

# Two Years into the Pandemic: A Brave New Workplace

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## COVID-19 Related Lawsuits



- From the beginning of the COVID-19 pandemic in March 2020 through March 15, 2022, approximately **5,380** COVID-19 related employment lawsuits have been filed in state and federal court, including **517** class actions. Most filings have been in the following states:
  - California: 1,674
  - New Jersey: 456
  - New York: 386
  - Florida: 375
  - Ohio: 249
- More lawsuits are expected in 2022, related to (1) ongoing safety concerns as more employees to report to work in-person; (2) the legality of mandatory vaccine policies; (3) religious and disability discrimination claims arising out of requests for exemption from the COVID-19 vaccine; and (4) claims of failure to pay required COVID-19 sick leave.



# COVID-19 and Return to Work

## Return to Work Issues



- Managing a hybrid work schedule
- Requests for accommodation to work solely from home
- Monitoring meal and rest period compliance
- Maintaining productivity two years into remote work

## Requests for Accommodation – Remote Work



- The FMLA is job protected leave that entitles an eligible employee to take intermittent leave (with the employer's agreement) or leave for a period of time return to their same job or a substantially similar one.
- The Americans With Disabilities Act (ADA) is a law designed to help people with disabilities access the same employment opportunities and benefits available to people without disabilities
  - Employers must provide reasonable accommodations to qualified applicants or employees with disabilities.
  - A reasonable accommodation is any modification or adjustment to a job or the work environment that will enable an applicant or employee with a disability to participate in the application process or to perform essential job functions.

## Requests for Accommodation – Remote Work



- The ADA's definition of disability is intentionally expansive
- Someone who has a mental or physical impairment that prevents participation in major life activities (such as working) is disabled.
- If an individual has a record or history of such an impairment, he is considered disabled.
- An employee need not use any magic words or tell you he is disabled; if the employer knows or has reason to know an employee may be disabled, or if the employee requests accommodation, the employer must engage in the interactive process with the employee.
- The disability can be readily apparent, such as a person in a wheelchair, or the disability may be less obvious such as a neurological disorder.

## Requests for Accommodation – Is it a disability?



To Whom It May Concern,

Due to an underlying, permanent condition, my patient requires accommodations to avoid bright lights and scents such as scented lotions, perfumes, colognes, etc.

- ✓ Does it sufficiently describe a disability without revealing a diagnosis?
- ✓ What limitations is the employee experiencing?
- ✓ How do these limitations affect the employee and the employee's job performance?
- ✓ What specific job tasks are problematic as a result of these limitations?
- ✓ What accommodations are available to reduce or eliminate these problems?
- ✓ Can the employee perform the duties fundamental to their job with accommodations?

## Requests for Accommodation – Is it a disability?



To Whom It May Concern,

Due to her chronic underlying medical conditions, I recommend this patient be permitted to continue to work full-time from home, as having her return to the office would have a significant negative impact on her health. She cannot safely work under the extremely bright LED lighting provided in her office space. In addition, she cannot safely carry all of her own work station equipment each day (supplies, ergonomic chair, etc.) in to work each day and must work in a relatively confined space with close access to the restroom at all times throughout the work day.

This is a permanent recommendation.

## Requests for Accommodation – Is it a disability?



This letter is to confirm your diagnosis of PMDD (premenstrual dysphoric disorder) and support your request for reasonable work place accommodations. Due to your chronic medical condition, we expect that you may experience symptom flares for up to 14 days per month. It is reasonable to request the accomodation to participate in remote work during these 14 days each month.

Sincerely,

- ✓ Does it sufficiently describe a disability under the ADA? **YES**
- ✓ Does it describe the limitations the employee experiencing? **NO.**
- ✓ Does it describe how the limitations affect the employee and the employee's job performance? **NO.**
- ✓ What specific job tasks are problematic as a result of these limitations? **UNKNOWN**
- ✓ Does it suggest a reasonable accommodation? **MAYBE**

## Requests for Accommodation – Remote Work



- Changing the location where work is performed – and thus permitting remote work - likely falls under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework.
- Permitting an individual to work from home when recovering from a disabling condition, is a reasonable accommodation for a defined period of time.
- The employer may request information and documentation as to why the disability might necessitate the individual working at home.
- The individual must explain what limitations from the disability make it difficult to do the job in the workplace, and how the job could still be performed from the employee's home.

## Requests for Accommodation – Remote Work



- The EEOC guidance makes clear that an employer should not deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees when some meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.
- An employee may work at home only to the extent that his/her disability necessitates it.
- This can be defined – for a short time will recovering from treatment or surgery related to a disability.
- In other instances, the nature of a disability means an employee cannot predict when they need to work at home. Absent an undue hardship, the employer should consider intermittent work from home.

## Remote Work



- Monitor Meal and Rest Period Compliance – ensure employees are aware of requirements and sign acknowledgments
- Ensure accurate timekeeping records – do what is necessary to avoid off-the-clock work especially by non-exempt employees
  - Do they need access to email on their phone?
  - Do supervisors use text messaging with non-exempt employees to advise them of work responsibilities or schedules?
- Manage expense reimbursement claims
  - Are you requiring work from home?
  - If employees choose to work remotely, do you have a dedicated office space for them to work?



What Has The Pandemic Taught Us  
About What Employees Want?  
Hybrid Work Environments!

# What is the Role of the Office Now?

“We’re returning to the office because our culture is so important”

The culture:



ifunny.co

- Pre-pandemic, most people were dissatisfied with their office space. Post-pandemic, offices may not be as essential as we once thought.
- Hybrid working is increasingly the norm. For it to be successful, the office needs to change and continually evolve.
- The hybrid office requires a balance of spaces, calibrated to each organization and the widest range of individuals within it.

