



LITTLER MENDELSON
EXECUTIVE EMPLOYER SURVEY REPORT
JULY 2016

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Employment & Labor Law Solutions Worldwide®

This report summarizes and analyzes the results of Littler Mendelson’s fifth annual Executive Employer Survey. It examines the legal, economic and social issues having the greatest impact on the workplace, based on survey responses from 844 in-house counsel, human resources professionals and C-suite executives from a range of industries.

Disclaimer: Survey questions and resulting findings do not represent any specific political affiliation or preferences of Littler, nor do they constitute any legal, economic or political advice.

EXECUTIVE SUMMARY

Even as employers continue to grapple with the implications of momentous new legal requirements, they are bracing for further shifts in the regulatory and enforcement landscape, while at the same time scrambling to keep up with rapidly changing social norms in the workplace. Those are among the key findings of Littler’s 2016 Executive Employer Survey.

REGULATORY

The fifth annual survey reveals that employers are still feeling the impact of key legislation and regulations, particularly the Affordable Care Act (ACA) and enforcement by the Equal Employment Opportunity Commission (EEOC) and Department of Labor (DOL). At the same time, they expect an uptick in enforcement and litigation stemming from more recent developments, such as the expanded definition of a “joint employer” and the revised overtime rules.

Specifically:

- The greatest year-over-year change in our survey results came in the area of EEOC enforcement. There was a dramatic rise in the expectation of discrimination claims over the next year related to the rights of LGBT workers (31 percent in 2015 to 74 percent in 2016) and equal pay (34 percent in 2015 to 61 percent in 2016). The Commission has sent a clear signal that LGBT discrimination and equal pay are among its top enforcement priorities – mirroring key areas of focus for the Obama administration, government efforts at the state and federal levels, and increased public attention.
- Employers also expect a continued crackdown by the DOL, likely driven in large part by the recently revised overtime regulations. This year, 31 percent of respondents said they expect DOL enforcement of federal employment laws to have a significant impact on their workplaces – up from 18 percent last year. And even though they completed the survey in the weeks prior to the release of the final Fair Labor Standard Act “white collar” overtime regulations, 65 percent of respondents had already

conducted audits to determine impacted employees. However, only 28 percent had taken further action and another 28 percent said they were taking a “wait and see” approach. Given that the reclassification process takes roughly six months and the rule is unlikely to be blocked from going into effect on December 1, 2016, employers should move quickly to ensure compliance.

- The NLRB’s expanded definition of a “joint employer” has opened the floodgates for claims against employers based on the actions of subcontractors, staffing agencies and franchisees, according to respondents. A full 70 percent said they expected a rise in such claims over the next year and roughly half anticipate rising costs and increased caution in entering into arrangements that might constitute joint employment.
- ACA implementation continues to affect employers, as 85 percent of our respondents said they expected the law to have some impact on their workplaces in the next 12 months. That is unchanged from last year, though down from 97 percent in 2012, the first year of our survey (and the year before the ACA’s major provisions started taking shape). Additionally, 66 percent do not anticipate a complete repeal of the ACA under a Republican president, but respondents saw a greater likelihood of changes to individual provisions. Approximately half anticipated a Republican administration could lead to a repeal of or changes to the Cadillac excise tax (53 percent) or play-or-pay mandate (48 percent).

ECONOMY

Employers’ view of the impact of economic conditions remains largely unchanged from last year, reflecting the relatively steady economic conditions of the past several years. Though approximately half of respondents indicated that their companies plan to hire, employers have become more and more comfortable with the size of their workforce since we first conducted this survey in 2012.

Specifically:

- Just over half of respondents (56 percent) said they plan to hire in the next year. But that is down from 71 percent in 2012. Also, 26 percent said they would make no changes to their current workforce – twice as many as in 2012, when only 13 percent indicated no plans to make staffing changes.
- Over the past five years, we’ve seen a steady decline in the degree to which respondents believe employees are being impacted by underemployment (from 67 percent in 2012 to 32 percent in 2016) and an inability to find employment elsewhere (from 85 percent in 2012 to 40 percent in 2016). However, a full 75 percent continue to report that employees are being asked to do more with less, which may reflect the new normal in the current world of work.

WORKFORCE MANAGEMENT

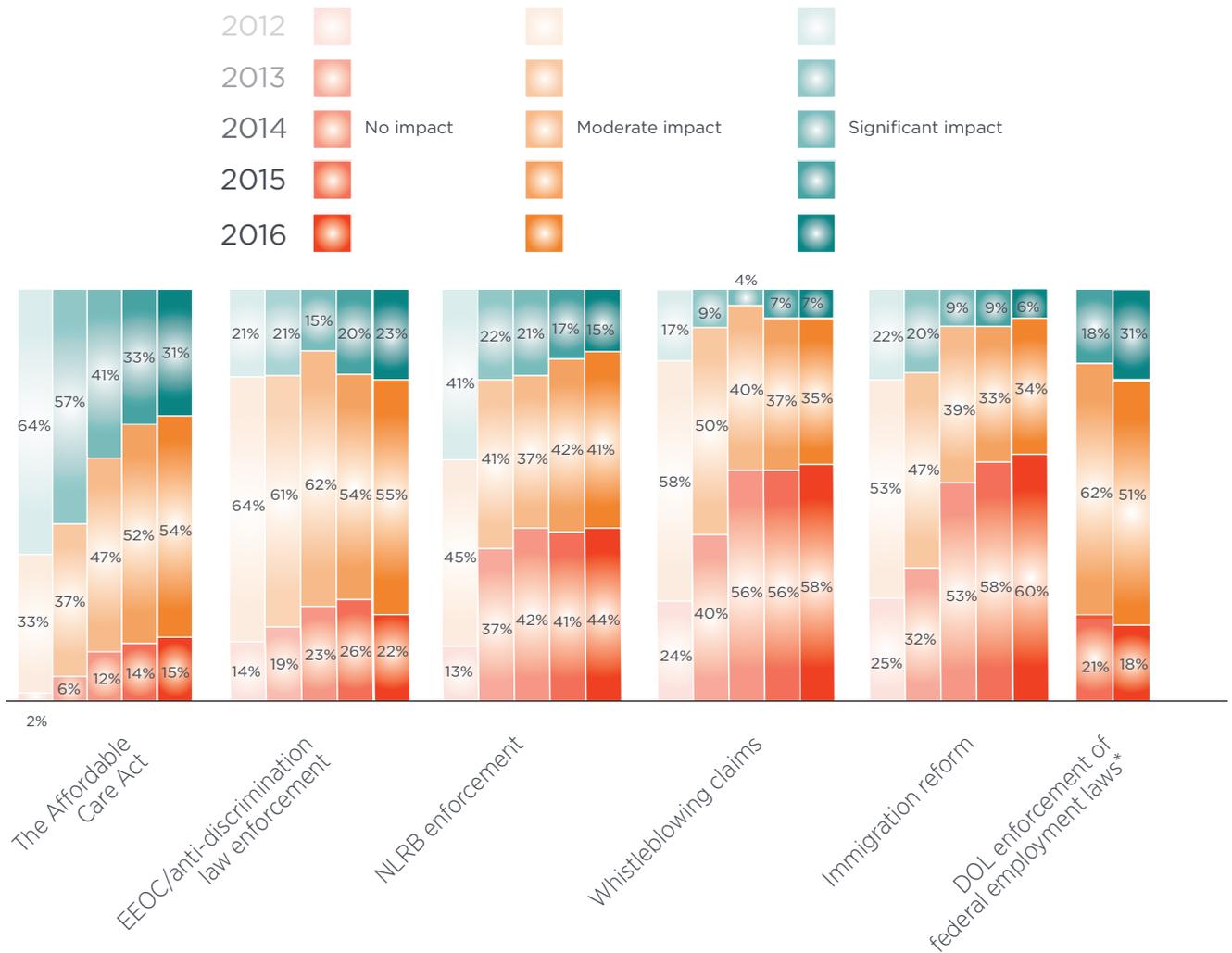
Employers have always had to keep an eye on demographic and social trends, which inevitably play out in the workplace. But today's companies face unprecedented challenges. The shift to a so-called "gig economy" and the rise of big data, combined with more complex rules around employee classifications and the increasingly global nature of employment, present a series of conundrums. And ongoing headlines about violence in the workplace are clearly leading many employers to take preventive steps.

