- Comply with the Older Worker Benefit Protection Act
 - Plain, understandable language
 - Specifically release ADEA claims
 - Consideration must be specific to ADEA
 - Cannot waive claims arising after the agreement
 - Advise employee in writing to consult attorney
 - Provide 21 days for employee to review
 - Provide 7-day revocation period after execution
 - Special rules for group terminations/releases (45 days, other info)

SEVERANCE/SETTLEMENT AGREEMENTS



- Cannot prohibit an employee from filing a charge of discrimination or other administrative charge with a federal (or other government) agency
- Can provide that employee will not accept any monetary relief from such a charge

SEVERANCE/SETTLEMENT AGREEMENTS



- Other key terms:
 - Non-admission clause: Company is not admitting it did anything wrong
 - No-rehire
 - Confidentiality
 - Non-disparagement
 - ✦ Make sure to distinguish between the company and its employees
 - Neutral reference

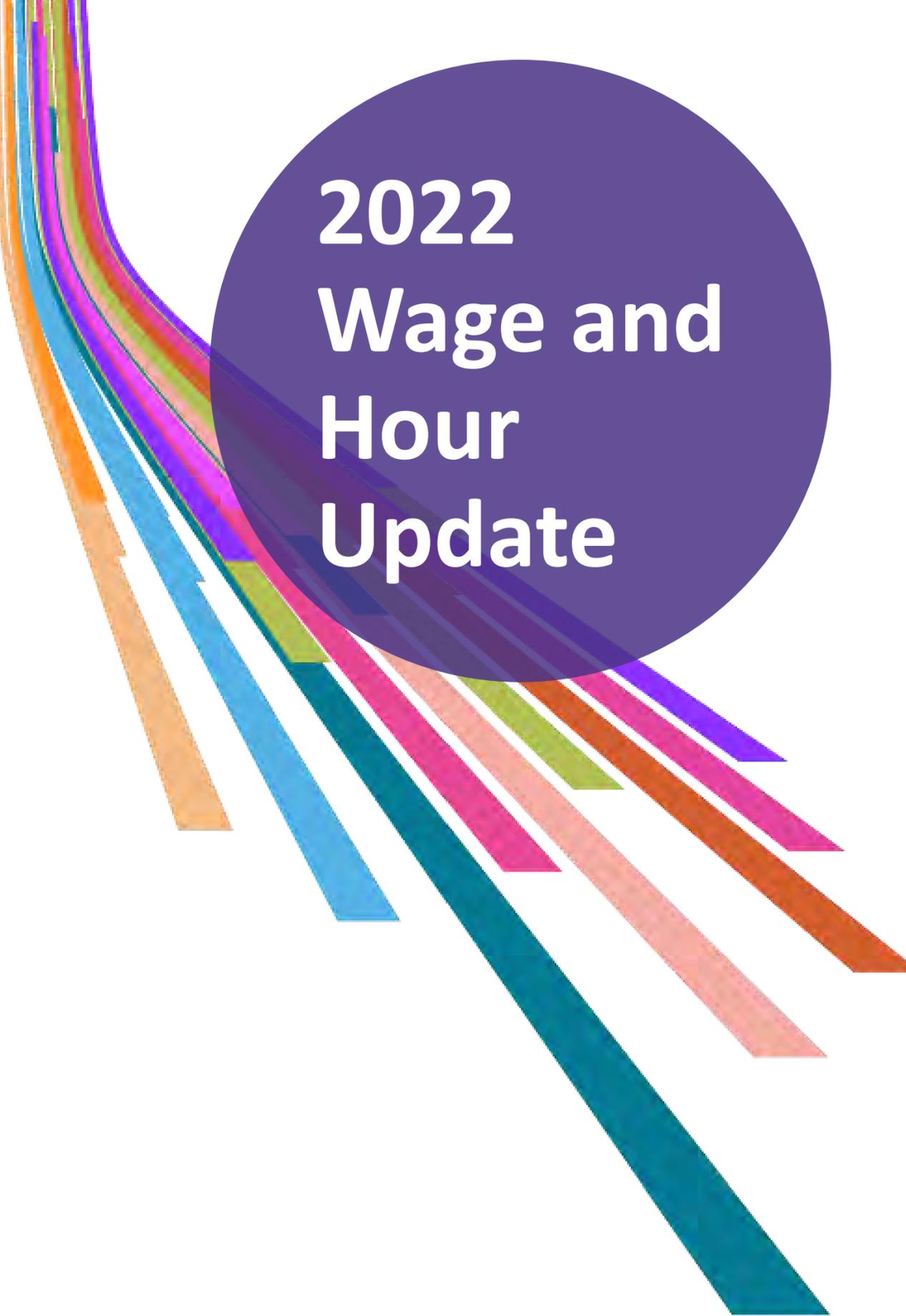
2022 Wage & Hour Issue



Kim Miers