# What drives people to want to be onsite?

## Technology

Easier access to technology onsite than at home

## Colleagues

Collaborate with colleagues in face-to-face settings

## Routine

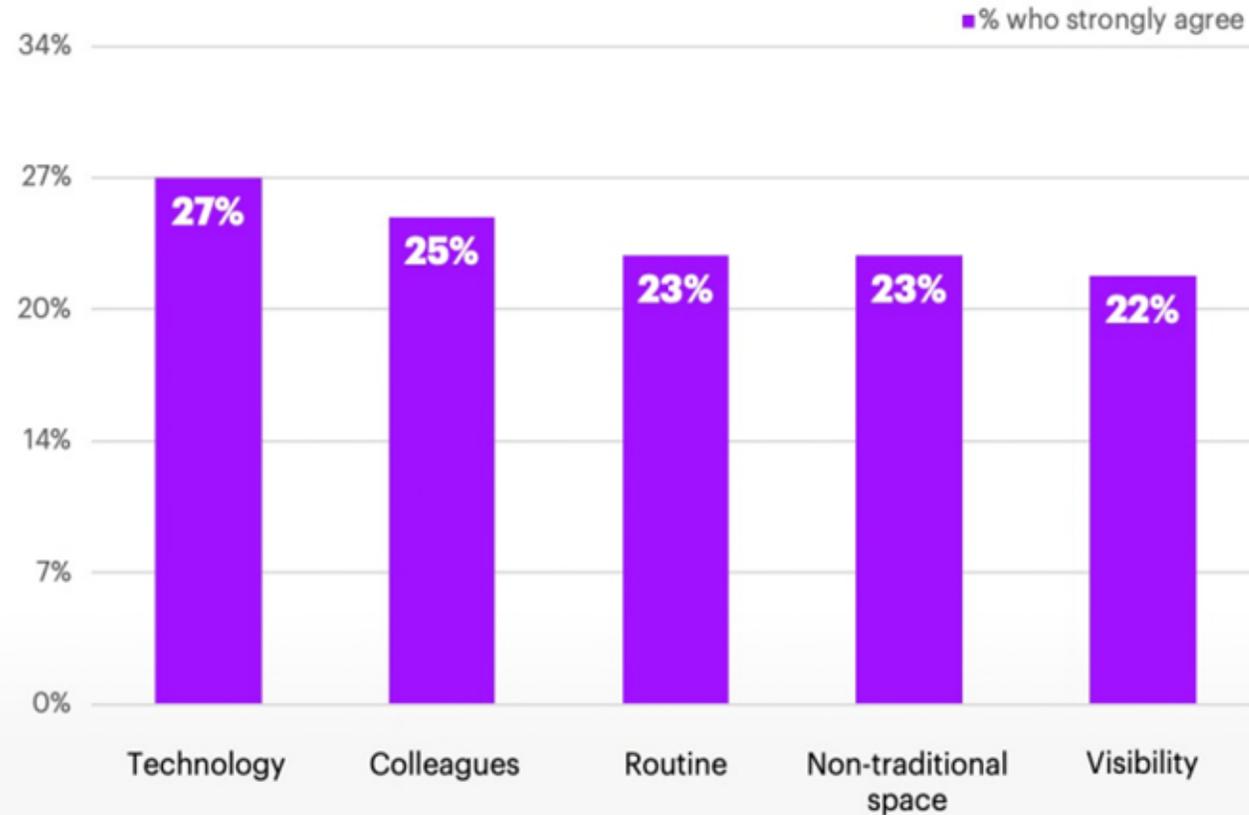
Benefit from the routine that going onsite creates

## Non-traditional space

Need non-traditional space to ideate and innovate

## Visibility

Improved visibility to leaders



# What drives people to want to be remote?

## Safety

Remote work makes me feel safer

## Quality of life

I have a better quality of life working remotely

## Freedom

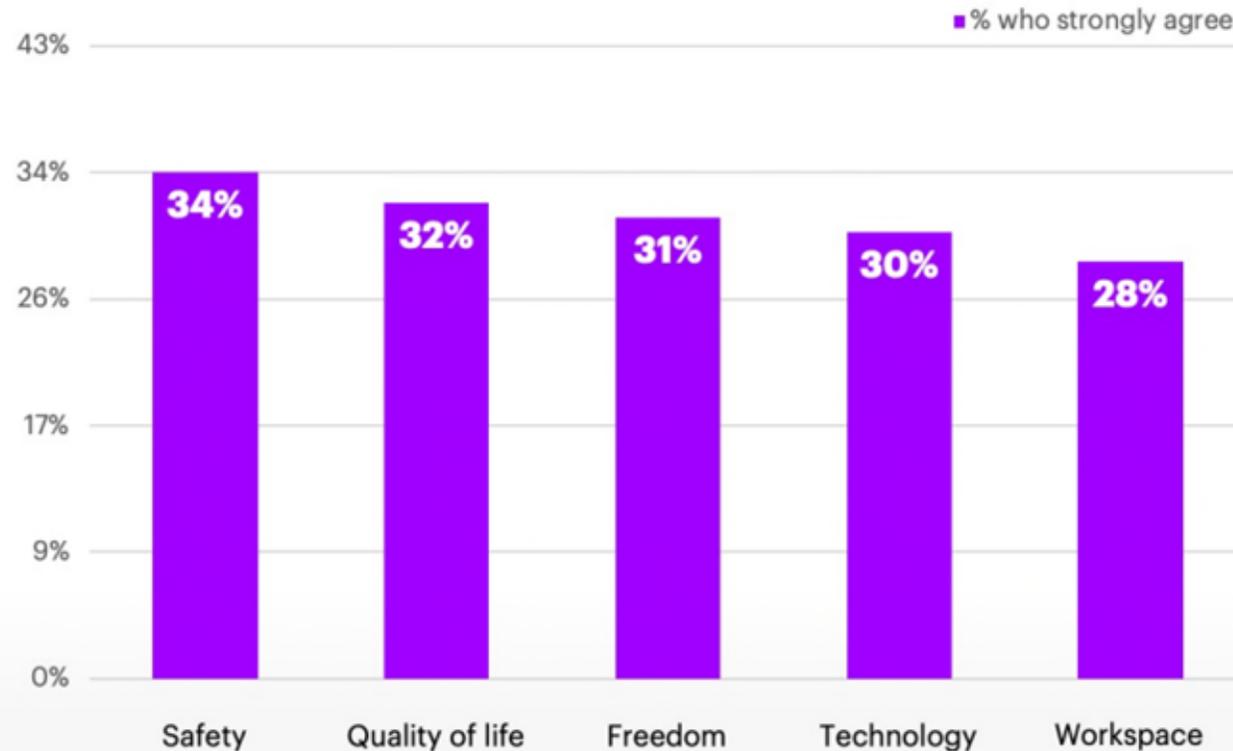
Remote work gives me the freedom to take more productive breaks from work when I need to