Specifically:

- Despite the rise in independent contractor misclassification lawsuits, as well as a multitude of regulatory and enforcement initiatives, more than half of respondents at large-cap organizations either said they were not reluctant to hire more freelancers or contractors (24 percent) or they were neutral on the matter (35 percent). This shows that employers are willing to pursue flexible work options, despite the legal risks and compliance difficulties, given the attractiveness and fit of the model.
- More than half of employers (52 percent) said they had updated or implemented a zero-tolerance workplace violence policy. Only 11 percent they had taken no action because they felt violence wasn't a concern for their workplace.
- More than a third of employers at large-cap organizations (34 percent) said they use, or are considering using, data analytics to help make workplace decisions, such as hiring and performance evaluations. We expect this percentage to continue to grow as employers recognize the potential for big data to help them more effectively manage their workforce.
- Similar to the 2015 survey, respondents identified employee use of personal devices for business purposes as their greatest technology-related challenge in the workplace. However, this percentage dropped from 51 percent in 2015 to 42 percent in 2016 as employers have increasingly implemented bring-your-own-device policies.
- With the continued globalization of business, 55 percent of respondents with large-cap organizations expressed significant concern in complying with employment laws in foreign jurisdictions.

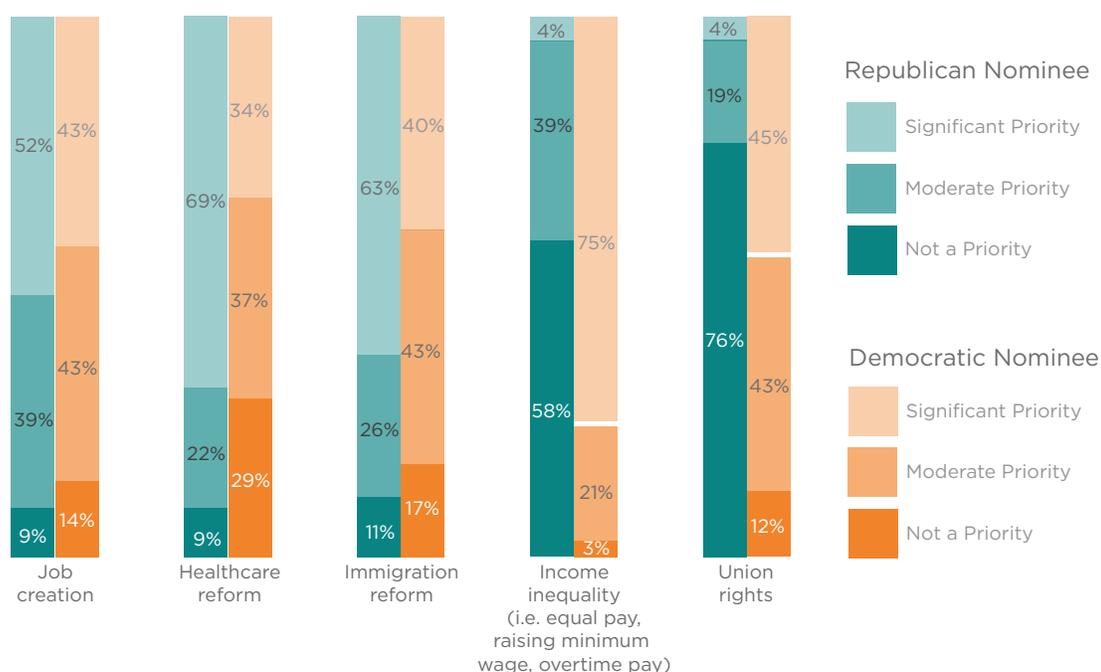
REGULATION

Question: How much impact do you expect the following regulatory issues to have on your workplace over the next 12 months?



* This answer choice was not provided prior to the 2015 survey.

Question: How much of a priority do you think each political party will make the following issues in the 2016 election?

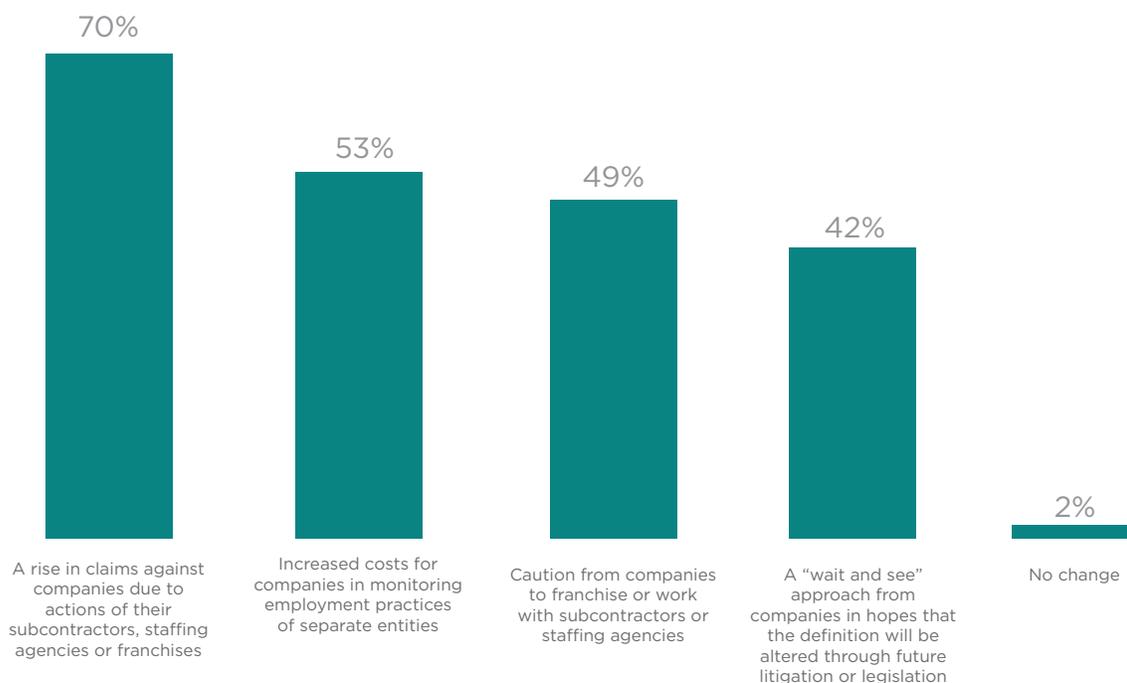


Over the past five years, our survey has shown a relatively steady or slight downward trend in the perceived impact of various regulatory issues on the workplace, with the notable exception of the enforcement of federal employment laws by the DOL. That said, the fact that less than a quarter of respondents expect both the ACA (15 percent) and EEOC enforcement (22 percent) to have no impact on their workplace over the next 12 months shows that, while concerns may have diminished in recent years, these issues remain top-of-mind for employers.