Office Managing
Shareholder

Littler



**2022
Wage and
Hour
Update**



**TEXAS EMPLOYMENT
RELATIONS SYMPOSIUM**

AUGUST 11-12, 2022
The Westin Riverwalk, San Antonio

kmiers@littler.com



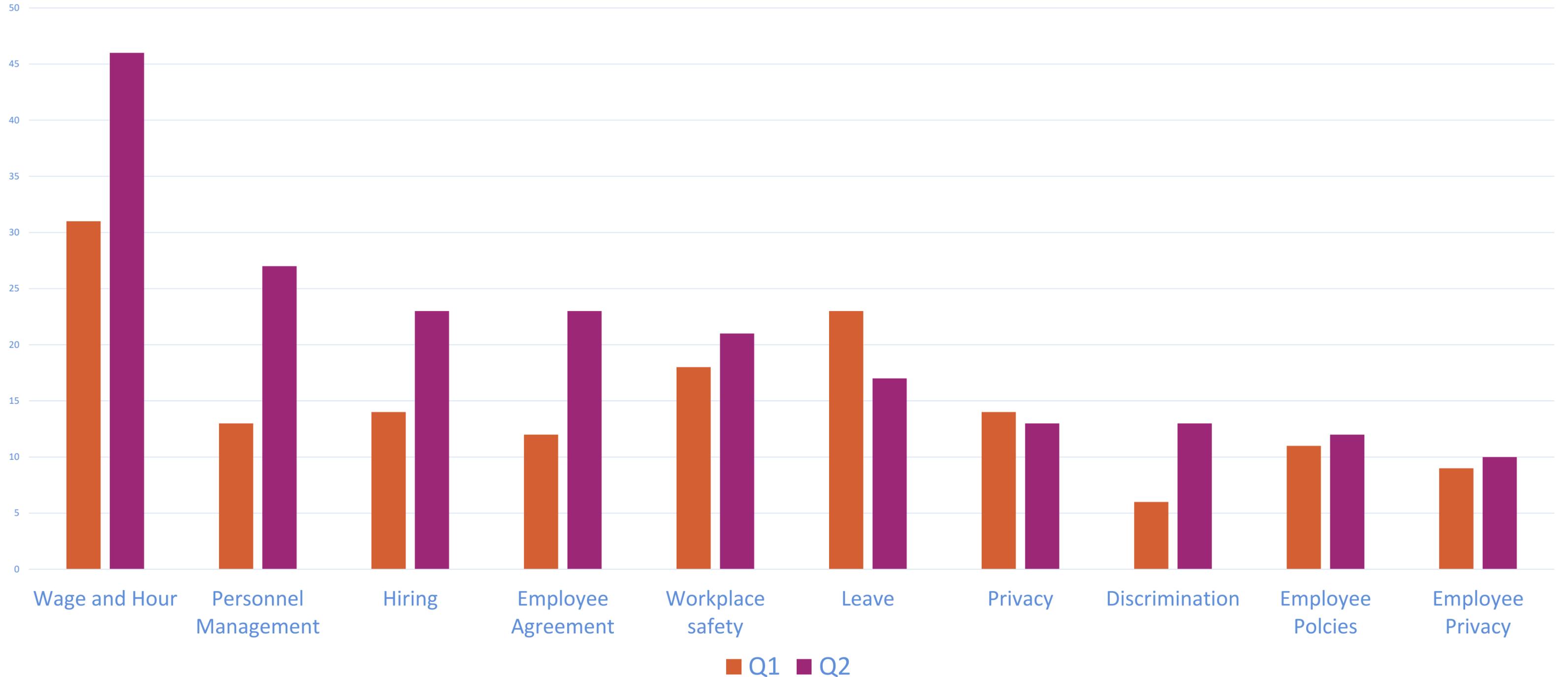
WELCOME



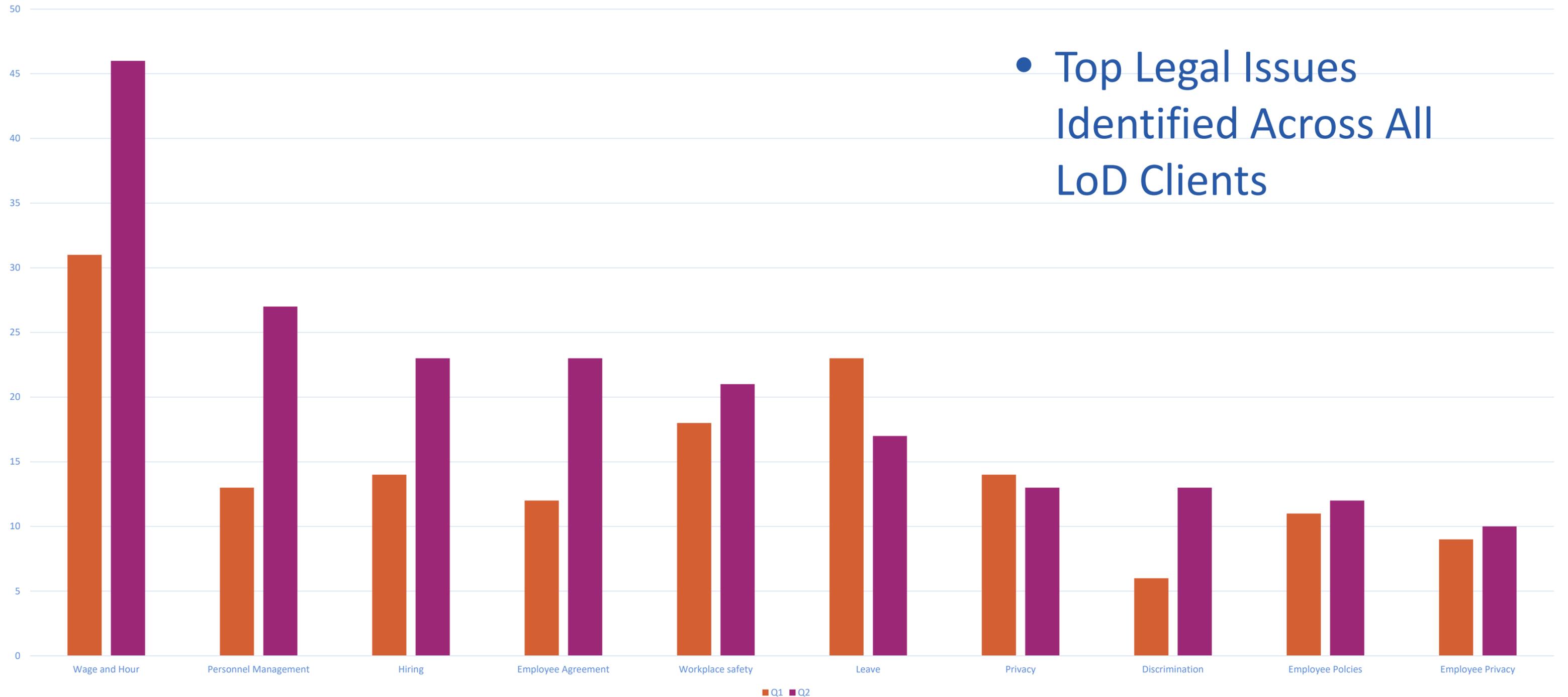
AGENDA

- Top Legal Issues
- Top Questions in 2022
– So far!
- Top Wage/Hour Mistakes

Top Legal Issues - 2022



Top Legal Issues - 2022



A pair of glasses with gold frames and clear lenses is resting on a light-colored wooden desk. Below the glasses, a white document is partially visible, featuring the text 'FLSA' in large, bold, black letters. Underneath 'FLSA', the words 'Fair Labor Standards Act' are written in a smaller, black font, enclosed within a double-line border.

FLSA

Fair Labor Standards Act

**Exemptions FLSA
& State Level**

Our workforce continues to feel the effects of the pandemic, either through relocations or modifications to daily work routines.

What should we be thinking about as it relates to the exempt or non-exempt status of our employees?