## Technology

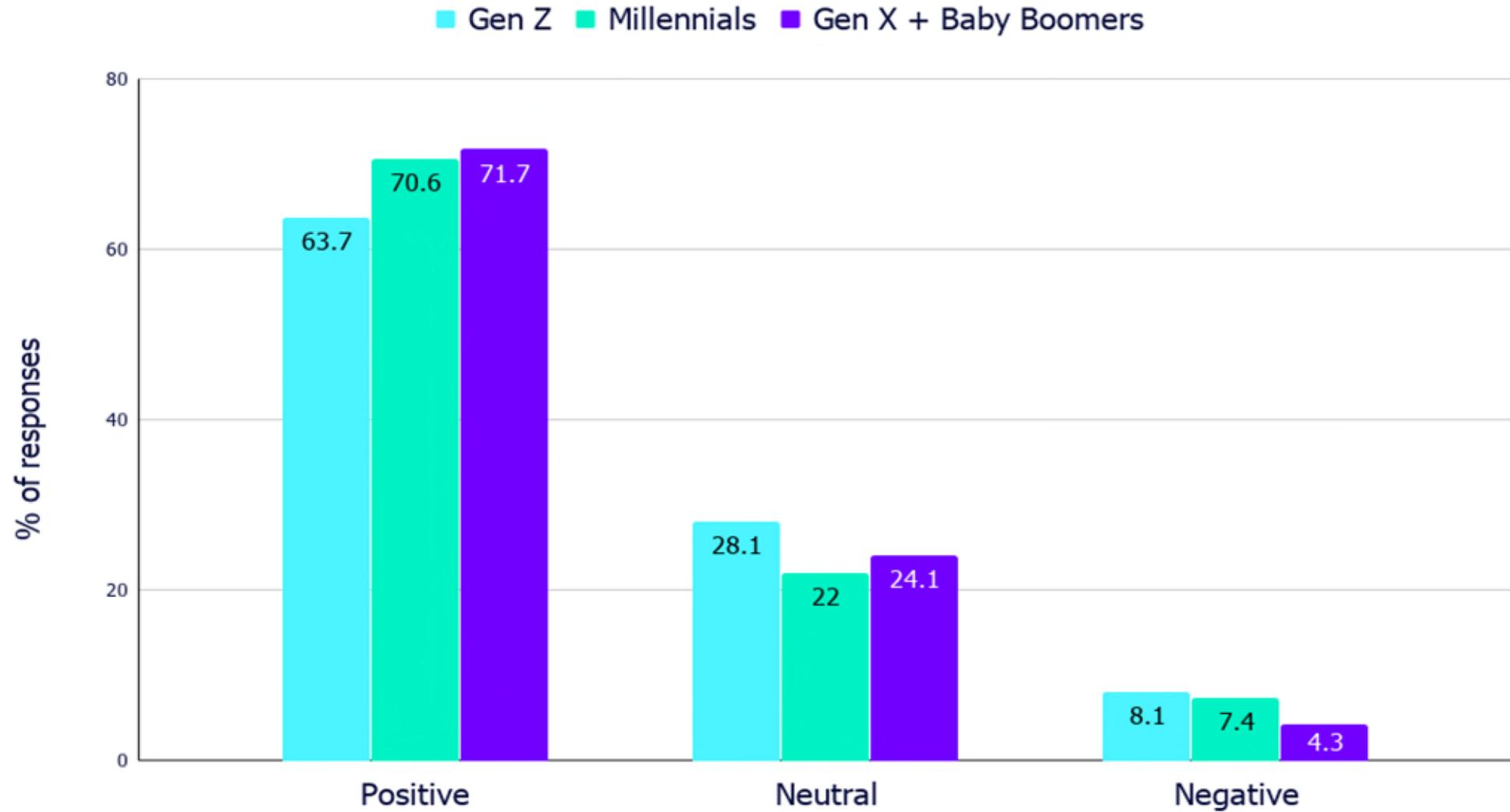
I have the tools and technology to effectively work remotely