In this year's survey, DOL enforcement closely paralleled the ACA as the issue respondents expect to have the greatest impact on their workplaces. As the DOL continues to aggressively pursue its regulatory agenda, employers are feeling the effects, particularly from new overtime regulations set to take effect on December 1. Federal agencies continue to be the governmental bodies inflicting the most pressure on employers, and while this could lessen under a future Republican administration, there is no guarantee.

In ranking the priority they expect a candidate from each party to place on various issues, responses largely reflected the rhetoric of the political parties. Respondents said job creation and immigration reform would be important priorities for both the Republican and Democratic nominees, although candidates from either party will certainly approach these issues differently. Employers grappling with a multitude of changes to federal and state laws related to income inequality (e.g., new overtime rules, state equal pay, minimum wage laws, etc.) expect this to continue to be a key focus of the Democratic candidate. But whoever wins the presidency, we will certainly continue to see a patchwork of rules and regulations at the state and local levels addressing income inequality.

Question: Based on the National Labor Relations Board’s recent expansion of the definition of a “joint employer,” which of the following do you expect to see in the next 12 months? (check all that apply)

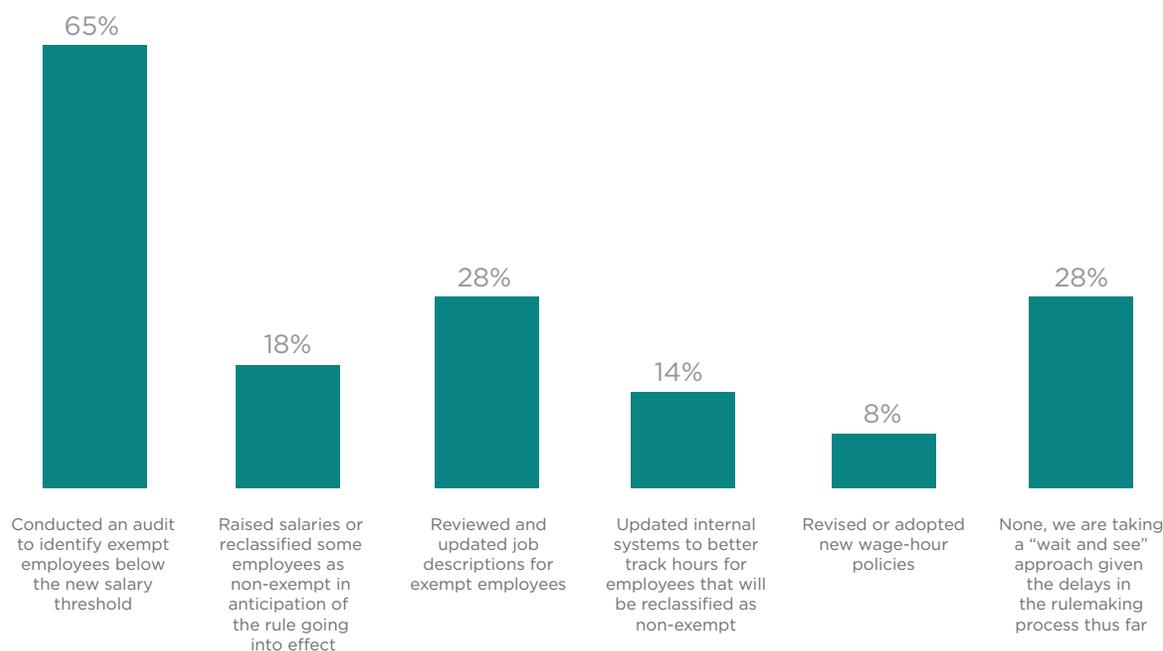


In August 2015, the NLRB changed its standard for determining whether two or more entities are joint employers of a single workforce, finding “indirect control” over essential terms and conditions of employment to be a factor in the determination. The decision had a widespread impact on businesses, and survey respondents not surprisingly expect the expanded definition’s implications to continue to ripple through their companies over the next 12 months.

It is significant and telling that only 2 percent of respondents expect the decision to bring about no change. On the flip side, 70 percent expect a rise in claims over the next year and roughly half anticipate rising costs and increased caution in entering into arrangements that might constitute joint employment.

Interestingly, 42 percent said they were taking a “wait and see” approach, expressing optimism that the NLRB’s decision would be reversed in appeal or altered through future litigation or legislation.

Question: What actions have you taken to prepare for the Department of Labor’s final Fair Labor Standard Act “white collar” overtime regulations? (check all that apply)

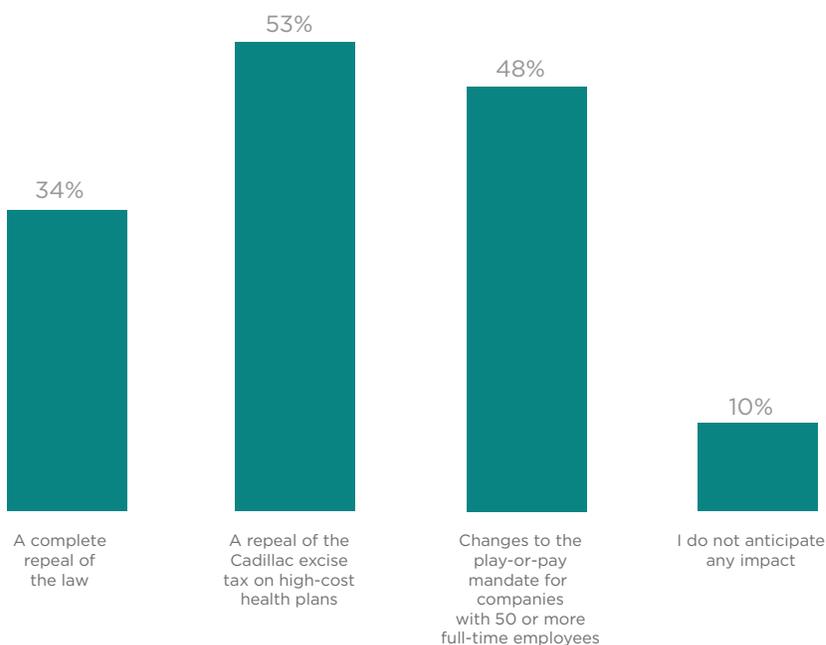


The final rule drastically increasing the number of Americans who can qualify for overtime pay was announced on May 18, 2016 (after respondents completed our survey), but the majority of employers we surveyed had already started to prepare for the change. Sixty-five percent of respondents said their companies had conducted an audit to identify exempt employees earning below the proposed new salary threshold. While the DOL provided employers with roughly six months to comply before the final rule becomes effective on December 1, employers that began assessing the impact early will be ahead of the curve, as it can take up to six months to determine whom to reclassify and to implement reclassification.

More than a quarter of respondents (28 percent) took a further step, reviewing and updating job descriptions for exempt employees. Because misclassification lawsuits often center on disagreements about the nature of the employees’ work, this is an important step to take to document employees’ job duties, particularly if it becomes necessary to defend the exemption in future litigation.