FLSA Basics

- The FLSA requires employers to pay employees:
 - At least the minimum wage for all hours worked
 - Overtime for all hours worked over 40 in a week at 1.5 times the employee's regular rate of pay



FLSA Basics

- Unless an employee qualifies for an exemption from minimum wage, overtime or both



Tell me more about exemptions ...

- “Exempt”
 - Exempt from minimum wage and overtime requirements
- “Non-exempt”
 - Paid at least minimum wage and 1.5x regular rate for hours over 40 in a workweek



Tell me more about exemptions ...

- Salary threshold
 - \$684 per week
- Duties
 - Administrative, executive, learned professional, computer employee, sales

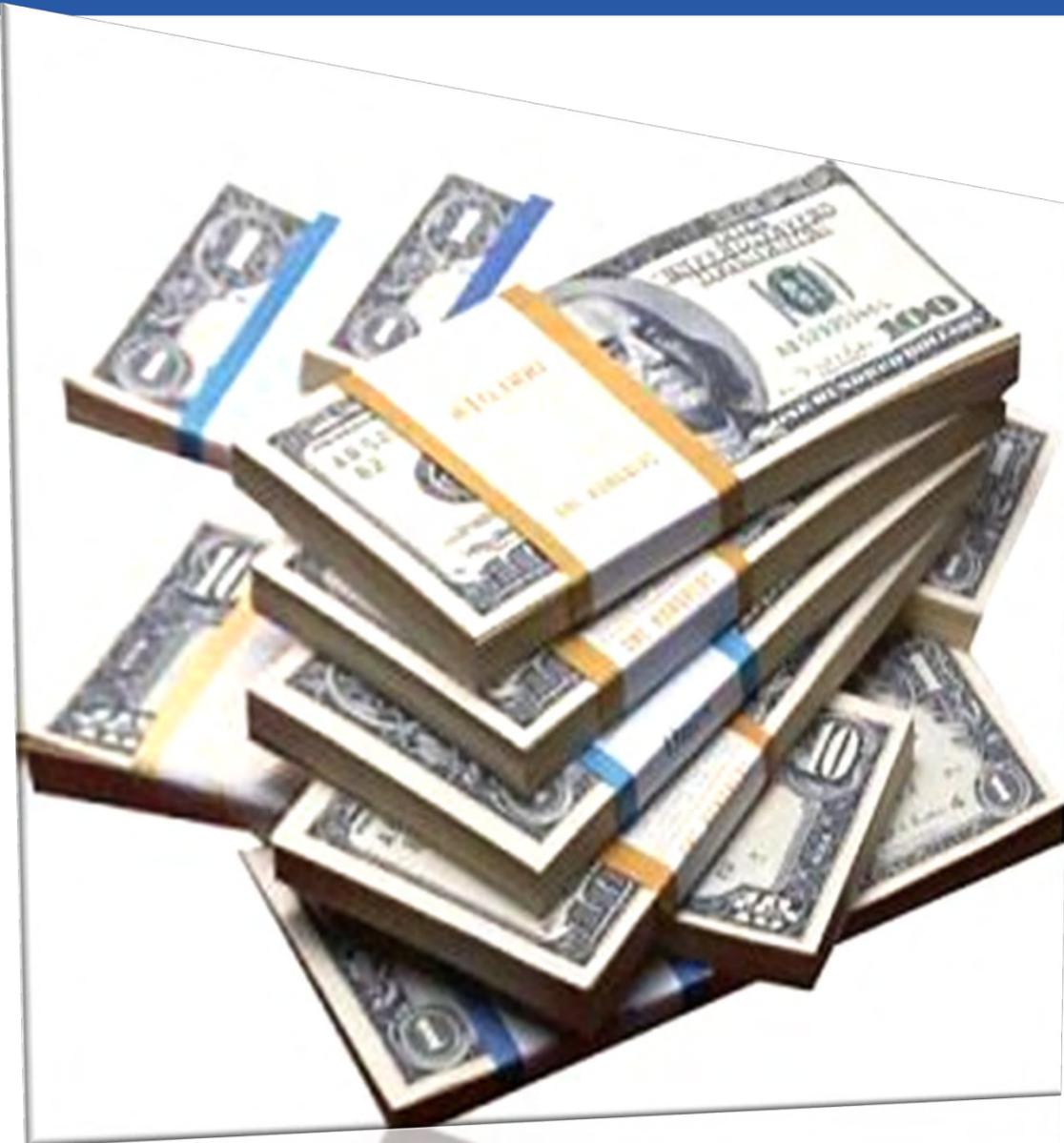


What is a “primary duty”?

- The principal, main, major or most important duty
 - Relative importance of the exempt duties;
 - Time spent performing exempt work;
 - Relative freedom from direct supervision; and
 - Relationship between salary and wages paid to other employees for similar nonexempt work.