## Workspace

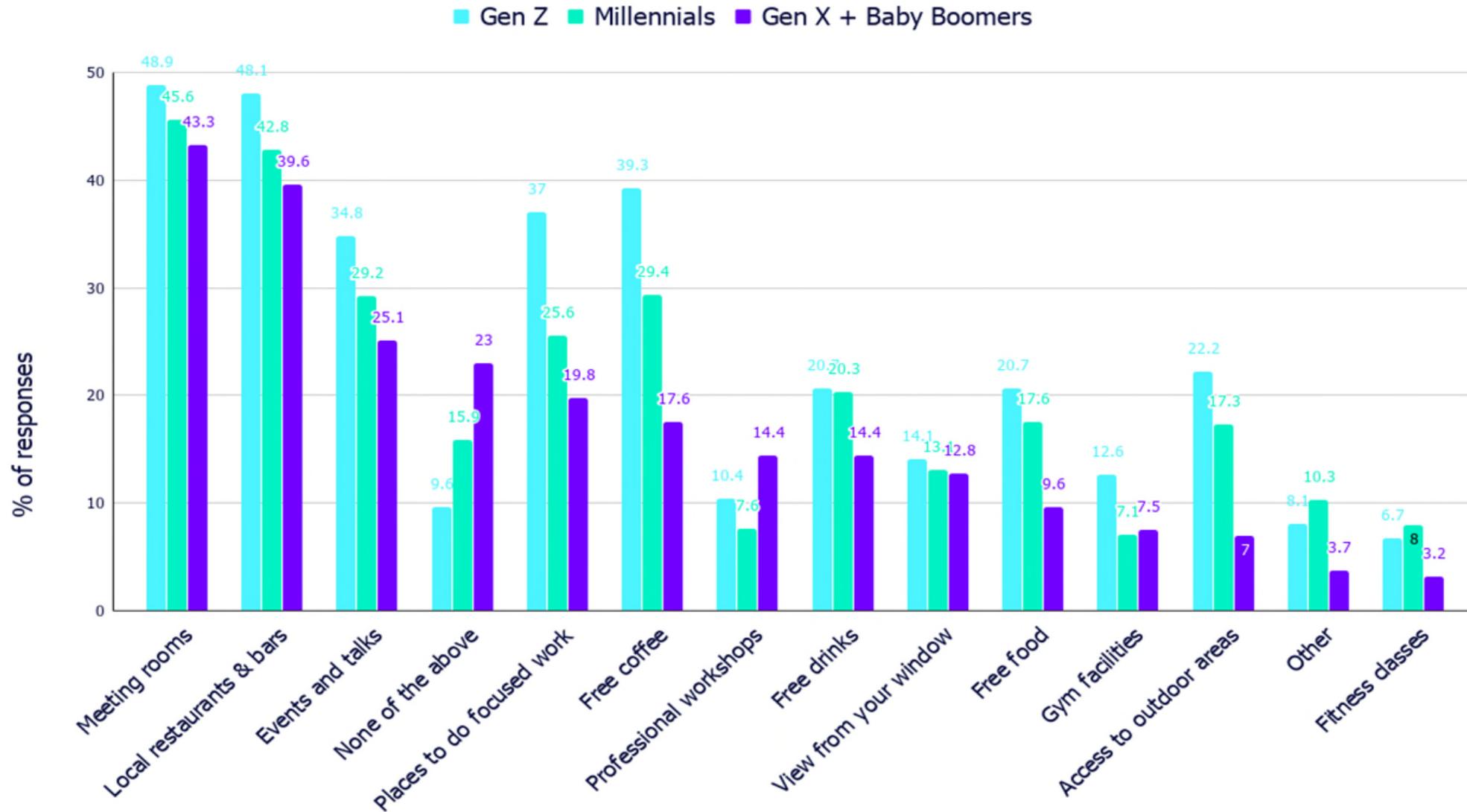
I have sufficient work-from-home space



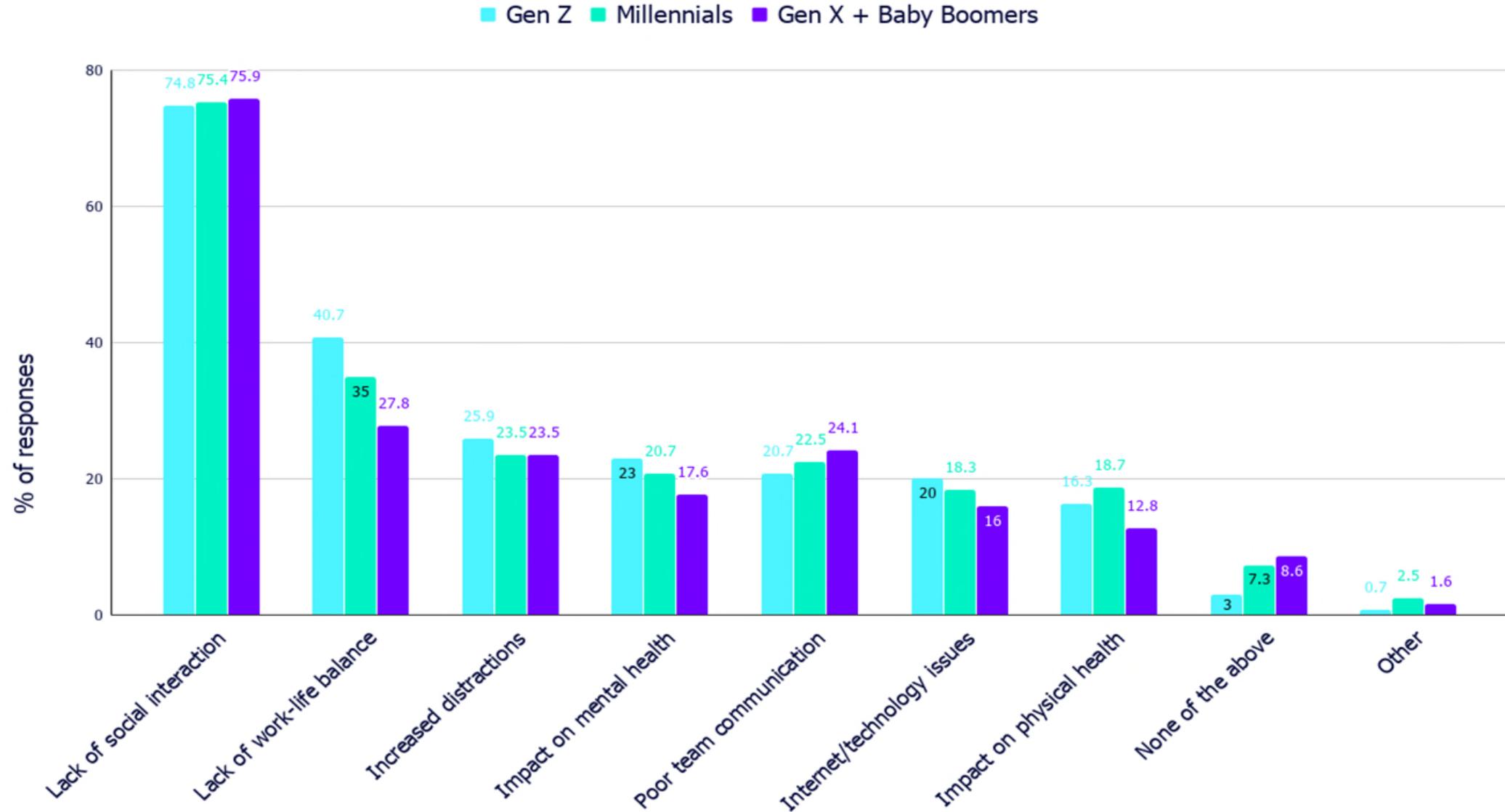
On the whole, how have you found working from home?