Interestingly, more than a quarter of respondents (28 percent) said they had taken a “wait and see” approach given the delays in the rulemaking process thus far. While the rule will surely draw legal challenges and legislation to block it is pending, neither is likely to be successful, particularly before the rule goes into effect. Thus, employers should proceed under the assumption that the rule will be effective on December 1, moving quickly to identify impacted employees and make tough decisions on whether to reclassify or increase the salaries of exempt employees earning below the new minimum salary threshold.

Question: What impact do you think a Republican administration could have on the Affordable Care Act? (check all that apply)

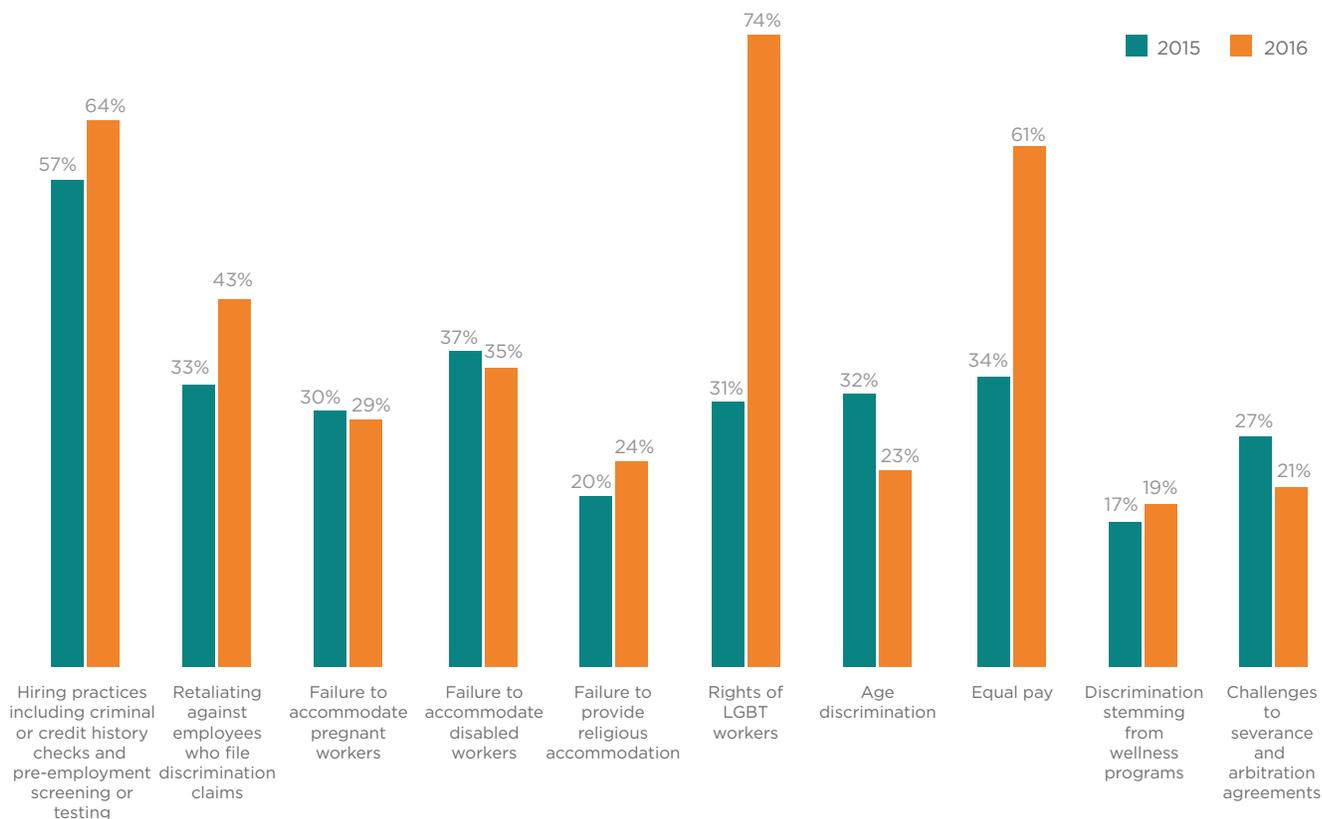


The majority of respondents (66 percent) do not anticipate a complete repeal of the Affordable Care Act, even under a Republican administration. While the political future of the ACA will depend on a host of factors, including which parties control each house of Congress, respondents predicted a greater likelihood of change under a Republican president in relation to the law's individual provisions.

Congress ended 2015 by approving a bill that included a two-year delay, until 2020, of the ACA's so-called Cadillac excise tax on high-cost health plans. With opponents of the excise tax expected to continue to fight for a full repeal of the provision, it's not surprising that more than half of respondents (53 percent) expect such action under a Republican president. While the play-or-pay mandate, requiring companies with 50 or more full-time employees to offer health coverage, is now in full effect, roughly the same percentage of respondents (48 percent) said they expected changes to this provision.

Legislative or regulatory changes to the ACA could occur regardless of which party occupies the White House, and healthcare reform will continue to be a point of debate during the presidential campaign. However, even as uncertainty about the ACA persists, employers should remain diligent in complying with the law and its existing requirements.

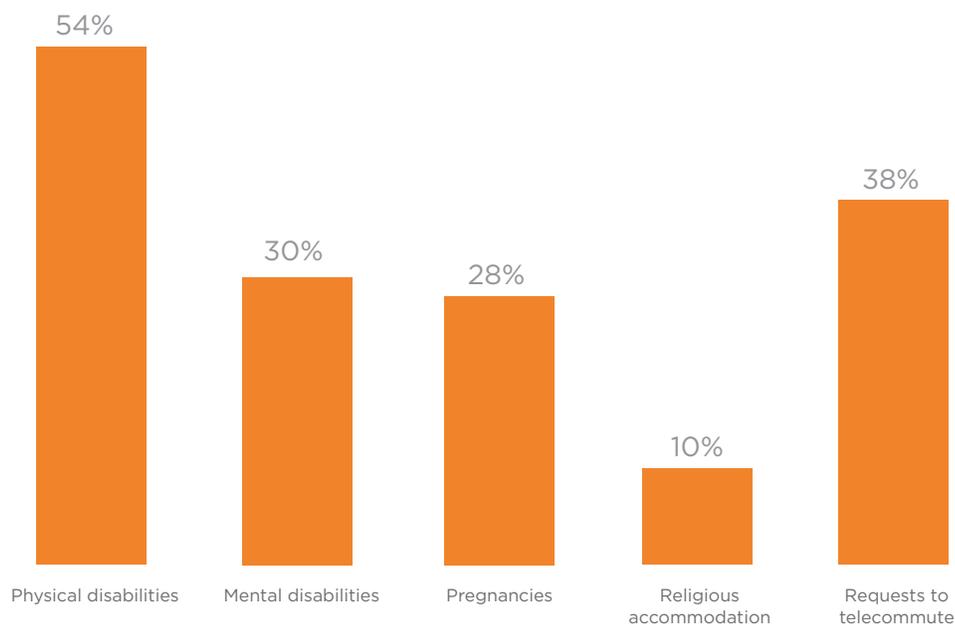
Question: Of the following areas where the Equal Employment Opportunity Commission is focusing its enforcement efforts, which do you feel are likely to see an increase in workplace discrimination claims over the next year? (check all that apply)



The number of employers anticipating discrimination claims related to LGBT workers and equal pay rose dramatically in 2016. From lawsuits initiated by the Commission to statements from Chair Jenny Yang, the EEOC has sent a clear signal that discrimination based on sexual orientation and equal pay are among its top enforcement priorities. The year-over-year rise also almost certainly reflects increased public attention and media coverage of these issues. Federal and state government officials have increased their focus on protecting the rights of LGBT employees, and judges have started citing the EEOC's position on LGBT discrimination in their decisions. Several states are also introducing and enacting laws mandating equal pay and wage transparency, echoing the Obama administration's focus on the issue. As further evidence that the EEOC will continue to prioritize equal pay, the Commission in early 2016 proposed that pay data be included in employer information reports (or EEO-1s) to help identify possible discrimination and help employers achieve equal pay.

