
***Hiring to Firing* Podcast — “The Costanza Effect: What the TV Series *Seinfeld* Teaches Us About Quiet Quitting”**

Hosts: Tracey Diamond and Evan Gibbs

Guests: Rebecca Silk, Litigation and Compliance Attorney, Paradies Lagardere

Evan Gibbs:

Welcome to *Hiring to Firing* the podcast. I'm Evan Gibbs, here with my cohost Tracey Diamond. We're both partners in the labor and employment practice at Troutman Pepper, and we're here on our podcast dedicated to all things employment law, from hiring to firing, so to speak.

Tracey Diamond:

Per our usual format, we have a special guest here with us, Rebecca Silk. Rebecca, why don't you go ahead and introduce yourself and tell us a little bit about your current gig and your background?

Rebecca Silk:

I am currently a litigation and compliance attorney at Paradies Lagardere. Paradies Lagardere provides retail and dining experiences in over a hundred airports throughout North America. So, in my role, litigation of any and all kinds, and then of course partnering with our human resources department to make sure we're in compliance with all the various employment laws in the almost 40 states we're in. So, lots to be always thinking about and considering. Prior to working at Paradies Lagardere, I was an associate at Troutman in the Labor and Employment Group for about seven years and was at another firm for a few years before that, also in the Labor and Employment group.

Tracey Diamond:

How has it been going from labor and employment to handling all kinds of different litigation? I bet you that's been interesting.

Rebecca Silk:

It's been really interesting. I always say boredom to me is probably one of the worst things you could be at a job, and it's never boring and you become an expert very quickly on some very specific things. But honestly, employment law was kind of like that too, because it touches so many things and especially, again, with not only the state variations but different cities, especially California or Illinois, city by city it could change so much. So definitely a change, but you've always got to be ready to jump on the next emergency.

Tracey Diamond:

Well, so great to see you again and thrilled to have you here.

Evan Gibbs:

Yeah, we're really glad you could join us today. Today we're talking about a new workplace buzzword that I think probably everybody on the call or everybody on the podcast and our

listeners have probably heard about, called Quiet Quitting. I'd actually not heard about it until a couple of weeks ago, I have to confess, but I looked it up, and according to the internet, different people give different definitions of the term. Some people don't even believe that it's a real thing, but I think that most people align around the idea that quiet quitting is putting in the bare minimum they need to at work to get by and do absolutely nothing more. So, I'm curious, Rebecca and Tracey, what have you heard about this new trend? And you can't see, but I'm using air quotes as to whether or not it's actually a trend.

Rebecca Silk:

I think the original intent was just people saying, "I'm not going to risk my physical and emotional health for my job anymore." Not meaning that you're not going to work hard anymore, but that you're going to set healthy boundaries between work and life. But I think that's become interpreted into doing the bare minimum or just not working at all, but still on the company dime, and that from what I've seen seems to be the employer's concern.

Tracey Diamond:

That's so interesting, because on the one hand, the first part of what you said, Rebecca makes a whole lot of sense, this idea of setting some kind of boundaries. And I do think it's been a little bit of a response to the COVID pandemic, where people who worked from home, their work lives and their personal lives have just utterly blended, and a lot of people have been complaining that they're working harder than ever because there just never seems to be a start and stop to their work day.

But then there's the abusive end of that spectrum, where employees are really not even performing at all. They're just trying to get away with not working and just bringing in a salary to not work. A September 6th, 2022 Gallop poll, which is real recent, says that 50% of the US workforce is "quiet quitting", and they're defining that as doing only what their job descriptions require. That kind of begs a question of if your job is set forth in a job description, should you have to do more than what your job description requires? So, it's a very interesting term, and I think it goes in a lot of different directions.

Evan Gibbs:

I read that article, Tracey, and the poll that you're referring to, and I'm curious, I didn't see in that particular article if there are any generational splits or divides or anything like that, but I wonder if there's any correlation between age cohorts or something like that in the data. I don't know the answer, but I think that'd be interesting to know too.

But I think this part of the discussion brings us around to the show, as always, everyone, if you've listened to the podcast before, we always take a popular TV show or a movie or something out of pop culture and we use that to highlight a concept that we're talking about on the show. And so today, to highlight the concept of quiet quitting, we decided to introduce one of our favorite shows, *Seinfeld*. It's a classic comedy show from the early nineties. And our clips that we're going to use today focus on who I think we can all consider the original quiet quitter, Mr. George Costanza. Let's listen to our first clip.