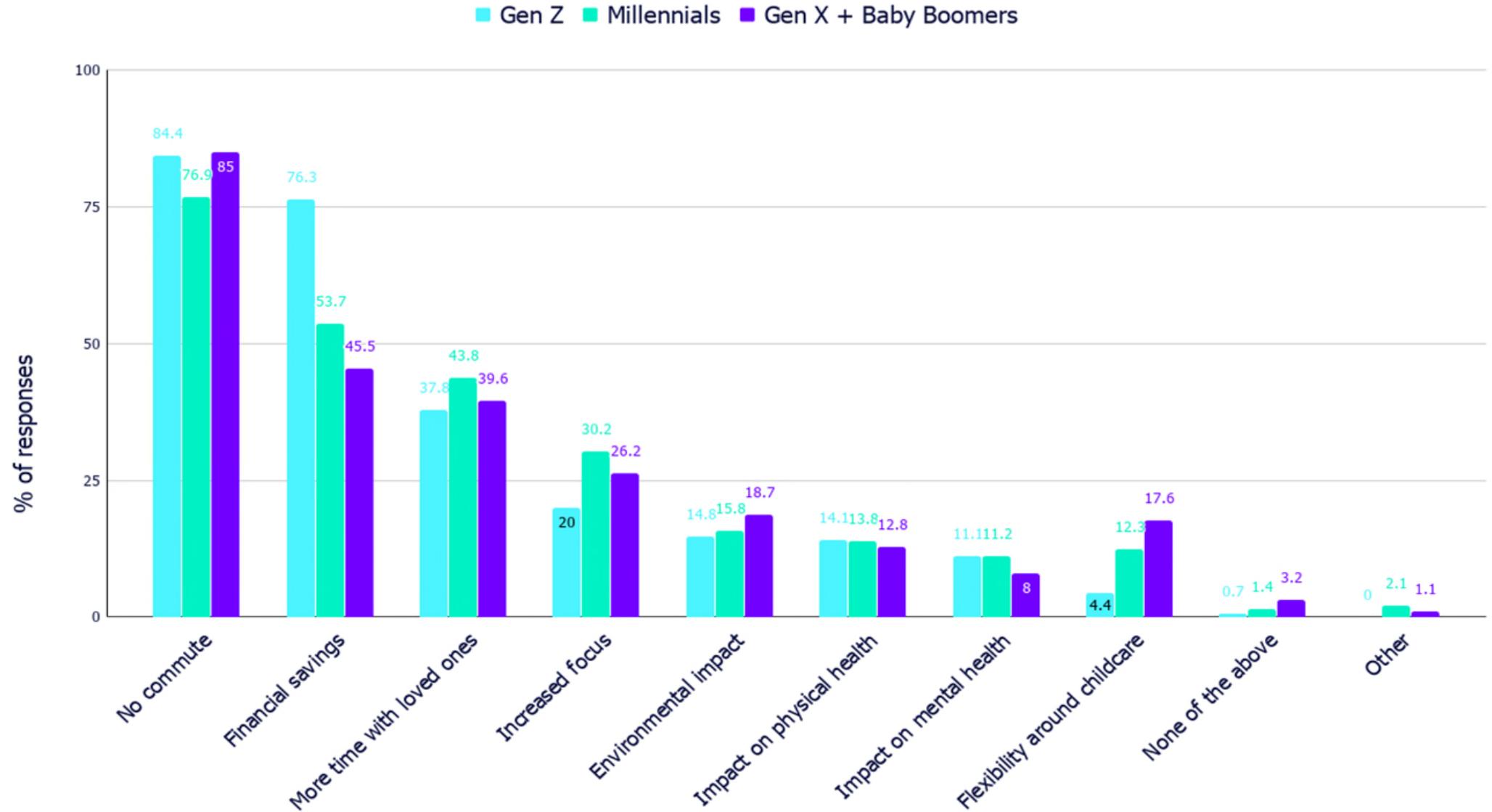
## People aside, which of the following things do you miss about the office experience?



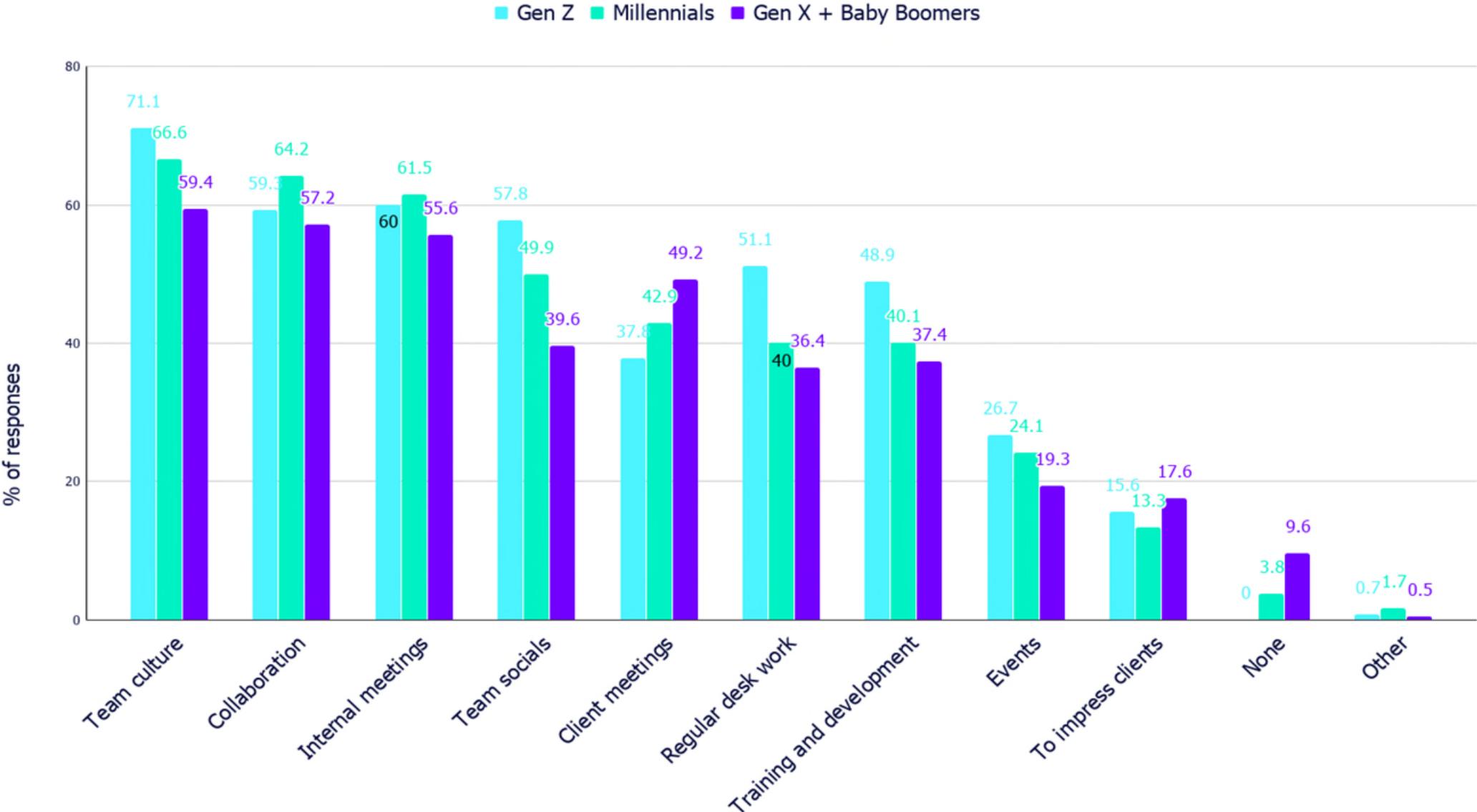
# What have you disliked most about working from home? (Select up to 3)