Littler's 2015 [Annual Report](#) analyzing EEOC developments also revealed that the Commission has focused intently on reducing LGBT-related discrimination by employers, particularly with regard to the rights of transgender workers, and gender-based wage discrimination. Lawsuits since filed by the Commission in early 2016 have likewise indicated that the EEOC has expanded its focus to address discrimination on the basis of sexual orientation. The 2015 report also found that the EEOC devoted more resources to "failure to hire" cases than any other area. Littler's 2016 Executive Employer Survey shows that employers are feeling the impact of these efforts. Sixty-four percent identified workplace discrimination claims related to their hiring practices – including the consideration of criminal or credit history in the hiring process and pre-employment testing or screening practices – as an area of concern.

Question: In which of the following areas has your company seen an increase in the number of accommodation requests from employees over the past 12 months? (check all that apply)



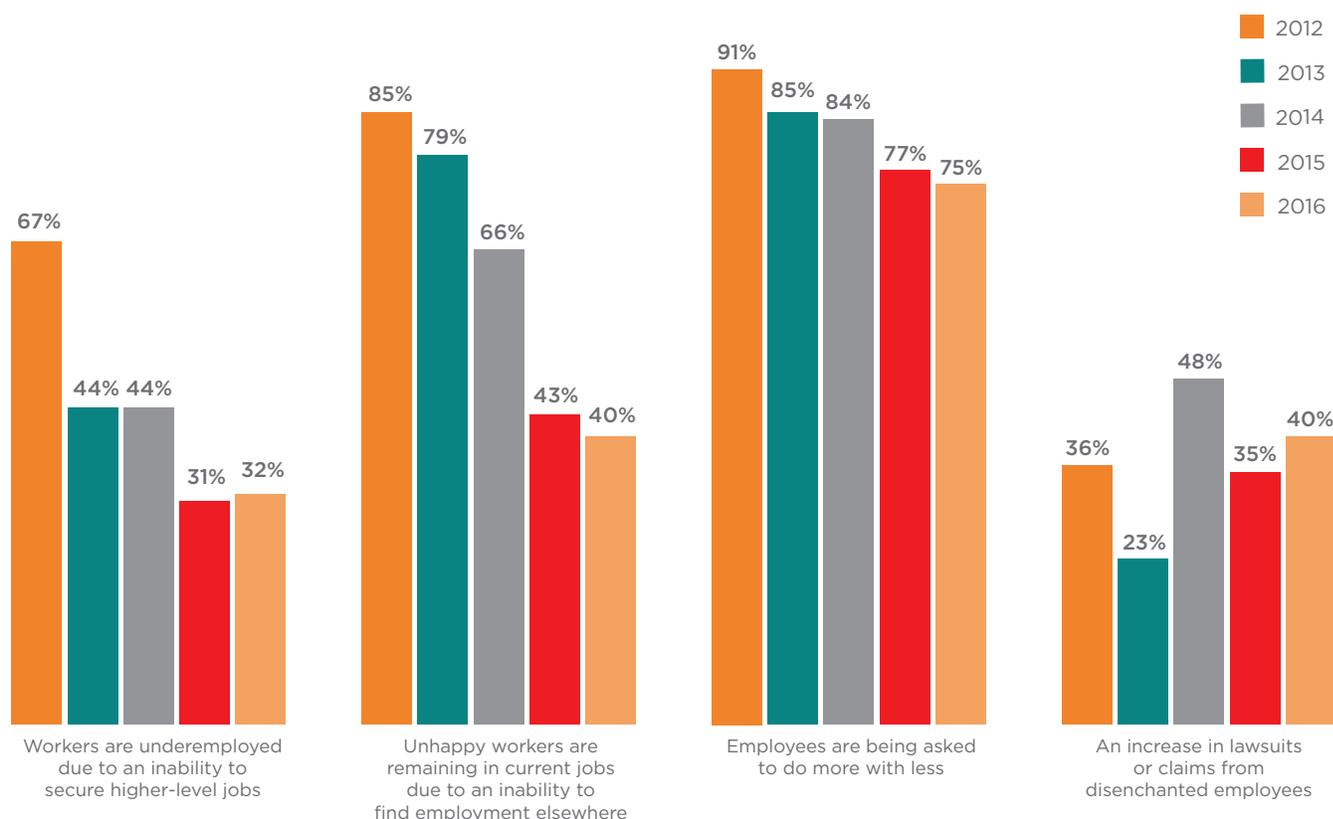
Providing reasonable accommodations to employees has long been a key area of confusion and potential liability for companies. The fact that respondents said accommodation requests were rising – when they were already at a high level – shows that this issue continues to pose challenges for employers.

Littler's 2015 [EEOC Report](#) referenced above found that of the 142 lawsuits filed by the EEOC during FY 2015, the largest number (37 percent or 53 lawsuits) involved claims under the Americans with Disabilities Act (ADA). Thus, it is not surprising that survey respondents saw increases over the past 12 months in accommodation requests from employees with physical (54 percent) and mental (30 percent) disabilities, as well as requests related to pregnancies (28 percent). On the latter point, the EEOC's updated pregnancy guidance makes clear that failing to accommodate pregnant employees may expose employers to ADA claims based on temporary disabilities related to pregnancy.

The survey also showed that more than one-third of respondents (38 percent) received more requests to telecommute over the past year. Given how the world of work is changing, requests for remote work or work from home arrangements will almost certainly continue to grow.