Elaine:

What do you do all day?

George:

Not that much.

Jerry:

I thought that new promotion was supposed to be a lot more work.

George:

Yeah, when the season starts. Right now, I sit around pretending that I'm busy.

Jerry:

How do you pull that off?

George:

I always look annoyed. Yeah, when you look annoyed all the time, people think that you're busy. Think about it.

Elaine:

Yeah, you do.

Jerry:

Yeah, he looks busy.

Elaine:

He looks very busy.

George:

Yeah. I know what I'm doing.

Tracey Diamond:

I think this clip is particularly humorous because of George's thoughts that if he's particularly annoying, people will leave him alone and he can get away without working. And it kind of makes me think of some people I know, nobody on this call of course, but some people I have worked with in the past, where they are annoying or abrasive and I wonder if they use that to try to get away with not working. George is wanting to do little or no work while convincing his boss that he's crushing his new job. Here's another clip where George makes it seem like doing a crossword puzzle is actually a stressful work assignment.

George:

Singing duo Captain and... Tennille! (Bangs pen)

Wilhelm:

George, I think you may be taking work a little too seriously.

George:

Well, I've got a lot to do!

Tracey Diamond:

So, Rebecca and Evan, would these tactics have worked if George was working remotely?

Rebecca Silk:

I think there's a new version that I've seen on social media what George is doing, and that is making your Microsoft Teams light green at all times. I've seen, on TikTok and Instagram, people at concerts and music festivals, but constantly refreshing their Teams so it's green.

Tracey Diamond:

Awful.

Rebecca Silk:

That would be what George would be doing, of creating hijinks and problems while constantly refreshing his Teams light.

Tracey Diamond:

If workers actually spent the time that they're spending trying to get out of working, actually doing their job, it would probably be less stressful for them and more productive for everybody else.

Evan Gibbs:

You might think so. I'll tell you, this makes me think, I've read some articles and I've heard clients talk some about these different kinds of tools that are out there that are used to monitor employee productivity. I know there are a lot of different... I did some searching on this to kind of understand what these tools did and what kind of options are out there. Have either of you heard of this kind of software and what the software can and can't do?

Tracey Diamond:

I've heard some actual podcasts about the topic, and it's a little bit Big Brother-y and I find it a little bit disturbing. In some respects, it's a bit of an outgrowth from the concept of using GPS technology for employees that are drivers or otherwise working remotely as a way to just sort keep track of where employees are at a given time. But it does seem like it's a bit intrusive. What do you think, Rebecca?

Rebecca Silk:

I think, and I was just having this conversation with someone recently, does a company really even want to spend the time monitoring and using these tools? What's the work on the employer end to read keystroke analysis to see how much someone's typing? Because that's a lot of work too. So, it's really what's your end goal that you're trying to figure out. Is it a fear of quiet quitting, or is there a performance and productivity issue? And figuring out what that balance is. But I think we also need to consider, to your point, the Big Brother employee morale

issue. If an employee is feeling that they're constantly being watched, what is that going to do to a culture?

Tracey Diamond:

Yeah, and one of the examples that I had heard about, employees were given the choice of if you want to work remotely, sign on the dotted line and you'll agree to this type of monitoring of your work. And so, employees felt that it was worth the cost to accept the monitoring, to have the flexibility of working remotely. It would be interesting to see if we see more and more of this as the economy continues to cool and the job market softens. Right now, it's just so hot, it's hard to, like you said, employee morale and recruiting, it could really take a hit because of this.

Evan Gibbs:

We're talking about the culture, and some of the articles I read, they talk about the different software, platforms that make their pitches about the increased productivity and things like that. But I really wonder, long term if companies are thinking more strategically about what's this going to do to the workforce long term and can they really expect to keep folks around if they're feeling constantly monitored, if they're being impact all day to make sure they're logging in the right keystrokes and things like that?

I also saw another article I thought was pretty interesting, about how the software, for example, there was an article about, I can't remember the specialty, but it was some type of specialty physician, and they had productivity software. And the doctor that was interviewed for the story said, "Yeah, we have this software and it shows us how productive we are versus our colleagues and things like that. But it doesn't capture a lot of the doctor to patient interactions. It doesn't capture the time where I'm having to sit and think about a problem, or if I've gotten a hard copy, for example, medical journal or something that I'm reading for a case. It's a really imperfect system and it led to additional work, busy work just to drive the productivity metrics and the software." And so, I just wonder if long term, that level of micromanagement is really sustainable for employees and organizations.