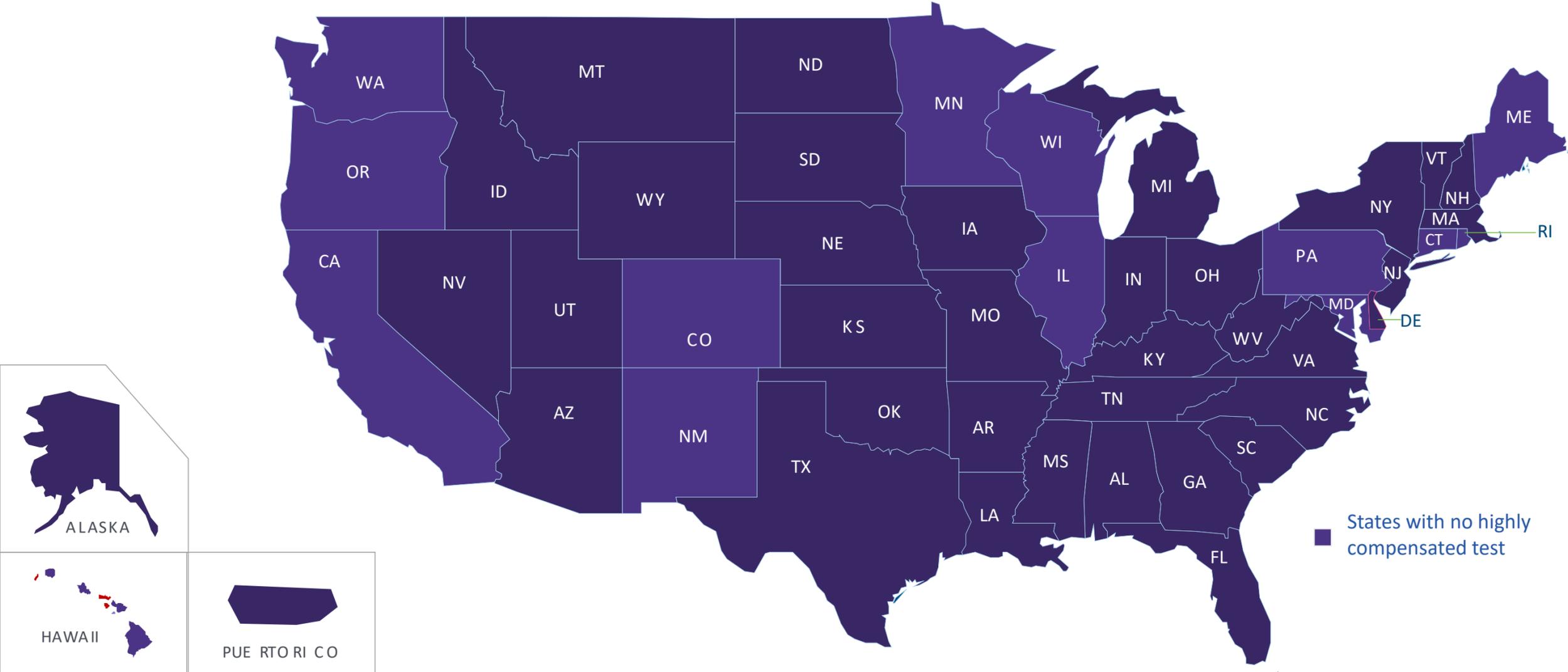
Different Minimum Salary

- Alaska
- California
- Colorado
- Connecticut
- Iowa
- Maine
- New York



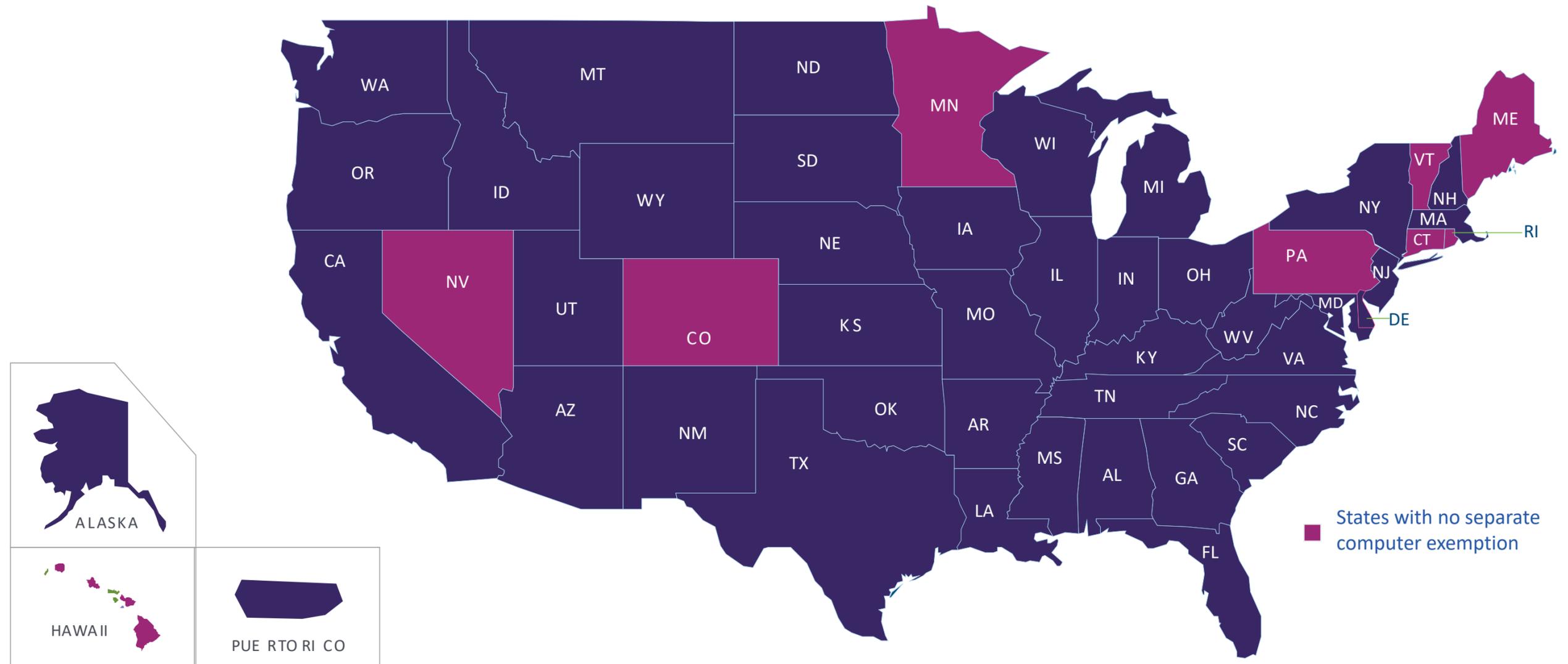
No Highly Compensated Test

- California
- Colorado
- Connecticut
- Hawaii
- Illinois
- Maine
- Maryland
- Minnesota
- New Mexico
- Oregon
- Pennsylvania
- Rhode Island
- Washington
- Wisconsin



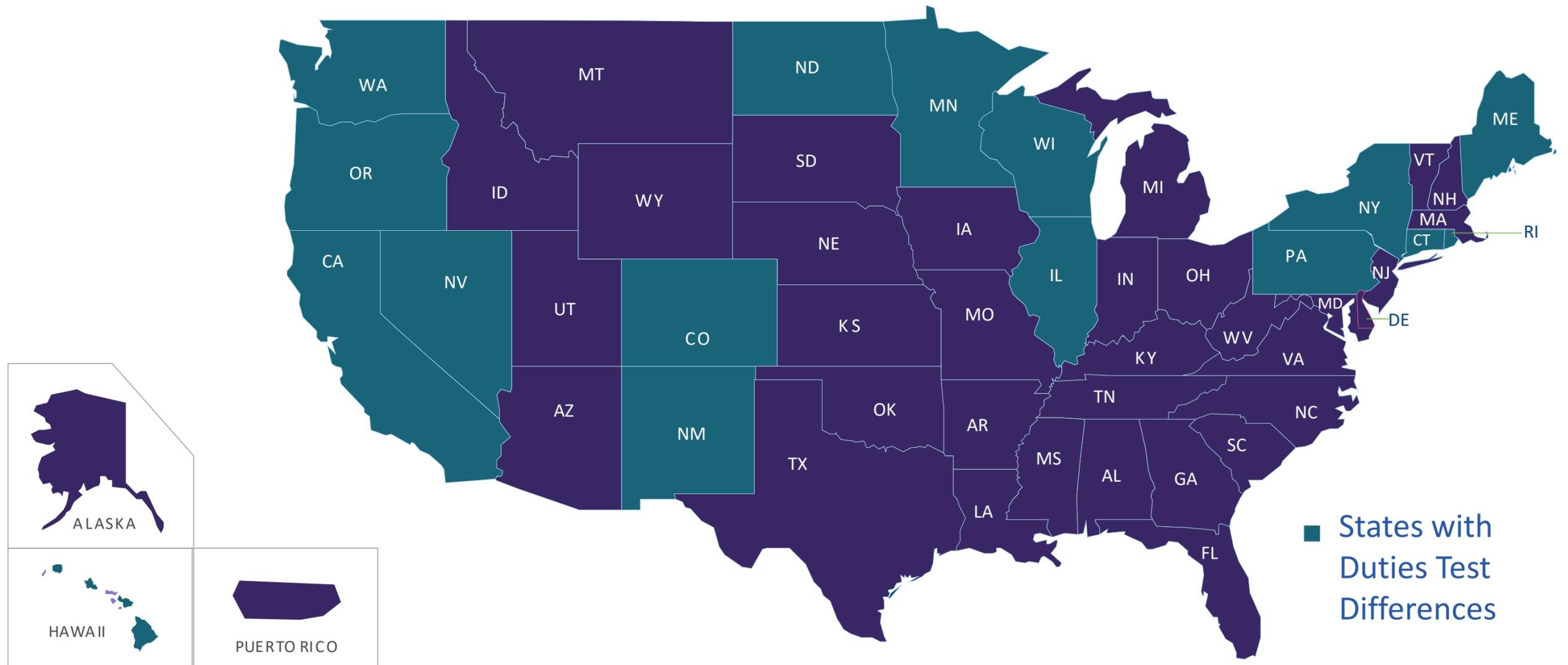
No Separate Computer Exemption

- Connecticut
- Hawaii
- Maine
- Minnesota
- Nevada
- Pennsylvania
- Rhode Island
- Vermont



States with Duties Test Differences

- California
- Colorado
- Connecticut
- Hawaii
- Illinois
- Maine
- Minnesota
- Nevada
- New Mexico
- New York
- North Dakota
- Oregon
- Pennsylvania
- Rhode Island
- Vermont
- Washington
- Wisconsin



Some Key Duties Differences

Outside Sales

- Time spent “outside”
 - California (50%)
 - Pennsylvania (80%)
 - Wisconsin (80%)
- Limit on non-sales work
 - Connecticut (20%)
 - Minnesota (20%)
 - New Mexico (20%)
 - North Dakota (20%)
 - Oregon (30%)
 - Pennsylvania (20%)

50% Primary Duty

- California
- Colorado executives

20% Non-Exempt Work Limit

- New Mexico, executive
- Wisconsin





Incentive Plans

As the talent wars continue to heat up, we are thinking about outside-the-box solutions for attracting and retaining top candidates.

What are some of the risks we should be aware of as we develop incentive plans?