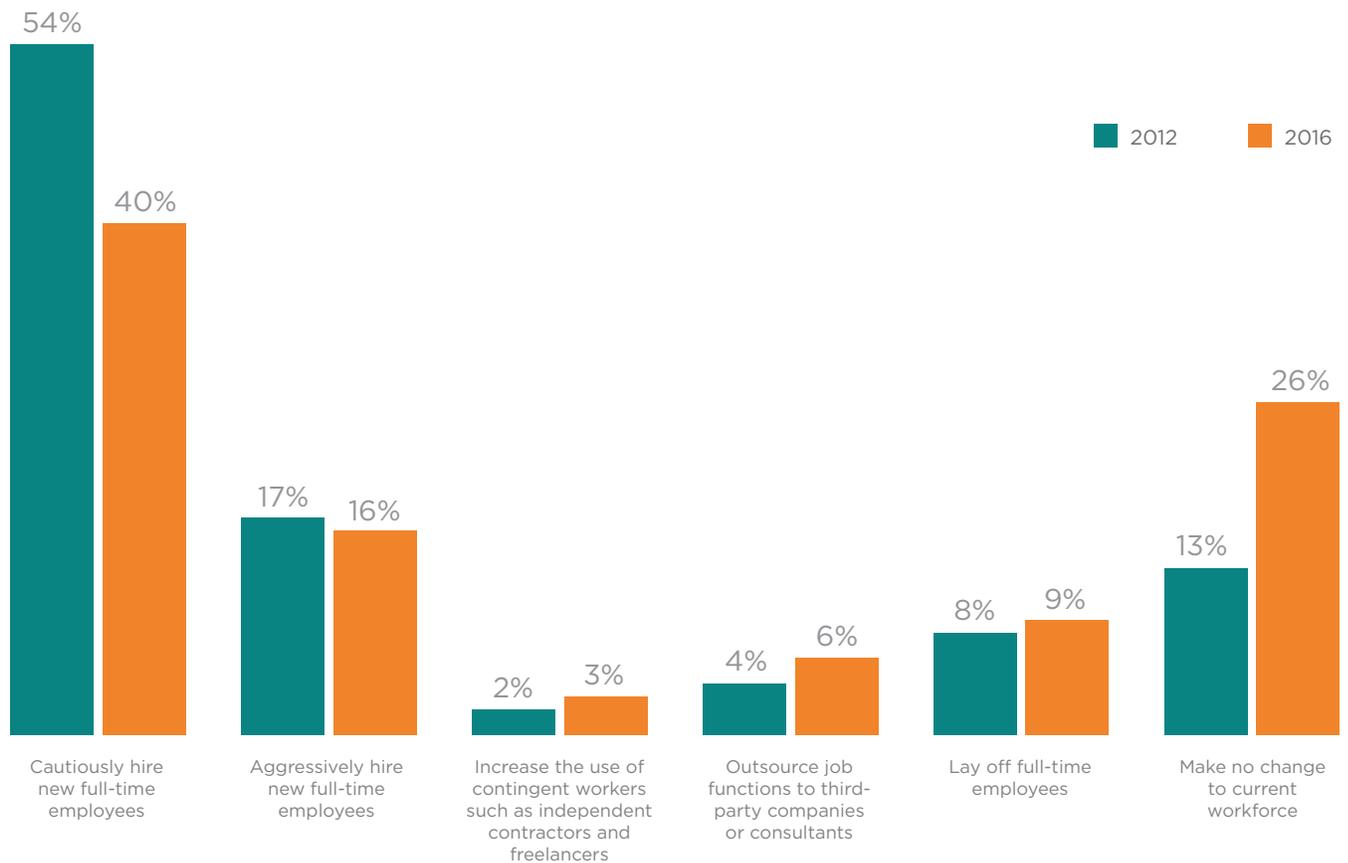
JOBS AND THE ECONOMY

Question: In which of the following areas do you feel current economic conditions are continuing to affect the workforce? (check all that apply)



Over the past five years, our survey has shown a steady decline in the impact respondents believe economic conditions are having on the workplace, particularly regarding underemployment (from 67 percent in 2012 to 32 percent in 2016) and the inability of unhappy workers to find employment elsewhere (from 85 percent in 2012 to 40 percent in 2016).

While the sentiment that employees are being asked to do more with less has waned, 75 percent of respondents still identified this as an impact of the current economy in the 2016 survey. Furthermore, a substantial percentage of respondents (40 percent) said economic conditions have caused disenchanted employees to bring lawsuits or claims against their employers.

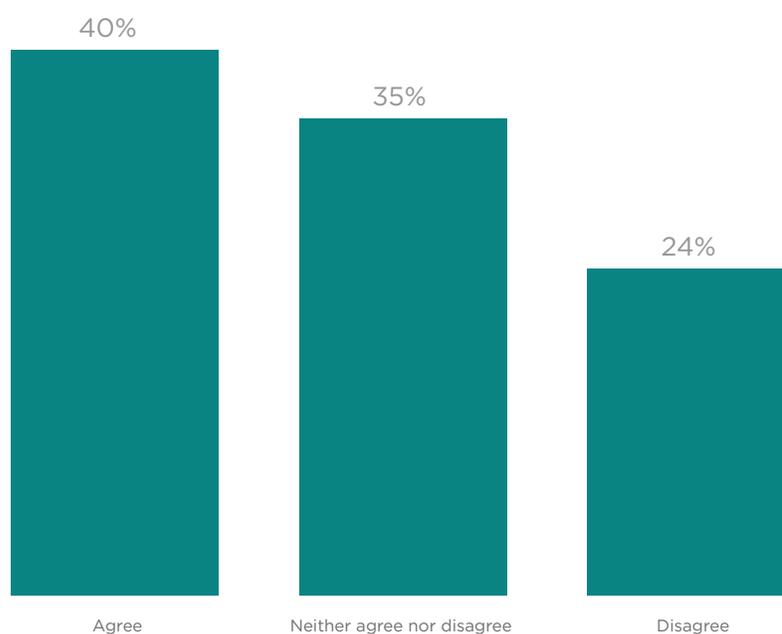
Question: In the next 12 months, does your company plan to:

Since this survey was first conducted in 2012, employers have become increasingly comfortable with their current workforce; this year, 26 percent said they had no plans to make changes in 2016 (up from 13 percent in 2012). However, a majority of respondents (56 percent) still said they planned to hire more workers, either cautiously or aggressively, in the coming year.

WORKFORCE MANAGEMENT

Question: To what extent do you agree with the following statement: My company has been reluctant to expand the use of independent contractors or freelancers due to the complexity of complying with differing state laws and/or fear of misclassification lawsuits.

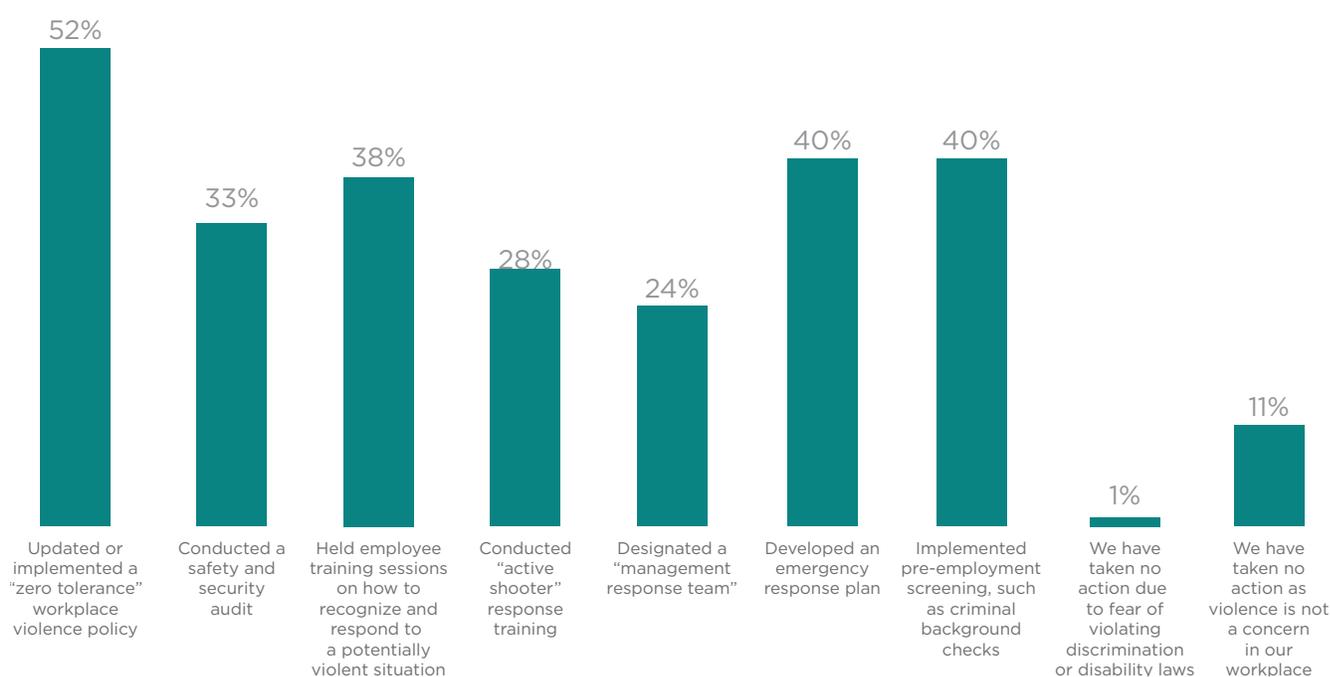
This chart reflects feedback from respondents with large-cap organizations