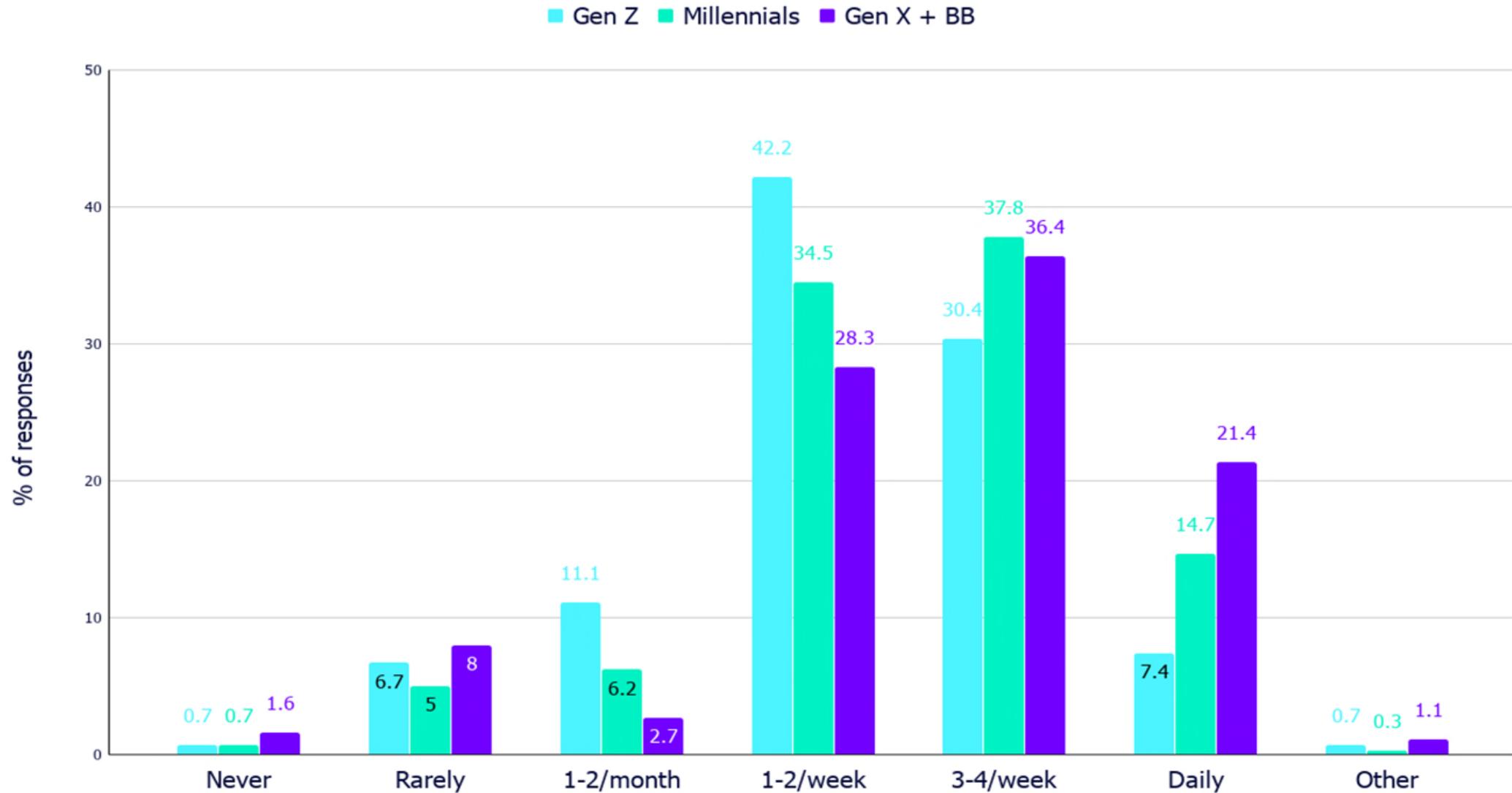
## What have you liked most about working from home? (Select up to 3)



# What would you want the office for?



## How often would you want to work remotely in the future?



# Why Are Some People Able to be Productive Anywhere?

People who can be productive everywhere have significantly greater personal and organizational resources than those who can't be productive anywhere.

<b>Personal resources</b>
Autonomy in job
Positive mental health
Desire to participate in learning
High degree of digital skills
Strong social bonds at work
Work-life enhancement

<b>Organizational resources</b>
Organization is agile
Organization is intelligent
Organization has health policies
Organization supports vaccination
Organization is digitally mature
Leadership is supportive

# 7 Workplace Trends for 2022

- **#1: The “Great Resignation” will cause organizations to fight to attract and retain top talent**
- **#2: Employee Compensation and Well-Being Will Be Key Issues for Leaders to Solve in 2022**
- **#3: The skills of the front-line manager will become increasingly critical to organizational effectiveness**
- **#4: A Hybrid or Remote-First Approach will be adapted by many organizations**
- **#5: Utilizing engagement surveys and focus groups to gather employee input and feedback**
- **#6: Continued expansion of gig workers or contingent workers**
- **#7: Expanded focus on Diversity, Equity, and Inclusion**



Safety Considerations and Notice to  
Employees of COVID Exposure

## Status of Vaccine Mandates



- OSHA (federal) has withdrawn its ETS which sought to mandate vaccination for employees of large employers
- The US Supreme Court has upheld the CMS vaccine mandate which applies to healthcare facilities participating in Medicare and Medicaid programs
- The fate of the mandate for federal government contractors with certain types of contracts remains uncertain
- The CDPH mandate requiring vaccination and boosters for health care workers remains in effect

## California Vaccine Legislation



- **SB 866** would allow kids 12 to 17 to get the COVID-19 vaccine without parental consent;
- **SB 1479** would require schools to continue testing and to create testing plans (On March 30, 2022 the bill was passed as amended, but referred to the Committee on Education);
- **SB 1464** would force law enforcement officials to enforce public health orders (hearing set for April 26 postponed by Committee of Public Health);
- **AB 1797** would make changes to the California Immunization Record Database;
- **AB 2098** would reclassify the sharing of COVID-19 “misinformation” by doctors and surgeons as unprofessional conduct that would result in disciplinary action (Passed in the Assembly and Referred to the Committee on Appropriations).