Rebecca Silk:

That reminds me of a story one of our former wonderful colleagues, Evan Ponce once told me, where he was opposing a motion for attorney's fees that had been filed, and the attorney who had wrote the motion for attorney's fees was trying to explain why the time he spent on the case was so reasonable. And he had a footnote in there that he did not even include the time he spent thinking about the case when he was in the restroom, which is where he did most of his best work.

Tracey Diamond:

No. He actually said that?

Evan Gibbs:

Oh, gosh.

Rebecca Silk:

Yes. He put that in a pleading to the court.

Tracey Diamond:

Wow.

Rebecca Silk:

That's an extreme obviously, but that begs the question of, especially with working from home, I need to clear my mind and go for a walk, or take a call on a walk, or there's so many different places and ways to do work now that's not necessarily right in front of your computer working, and how do you account for that? So, I think that's a very good point to come up with.

Tracey Diamond:

Yeah. I had heard the same thing, that it may be misguided to rely on these types of metrics because you're not capturing all the other work that employees do that that isn't necessarily in front of the computer or measuring keystrokes. So, if you're basing performance on that type of measurement of productivity, you're kind of missing the boat.

It may be that the technology becomes more all-encompassing, so it could be more accurately measuring productivity. But that does kind of leave us with the question of privacy. Getting back to George's example, could the New York Yankees have monitored George Costanza's office with a camera or something like that? And how different is that from monitoring keystrokes? And do employees have any expectation of privacy in the workplace?

Evan Gibbs:

I will say, first of all, if there was a camera on George Costanza for any substantial portion of his day, I'm a little afraid in what that camera would capture.

Tracey Diamond:

So true.

Evan Gibbs:

Hopefully, no one ever did that at George Costanza's place of business. I feel bad for whoever had to watch that if so. But yeah, I think the first distinction, just to throw out there is public versus private employer. If you work for, say a federal agency or even a local government entity, I think that there are different rules around what and how you can be monitored by the employer, because there's the fourth amendment element to searches and things like that in the public employment sector. But outside of that, with private employers, it's a little hit or miss. I know one of the big issues are one party versus two party consent states.

Tracey Diamond:

Why don't you explain what you mean by that, Evan, for our listeners?

Evan Gibbs:

Yeah. For some states, it's sufficient for one person on a call to consent to being recorded for it to be a lawful recording. Some states it's what's called a two-party consent state, to where both parties on the call or all parties on the call have to consent to being recorded. And so, if one person records somebody else without their knowledge or consent in a two-party consent state, then the recording is unlawful. That has different implications depending on which state. It might

be that it's not admissible in court, or in some states there could be some type of pretty minor but potentially criminal aspects to that. But it just varies state to state and sometimes even locally within a state.

Tracey Diamond:

Let's say we're recording in the workplace, and let's say you give employees notice and even have an employee signing on the dotted line saying that they consent to the camera that's up in the plant, let's say. But now you have employees working at home and you're turning their webcams on. Does that change the analysis at all?

Evan Gibbs:

I think so. I think there are a host of problems that could come from that. The thing that jumps out, of course to me, first thing is somebody, if they've got a bathroom right behind their computer and the camera's pointed at where they sit, yes, but also at the bathroom right behind them, they're essentially, their bathroom is being recorded. And there are some pretty strict rules around that. It's unclear in that situation how the employer would get around that. I don't know if somebody could prospectively waive a work recording or something like that. I don't know. But I think that's one of the first easy examples that jumps out to me where you could definitely have an issue with that.

Rebecca Silk:

Well, I think in response to that though, go back to what your company policy is. I would hope most employers have, and if they don't have, call Tracey and Evan immediately, an electronic communications and usage policy that very clearly states that there's no expectation of privacy. Can you word that to just have it be blanket on work devices or when conducting work? And then the other thing, which I actually dealt with a lot more pre-COVID, because it was less common, was telecommuting policies and what the expectations were then. And to have the expectation in writing that your workplace at home needs to be in a professional environment and things like that, to couch or limit those type of issues about environment. It's the employee's responsibility if they're going to be working from home to be in a professional environment, or can you just close your bathroom door? Is that really going to be that much of a hardship for an employee to deal with? Especially if they have the proper notice, if they've read the policies, and especially if they have a handbook acknowledgment form or a policy acknowledgment form signed.