The changing nature of work and the rise of the so-called gig economy have given companies more hiring options than ever, including independent contractors, contingent workers and an online workforce. In fact, a [2015 report](#) from the U.S. Government Accountability Office showed that, as of 2010, contingent workers composed 40.4 percent of the American workforce. While this shift has created greater flexibility for workers and increased efficiency for employers, it has given rise to more independent contractor misclassification lawsuits and regulatory investigations.

Our survey shows that large-cap companies are still wrestling with the implications of this changing environment. Forty percent said they are reluctant to use more independent contractors or freelancers due to the complexity of complying with various federal and state laws, as well as fear of misclassification lawsuits. However, the fact that the majority of respondents either disagreed (24 percent) or were neutral (35 percent) shows that regulatory and enforcement initiatives challenging the independent contractor model, as well as the rise in settlements and class actions surrounding alleged misclassification, are not holding back the tide of flexible work options given the attractiveness and fit of the model for employers and workers alike.

Question: Which of the following steps has your company taken to prevent workplace violence? (check all that apply)



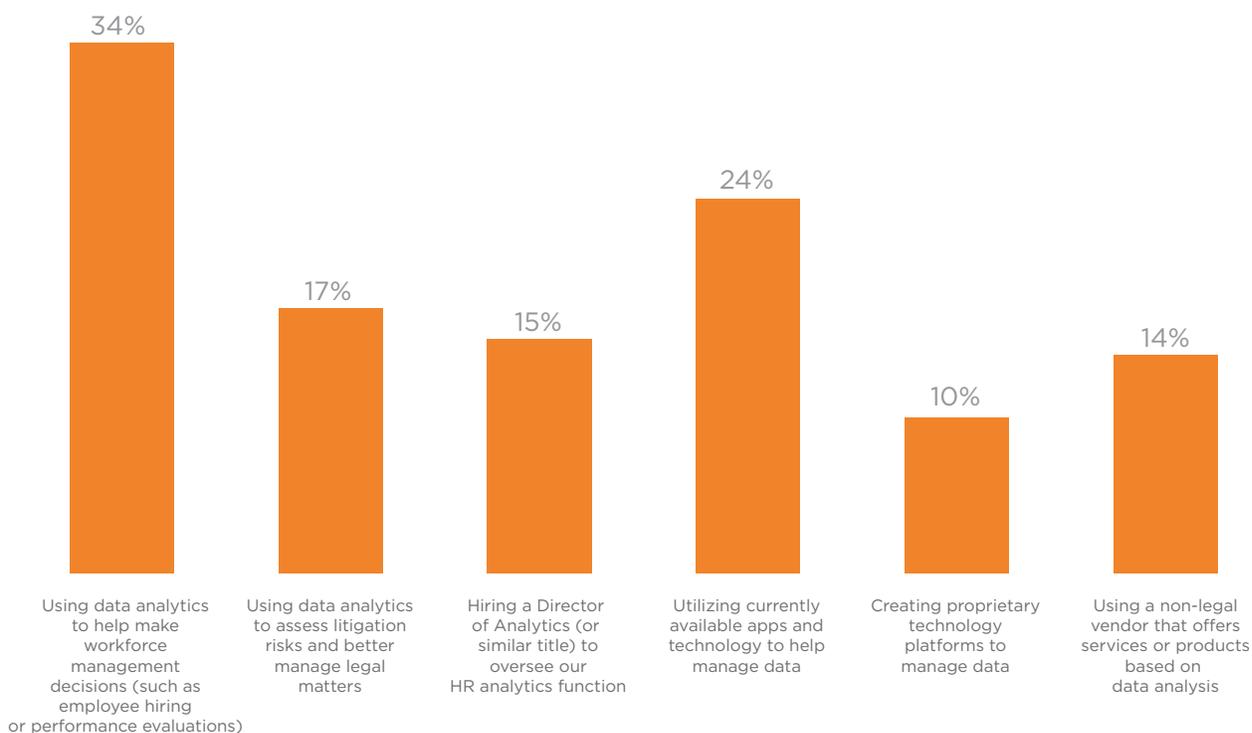
Tragic mass shootings across the country have left employers searching to understand what measures they can and should take to keep their employees safe. Employers are taking a range of actions, according to the survey, including updating or implementing a workplace violence policy (52 percent) and holding employee training programs (38 percent). These are basic steps that all employers would be advised to take. It is important that companies have policies to increase awareness of workplace violence and that employees understand the type of behavior that is prohibited, as well as how to report actual or potential threats in the workplace.

Interestingly, 40 percent of respondents said they had implemented pre-employment screening. While criminal background checks may provide invaluable information regarding an applicant's risk of engaging in violent behavior, employers have to be mindful of applicable legal constraints. This is particularly relevant in states where ban-the-box statutes prohibit employers from asking questions about conviction or arrest records until after a conditional offer of employment has been extended. The practice could also give rise to discrimination claims from groups that feel they are disproportionately impacted.

While 11 percent of respondents said violence was not a concern in their workplaces, the truth is that after an active shooter strikes, or a violent incident occurs, employers often state in the aftermath that they never thought it could happen to them. While instances of violence in the workplace are statistically rare, no employer is immune and taking preventive action can help save lives.

Question: With the rise in big data analytics, my company has or is considering the following: (check all that apply)