Key Factors to Consider

- Exempt vs. Non-exempt employees
- When is the bonus “earned”?
- When is it paid?
- What period of time is it intended to cover?
- What happens if an employee is fired or resigns before the bonus is paid?
- Will we seek to recoup any portion of a bonus that is “unearned”?

What About Paying Employees in Crypto?



- Federal law requires wages be paid “in cash or negotiable instrument payable at par”
- Many states require wages be paid in cash or negotiable form of U.S. currency

What About Paying Employees in Crypto?



- Wages must be issued free and clear – no discounts or fees
- Multitudes of compliance issues:
 - Minimum wage
 - Overtime
 - Exemption classification
 - State law penalties

Practical Recommendations

- Limit use of cryptocurrency to exempt employees
- Limit use of cryptocurrency to bonuses
- Provide detailed bonus plan document
- Obtain acknowledgment of risks





Recovering Over Payments

Mistakes happen...

Occasionally, we may accidentally overpay employees and/or an employee leaves our company before they earn a retention bonus.

Can we get that money back? And if so, how do we go about it in a lawful manner?

Where to start ...

- Decide if you want to recover the overpayment or allow the employee to retain the overpayment
- If you will seek to recover, determine the appropriate approach



Where to start ...

- Notice of overpayment and repayment agreement
- Be mindful of state laws





Wandering Workers

Our workers are wandering all over the place and we have questions!

In these mobile times, what is compensable for our wandering workers, what expenses are reimbursable, and are there state law issues at play we need to be worried about?

Expense Reimbursement

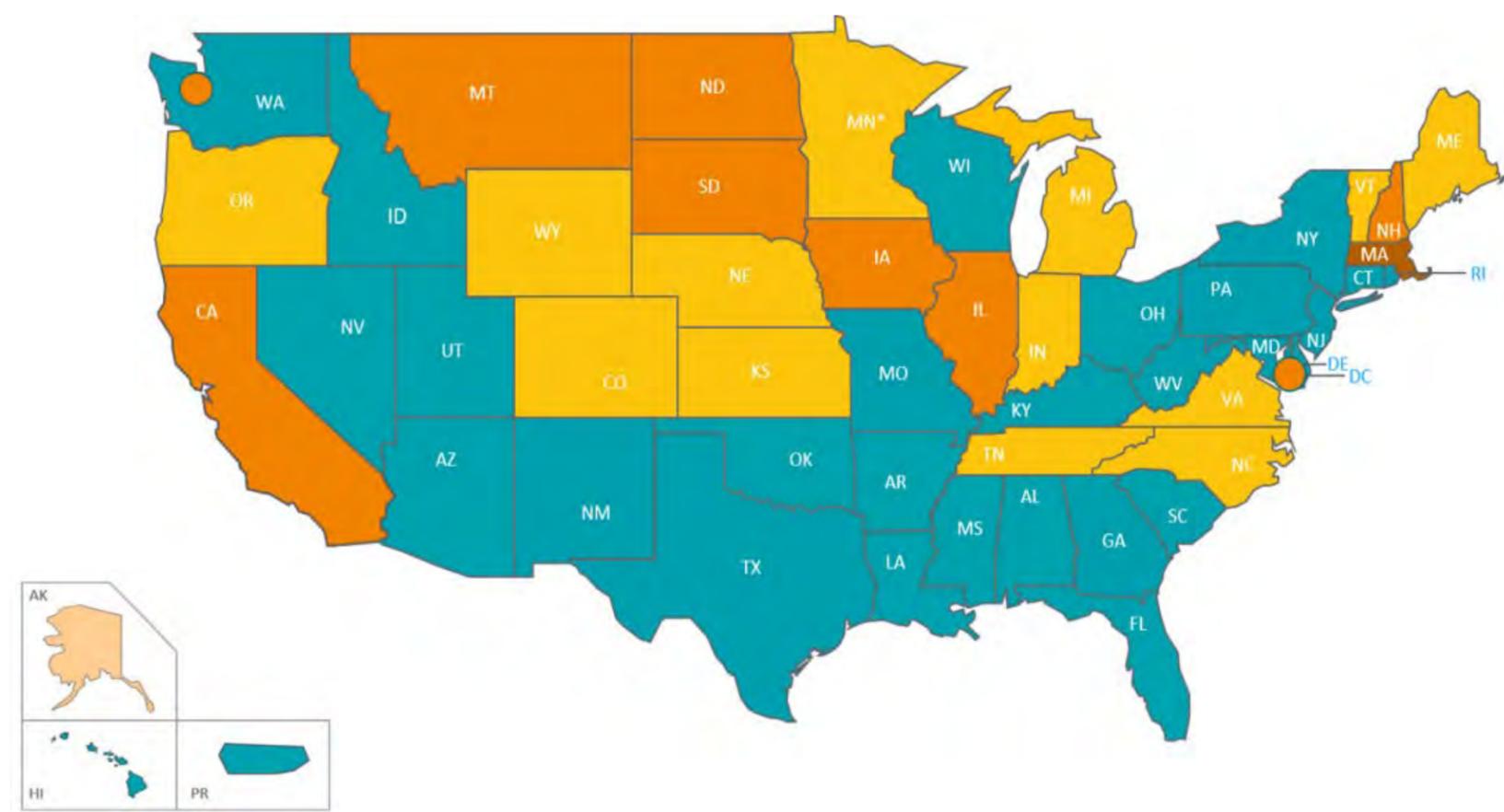
Expense Reimbursement

Necessary
“Reasonable Percentage”
“Free and Clear”
Exempt Employees

ORANGE – Reimbursement required for necessary, out-of-pocket expenses incurred to perform their work, (including those teleworking).

YELLOW – Some requirements to pay for certain equipment or limits on an employer’s ability to deduct the cost of tools/equipment.

RED (MA) – Case suggests failure to reimburse for out-of-pocket expenses constitutes nonpayment of wages.