Evan Gibbs:

Yeah.

Tracey Diamond:

Yeah. It's a good point, Rebecca, about the electronic communications policy, because most of the policies that I've seen don't really deal with video recording. It's more hitting at emails and the lack of a right to privacy in email communications. And this goes away from our topic today, but these days, employees are communicating in all sorts of ways, by video Teams, by Zoom, by Slack messaging, by other forms of instant messaging, WhatsApp, text messaging. So, it would behoove clients to be looking at those electronic communications policy or creating other policies that capture all that different information. And it can be in maybe a bring your own

device policy, it can be in a telecommuting policy. It absolutely should be addressed very head on in a telecommuting policy. But I don't think that's being captured in a lot of the current policies that clients have.

Evan Gibbs:

It gets even trickier; we're talking about employees using personal devices to communicate with coworkers outside of official channels. For example, a lot of policies, they may say that you have no expectation of privacy in your work email account or if you're using Teams for example. They may have that laid out really clearly in the policy. But what if, for example, you've got a team of coworkers that for whatever reason, they like to use WhatsApp. That's a good example. What kind of control and monitoring does the employer have over that? Can they monitor those conversations? It's a personal device on a personal account of a third-party program that the employer didn't purchase, doesn't have access to, and what are the rights around that? It's a pretty complicated issue. I've had to deal with that in a couple of cases recently, and it's really thorny as to what the employer can really get and what they can access. Especially in a situation where an employee refuses, says, "I'm not going to give this to you. You can't have access to it." I mean, what does the company do in that situation?

Tracey Diamond:

Yeah. And getting back to the idea of the video recording, what if an employee does consent to video, the employer tells the employee they're going to do it, the employee consents to it, but does the employer turn it off when the shift is over? Or is there such a thing as a shift when someone's working remotely? And what is the employer then capturing about the employee's personal life that they really shouldn't be looking at because of where the webcam is placed and the employee forgot to maybe close down their computer at the end of the day. I could see that causing lots of issues down the line, for sure.

Rebecca Silk:

I'll tell you right now, my laptop has the ability to close and turn on the video camera, but I forget sometimes to do that. I mean, I think most people do. That's not top of my mind. Or if your company, I know Troutman did this, they gave us all tabs to put over if we wanted that, if we had that concern. But you can't rely on employees to make sure you're doing that.

Which then again, I think goes back to the point, which I think is really the ultimate point in my mind at least, of what are employers really worried about that they want to carry this risk? Is this risk really worth it? Or is it really maybe one or two employees who are poor performers regardless of work from home, quiet quitting as a trend or not. If they're poor performers, treat them as poor performers rather than taking on this risk and this administrative responsibility that might be, in my opinion, a little bit hyperbolic based on social media compared to the reality.

Tracey Diamond:

It's micromanaging but not managing well enough.

Rebecca Silk:

Yeah.

Tracey Diamond:

All at the same time. Yeah. I could say that I agree with you 100%, Rebecca. And I would say that's one moral of the story here, and the other moral of the story is the George Costanzas out there better beware, because their employer's watching.

Rebecca Silk:

I am always surprised when I hear people seem surprised that they don't know that their employers can see when they're shopping online. I think even if we go back to the basic tracking that's been around for a really long time, like internet usage or badge swipes. Badge swipes on an office are the easiest thing to pull. In a wage and hour case, that's one of the first things companies have to pull to see when they were in there if they didn't have a clock in, clock out system. So, the basics, I think employees aren't even aware of. And so, if an employer's going to get more sophisticated technology, how much do you communicate and how much are you required to communicate with that?

Tracey Diamond:

Absolutely.

Rebecca Silk:

I don't know the answer.

Evan Gibbs:

I'll tell you, this has been a really great discussion. I think we've hit a lot of really good and important points. I think there are a lot of issues out there that are still unclear and uncharted. So, I think one of the take-home messages is to tread lightly and carefully. Rebecca, we really appreciate you taking the time to join us today, and we really appreciate all of you for listening. Be sure to subscribe to the podcast and remember that we're available for streaming on all the major podcast platforms.

Tracey Diamond:

And check out our blog too, hiringtofiring.law for all the latest and greatest in employment law.

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