This chart reflects feedback from respondents with large-cap organizations

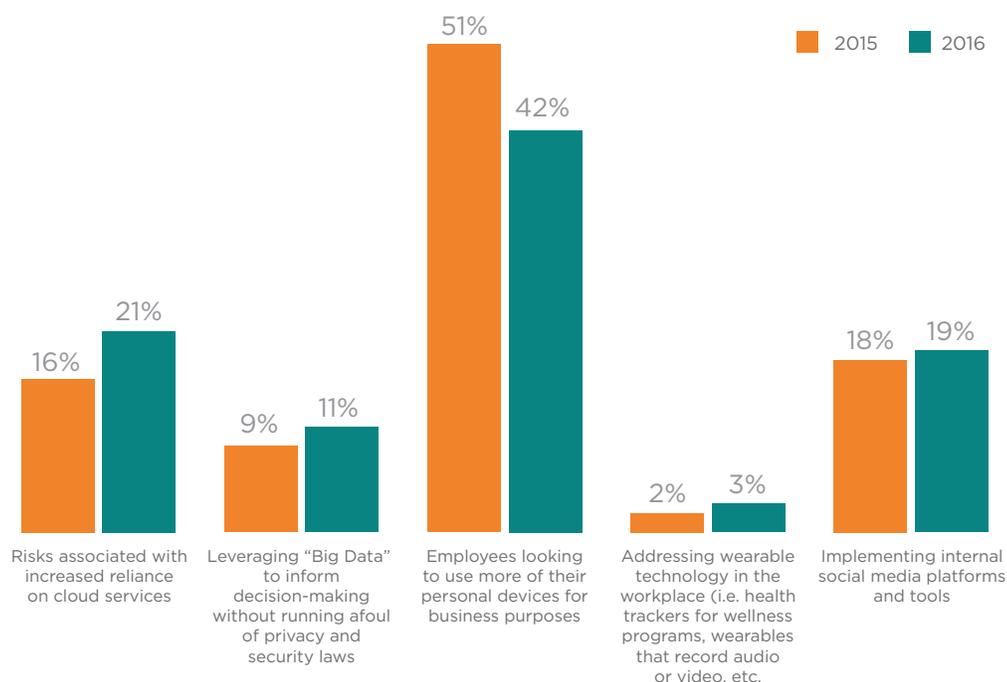


Large employers are starting to recognize all the ways big data can help them more effectively manage their workforce. Roughly one-third of respondents (34 percent) said their companies are using data analytics to help make workforce management decisions or are considering doing so. This is not surprising given that, from the selection and hiring process through performance management and promotion decisions, up to and beyond termination decisions, data has implications for nearly every aspect of employment decision-making.

The other two-thirds of employers who are hesitant to embrace big data in workforce management may be concerned with violating laws in such areas as privacy, discrimination and data security. While legal compliance is critical in using data analytics in the workplace, big data can actually be used to minimize implicit bias in decision-making, reduce the risk of lawsuits and maximize accuracy.

Employers dipping their toes into HR analytics said they were using a combination of applications and technology (24 percent), services or products from a non-legal vendor (14 percent) and proprietary technology platforms (10 percent). While there are several products on the market that offer valuable insights to employers, it is important to note that collecting and managing data internally or through non-legal vendors, as opposed to with a law firm that can offer attorney-client privilege, opens a business to the risk of claims that the algorithms used to make employment decisions adversely impact protected groups.

Question: Which of the following technological developments has been the most challenging to manage in your workplace? (select one)

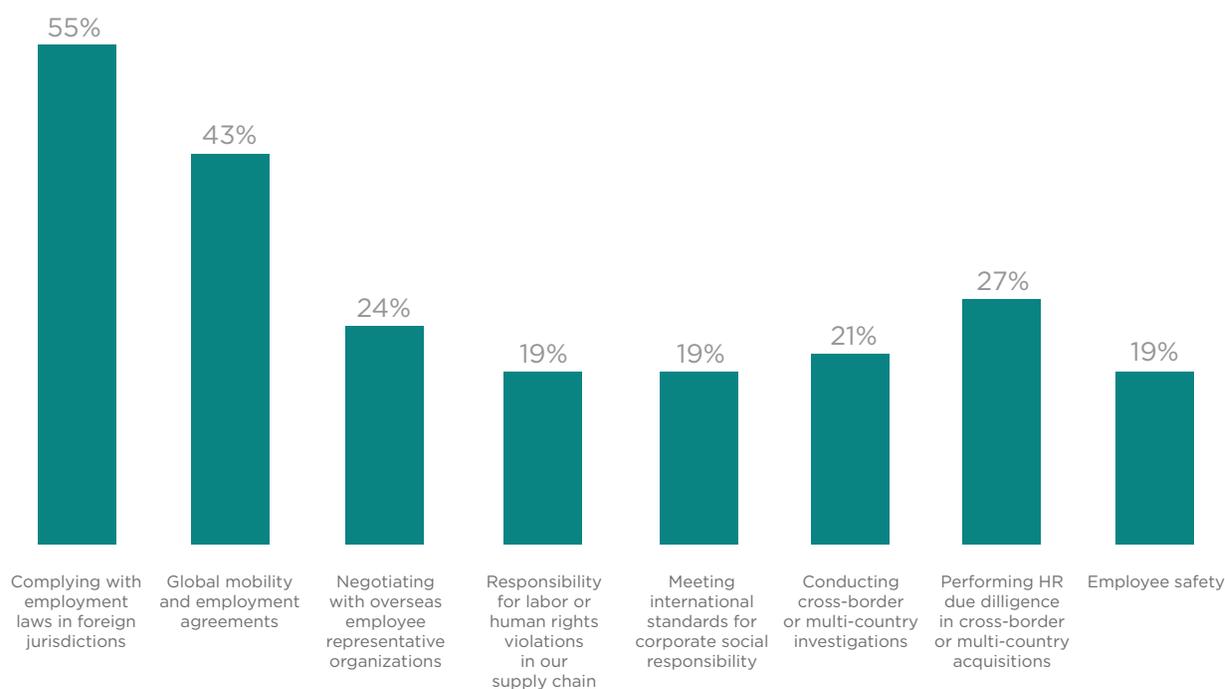


Employers continue to be concerned, albeit to a slightly lesser degree, with managing employees' use of personal devices for business purposes. Less than half (42 percent) identified this as their greatest challenge with regard to technological developments impacting the workplace. The 9 percent drop from 2015 likely indicates that more respondents implemented bring-your-own-device (BYOD) programs during 2015 and as result are less concerned about the use of personal devices for work.

The 2016 survey saw a slight increase in the levels of concern with relying on cloud services and with leveraging big data to make workplace-related decisions. Although the increases compared with 2015 were relatively small, they likely indicate that organizations are relying on more cloud services and big data analytics in their human resources administration.

Question: Which of the following are of significant concern to your company in operating outside of the United States? (check all that apply)

This chart reflects feedback from respondents with large-cap organizations



Employers operating abroad face a number of challenges in managing their workforce, and those issues are growing in importance, according to our survey. With more than half of respondents (55 percent) expressing significant concern over foreign employment-law compliance, it is clear that large-cap multi-national companies increasingly view human resources as a global, rather than merely a local, issue. The globalization of business often necessitates the movement of personnel across borders, and 43 percent of respondents expressed concern with global mobility and the employment agreements that govern these arrangements.

Interestingly, a considerable portion of respondents also expressed concern with more day-to-day, but no less critical, issues. Cross-border investigations (21 percent) and HR due diligence for acquisitions (27 percent) are challenging within the United States, but exponentially more complex across the globe because they require compliance with local laws and policies in every relevant jurisdiction. Also, as greater attention has been placed on corporate responsibility for protecting human rights, companies are starting to express concern with their own accountability for labor or human rights violations in their supply chain and with meeting evolving international standards for corporate social responsibility (each identified as a concern by 19 percent of respondents).

METHODOLOGY AND DEMOGRAPHICS

In April and May of 2016, 844 professionals primarily based throughout the United States and from a wide variety of industries completed Littler's Executive Employer Survey via an online survey tool.

Respondents included:

- C-suite executives (6%)
- In-house attorneys/corporate counsel (41%)
- Human resources professionals (47%)
- Other professionals (6%)

Companies represented were of a variety of sizes:

- Large cap; Greater than \$4 billion in market capitalization (19%)
- Mid cap; \$1 billion to \$4 billion in market capitalization (21%)
- Small cap; Less than \$1 billion in market capitalization (60%)

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