Expense Reimbursement

Expenses associated with telework are not “necessary” if:

- participation is **optional**; *and*
- employer makes **workspace and necessary equipment available.**

Consider: A Telework Policy and Agreement

Expense Reimbursement

- Is telework voluntary or mandatory?
- What is being provided by the employer?
- What else does the employee think they need to be successful?
- No purchases without prior approval
- How will supplies be replenished over time?

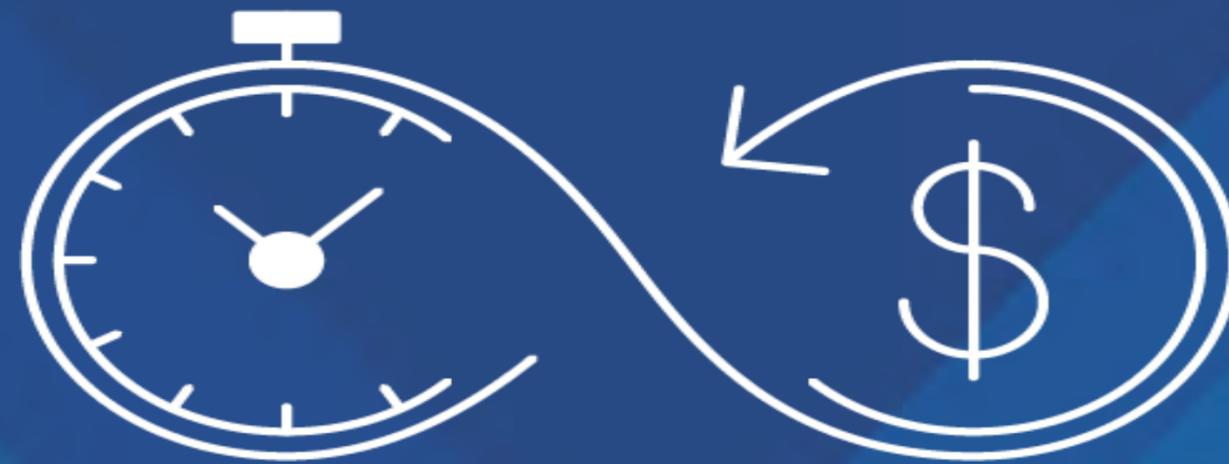


Consider: A Telework Policy and Agreement

Non-exempt employees

- Hours Worked and Timekeeping Policy
 - Accurately report all hours worked
- Specify what constitutes work
 - Short interruptions = work
- Defined work schedule
 - Prohibit work outside schedule





Top 5 Wage & Hour Mistakes

Top 5 Mistakes

Timekeeping practices that fail to capture all hours worked



Timekeeping Practices

- First to last principal activity
- Time worked beyond schedule
- Unauthorized overtime
- Meeting/training time
- Travel time



Timekeeping Practices

- Do you know your automatic clock rules?
- How are you handling emails and texts exchanged after regular work hours”?



Top 5 Mistakes

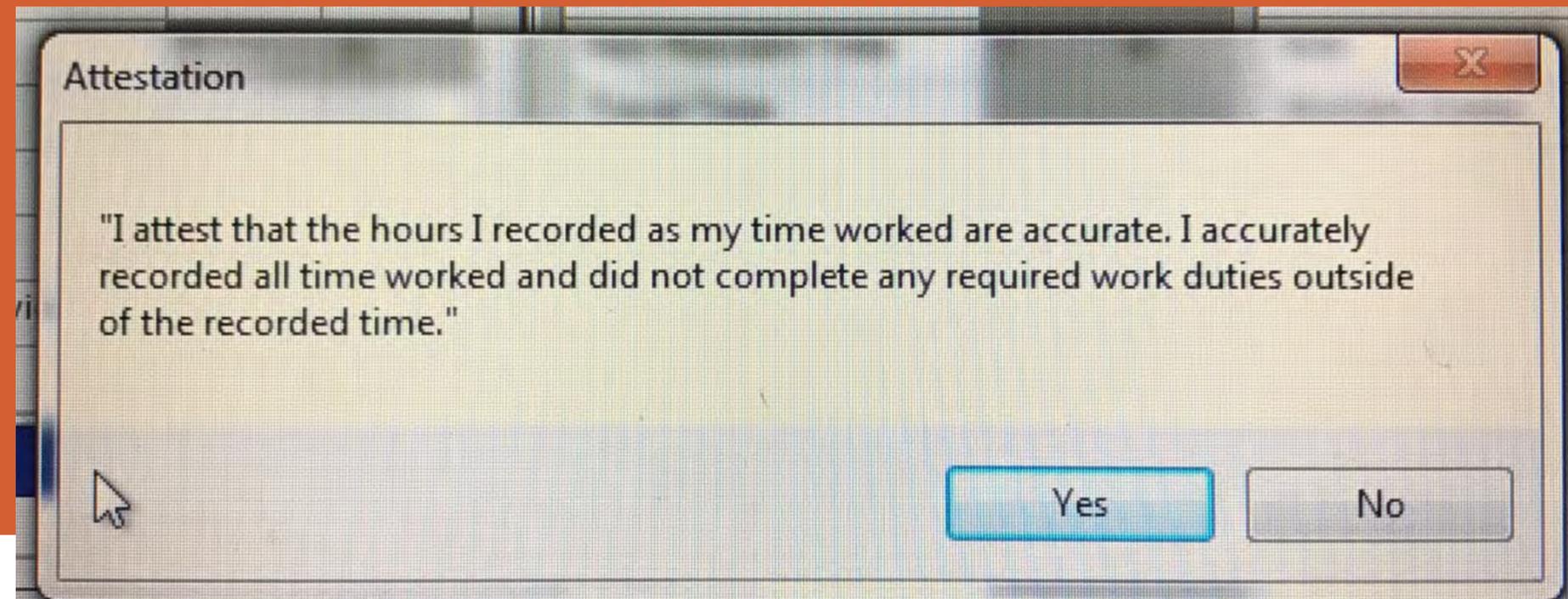
Failure to Monitor and Respond



Failure to Monitor and Respond



- Are you actually reviewing employee attestations?
- Do you know whether certifications are truthful?