## Cal OSHA Emergency Temporary Standard (ETS)



- The ETS was first enacted in November 2020 and has been readopted twice.
- It was set to expire on April 14, 2022, however the Standards Boards further extended the ETS through May 6, 2022.
- Employers must maintain a written COVID-19 Prevention Program.
- The ETS must be read in conjunction with other laws and guidance including paid sick leave and the California Department of Public Health (CDPH) Isolation and Quarantine guidance as discussed in detail in the following slides.

## What are the main requirements of the ETS?



- ✓ Identify, evaluate, and correct COVID-19 hazards.
- ✓ Require & provide face coverings and respirators.
- ✓ Advise employees they can wear face coverings at work regardless of their vaccination status, and that retaliation by the employer is illegal.
- ✓ Use personal protective equipment “PPE” under certain circumstances.
- ✓ Investigate & respond to COVID-19 cases in the workplace.
- ✓ Provide COVID-19 training to employees.
- ✓ Make testing available at no cost to employees who have had a "close contact" with COVID + indiv. If major outbreak, make testing available at no cost on a regular basis for employees in exposed work area. Not applicable to employees who are asymptomatic & recovered from COVID-19 in past 90 days.
- ✓ Exclude COVID + employees after close contact until they are no longer an infection risk.
- ✓ Follow return to work criteria.
- ✓ Maintain record COVID-19 cases & report serious illnesses to Cal/OSHA and to the local health department when required.

## COVID-19 Exposure Reporting – Expanded AB 654



- Within one day, employers must provide all employees who were at the same worksite as infected individual with:
  1. Written notice that the employee may have been exposed to COVID-19;
  2. Information regarding COVID-19-related benefits that the employee may be entitled to; and
  3. Notice of the cleaning and disinfection plan that the employer is implementing.
- Requires employer to notify the local public health agency of an “outbreak” within 48 hours. An **outbreak** is defined as **three or more probable or confirmed cases within a 14-day period.**

## Masks at Work

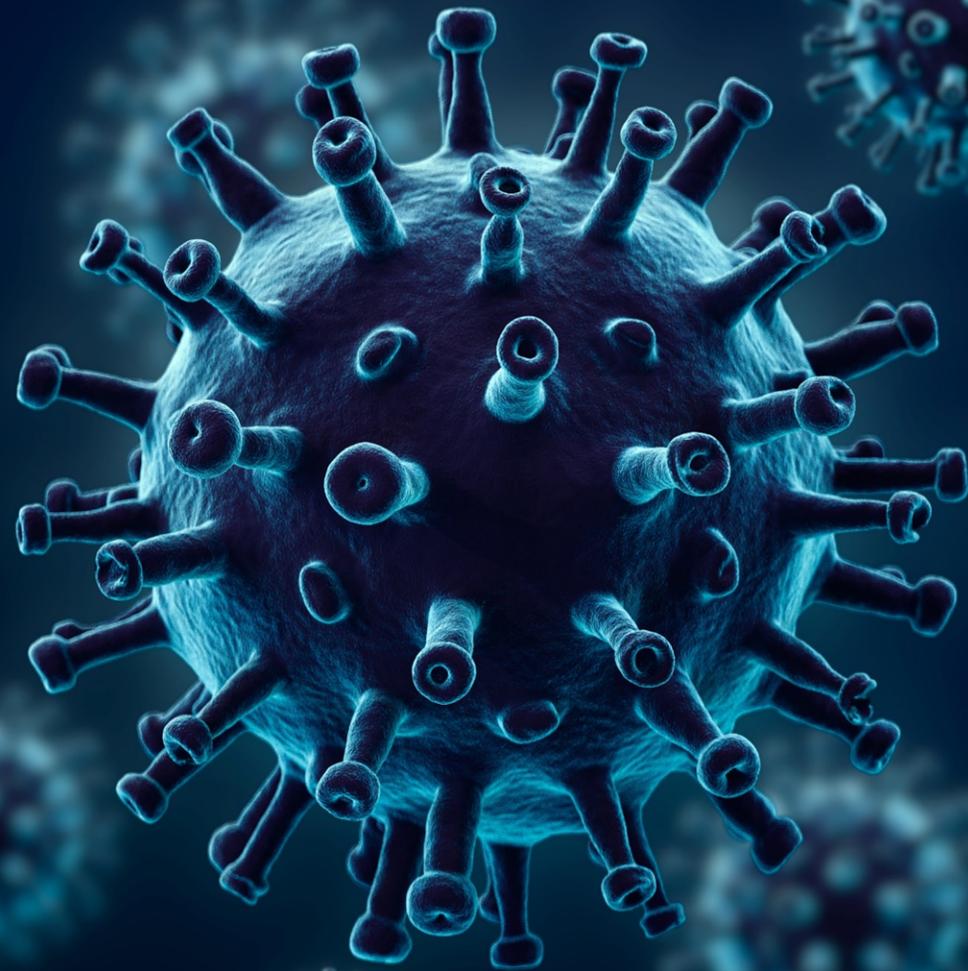


- Employers can follow current state guidelines that regardless of vaccination status, masks are no longer required indoors.
- Employers still must provide masks to workers who request them, and can't bar workers from wearing masks at work if they want to, unless doing so would create a safety hazard.
- Masks are still required in the event of a COVID outbreak at the workplace.
- The Isolation and Quarantine rules employers must follow under the Cal OSHA ETS still require masking by an employee who had COVID-19 or had Close Contact and returns to work after five days but before a full ten days has elapsed since symptom onset or specimen collection for the positive test.