Top 5 Mistakes

Failure to include “all remuneration” in the regular rate



Failure to include “all remuneration”

- Do you know the difference between an hourly rate and regular rate?
- Have you reviewed how overtime is being calculated?



Failure to include “all remuneration”

- Compensation includes:
 - Hourly wages or salary
 - Piece rates
 - Day rates
 - Commissions
 - Non-discretionary bonuses
 - Prizes and awards
 - Shift differentials
 - Premium pay for hazardous work
 - On call pay



Failure to include “all remuneration”



- Compensation does not include:
 - Discretionary bonuses
 - Gifts for special occasions (e.g. Christmas)
 - Payments for time not worked (e.g. vacation)
 - Business expense reimbursements
 - Premium pay of at least 1 ½ times hourly rate



Top 5 Mistakes

Improper Deductions



Deductions

- Deductions for nonexempt employees cannot bring pay below minimum wage
- Deductions should be authorized in writing



Deductions

- Potentially problematic deductions for nonexempt employees:
 - Employer required uniforms
 - Tools of the trade (cell phone/computer)
 - Cash shortages
 - Damages to company property



Deductions

- Potentially problematic deductions for exempt employees:
 - Partial day absences
 - Cash shortages
 - Damages to company property



Top 5 Mistakes

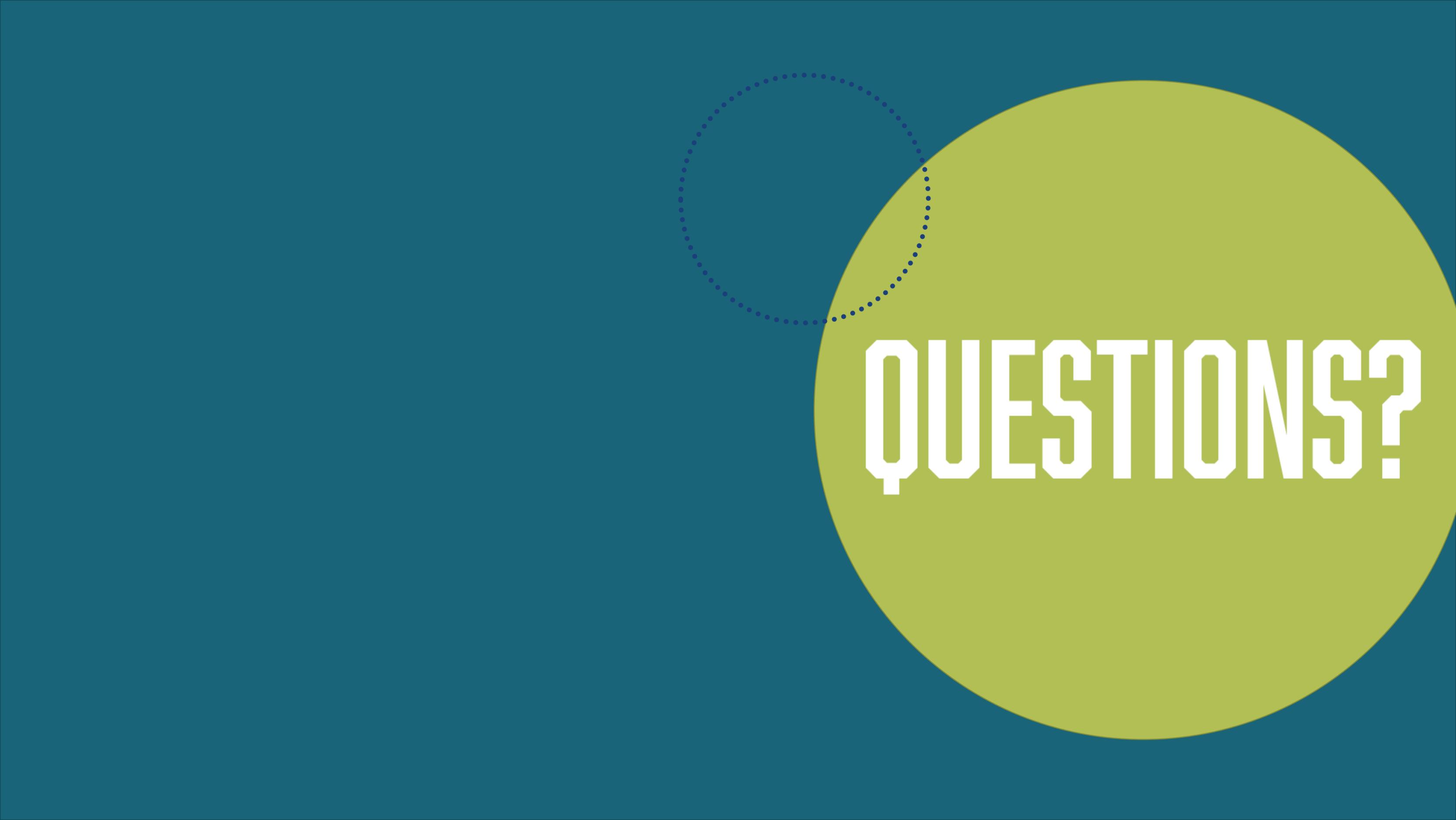
Misclassifying employees as exempt from overtime or as independent contractors





MISTAKES WERE MADE

- Compensable meal or rest breaks
- Unpaid internships
- Violating final pay rules
- Failing to identify the workweek
- Treatment of overtime in piece-rate context



QUESTIONS?



THANK YOU

Closing Remarks



C.B. Burns

Partner

Kemp Smith LLP