# Isolation and Quarantine Requirements under the ETS



Vaccination status	Isolation or quarantine	Period of time to be excluded from work
<b>All workers that test positive for COVID-19, regardless of vaccination status</b>	Isolation	<ul style="list-style-type: none"> <li>• Must be excluded from the workplace for at least 5 days.</li> <li>• A worker can return to work after day 5 if they do not have symptoms <u>and</u> test negative.</li> <li>• If a worker cannot test or declines to test<sup>1</sup> they can return to work after 10 days.</li> <li>• Must wear a face covering around others at work for a total of 10 days after the positive test.</li> </ul>
<b>Unvaccinated workers exposed to someone with COVID-19</b>	Quarantine	<ul style="list-style-type: none"> <li>• Must be excluded from the workplace for 5 days after the close contact <u>and</u> take a test on day 5.</li> <li>• A worker can come back to work after day 5 if they test negative and do not have any symptoms.</li> <li>• If the worker cannot test or declines to test<sup>1</sup> they can return to the workplace after day 10 if they do not have symptoms.</li> <li>• Must wear a face covering around others at work for 10 days after exposure.</li> <li>• If the worker develops symptoms, they must be excluded pending a test result.</li> </ul>
<b>Booster-eligible, but not boosted workers exposed to someone with COVID-19</b>	No quarantine	<ul style="list-style-type: none"> <li>• Does not need to be excluded from work if asymptomatic but must have a negative test 3-5 days after close contact.</li> <li>• Must wear a face covering around others at work for 10 days after exposure. If the worker develops symptoms, they must be excluded pending a test result.</li> </ul>
<b>Workers received a booster, or are fully vaccinated but not yet booster-eligible.</b>	No quarantine	<ul style="list-style-type: none"> <li>• Does not need to be excluded from work if asymptomatic, but must take a test on day 5 after exposure.</li> <li>• Must wear a face covering around others at work for 10 days after exposure.</li> <li>• If they develop symptoms, the worker must be excluded from the workplace pending a test result.</li> </ul>



COVID-19 Sick Leave

## COVID-19 Supplemental Paid Sick Leave



- **Expired**: CA 2021 Covid Supplemental Paid Leave expired on September 30, 2021
- **NEW**: January 25, 2022, CA Governor Newsom agreed to provide up to 2 weeks of supplemental paid leave through September 30, 2022

An employee is eligible for SPSL if unable to work or telework because:

- Employee subject to a quarantine related to Covid defined by legal guidance or medical provider.
- Employee receiving Covid vaccine / booster.
- Employee experiencing symptoms or caring for a family member Covid vaccine/vaccine booster that prevents the employee from work.
- Employee experiencing symptoms of Covid & seeking a medical diagnosis.
- Employee caring for a family member subject to quarantine order.
- The covered employee is caring for a child, whose school or place of care is closed due to COVID-19 on the premises.

## COVID-19 Supplemental Paid Sick Leave



- Applies to employers with 26 or more employees;
- Two equal buckets of paid sick leave hours are available, which total up to 80 hours for full time employees, for COVID-19 related reasons;
- Employers must identify SPSL hours *used* on an employee's paystub or a separate writing;
- Hours are retroactive to January 1, 2022 in that employees who took leave for qualifying reasons without pay can receive paid sick leave, which will count against their total allotted hours;
- Documentation of a positive test is required for positive employees, those seeking to care for a positive family member and when seeking retroactive payment for their own positive diagnosis;
- Employers cannot require an employee to exhaust SPSL before paying Exclusion Pay required by Cal OSHA's ETS (more on this in a couple of slides);
- At present, no tax credits are available for payment of SPSL.

## COVID-19 Supplemental Paid Sick Leave



### **Full Time Employees: Get up to 80 hours of Paid Sick Leave**

- ❖ 40 hours of flexible paid sick leave and additional 40 hours if employee or family member is COVID-19 positive

### **Part-Time Employees:**

- ❖ Regular schedule: the total number of hours normally scheduled to work over one week.
- ❖ Variable schedule:
  - *Worked more than six months:* seven times the average number of hours in the six months preceding the date of leave;
  - *Worked eight days to six months:* average over the course of employment;
  - *Worked seven days or fewer:* total number of hours worked during the days employed.

## COVID-19 Supplemental Paid Sick Leave



Two “buckets” of hours available - each bucket has equal hours based on Full/Part Time.

- Employee need not exhaust one bucket before using hours available in other bucket.
- **For employees**: Employers may require employee submit to COVID test after 5th day following the employee’s first positive result and require proof of same, provided employee not charged for test;
- **For family members**: Employer may require documentation of positive test to provide leave for this reason.

## Supplemental Paid Sick Leave



- Employees get to choose how to use their hours. An employee can elect to use hours from Bucket B if they or a family member is confirmed positive and can show test
- It is to the employee's benefit to choose Bucket B for positive results, because this leaves them with the hours available in Bucket A for other COVID related reasons. If an employee had positive results and used all their hours in Bucket A to cover this absence, they would have to get COVID again to make use of the hours in Bucket B. (Note: Employer can be flexible if it wishes here).

## Interaction between the ETS and SPSL



- Under the Cal OSHA ETS, there are two categories of people that need to be excluded *from work and paid while in isolation or quarantine* (exclusion pay), provided the exposure is work related:
  1. Employees who test positive (a “COVID-19 Case”)
  2. Employees who had a close contact with a COVID-19 Case during the positive person’s high risk exposure period which is 2 days before symptom onset or test specimen collection through 10 days later.
- Employers cannot require employees to use SPSL when exclusion pay is due. Unlike exclusion pay available under the ETS, employees need not have been exposed to COVID-19 at work for SPSL to apply.
- Proving that COVID-19 exposure is not work-related to avoid the ETS' exclusion pay requirement involves an employer conducting an investigation and producing evidence to show it is more likely than not that an employee's COVID-19 exposure did not occur in the workplace.

## Questions? Contact Us



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### Upcoming Webinars:

- July 2022, 10 AM Pacific – Conducting Lawful & Effective Workplace Investigation
- October 2022, 10 AM Pacific – Annual Wage & Hour Update

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