



THE LITTLER® ANNUAL EMPLOYER SURVEY
MAY 2017

Littler
Employment & Labor Law Solutions Worldwide®

This report summarizes and analyzes the results of Littler Mendelson's sixth annual Executive Employer Survey. It examines the legal, technological and social issues having the greatest impact on the workplace, based on survey responses from 1,229 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

The magnitude of change occurring in Washington, D.C., and within local governments, coupled with rapid advances in technology, is creating an unprecedented level of uncertainty in workplaces across the nation. Employers aren't yet counting on a near-term impact from the promise of deregulation at the federal level, confounding the difficulties they face in complying with the constantly evolving – and often conflicting – patchwork of state and local employment laws and regulations. They also continue to encounter new challenges in managing their workforces brought on by technological advances, globalization and changes in how work is performed.

Those are among the key findings of Littler's 2017 Executive Employer Survey, summarized below with the full charts following on pages 4-23.

WORKPLACE REGULATION

While employers are eyeing several labor and employment changes from the Obama administration to be rolled back under the Trump administration, they do not expect to see much regulatory relief in the coming year. And as states and municipalities continue to enact employment regulations to fill a perceived void at the federal level, employers expect ongoing challenges in complying with varying rules across the country.

Specifically:

- Respondents expect the Trump administration to prioritize several issues in 2017, mainly reforming healthcare and employee benefits law (**89 percent**) and immigration policies (**85 percent**). However, the anticipated impact of various regulatory issues on the workplace, including the Affordable Care Act (ACA) and enforcement by the Equal Employment Opportunity Commission (EEOC), National Labor Relations Board (NLRB) and Department of Labor (DOL), were nearly unchanged from the 2016 to 2017 survey. The exception was immigration reform, likely reflecting the Trump administration's already aggressive moves to reshape U.S. policy. This year, **63 percent** of respondents said they expect immigration reform to impact their workplaces, up from **40 percent** in 2016.

- The shifting, fragmented patchwork of state and local labor and employment requirements has created compliance challenges for the majority of respondents (**79 percent**). As a result, they are taking action to keep up, including updating policies, handbooks and HR procedures (**85 percent**); providing additional employee training (**54 percent**); and conducting internal audits (**50 percent**). Of the array of changes at the state and local levels, respondents have been most impacted by paid leave mandates (**59 percent**), background check restrictions (**48 percent**) and minimum wage increases (**47 percent**).
- Even before Republicans withdrew their healthcare bill, respondents were uncertain about the impact of repealing the ACA's employer mandate on their organizations. **Twenty-eight percent** did not anticipate an impact at all, and **27 percent** did not know what the impact **would** be. Showing their commitment to providing health insurance coverage for full-time employees, only **4 percent** of respondents anticipated dropping coverage for some employees if they were relieved of the employer mandate.
- The transitions in Washington, D.C., appear to have reduced employers' expectations for EEOC enforcement activity around LGBTQ rights and equal pay, which both saw a sharp rise in last year's survey in the anticipated volume of discrimination claims. However, about half of respondents still expect these areas, along with hiring practices, to be enforcement priorities of the EEOC over the next year.

WORKFORCE MANAGEMENT

Even outside of politics, the uncertainty of today's world is vexing employers on multiple levels. Accommodating unpredictable, intermittent leave is increasingly a major challenge for employers. And shifting requirements overseas for handling workers' personal data, as well as managing data breaches originating with employees, are creating additional difficulties. Some tools for mitigating volatility, such as using contingent workers to manage the ebbs and flows of business, are proving useful. And other tools with the potential to provide insights into complicated questions, such as data analytics, are not yet being used to their full potential.

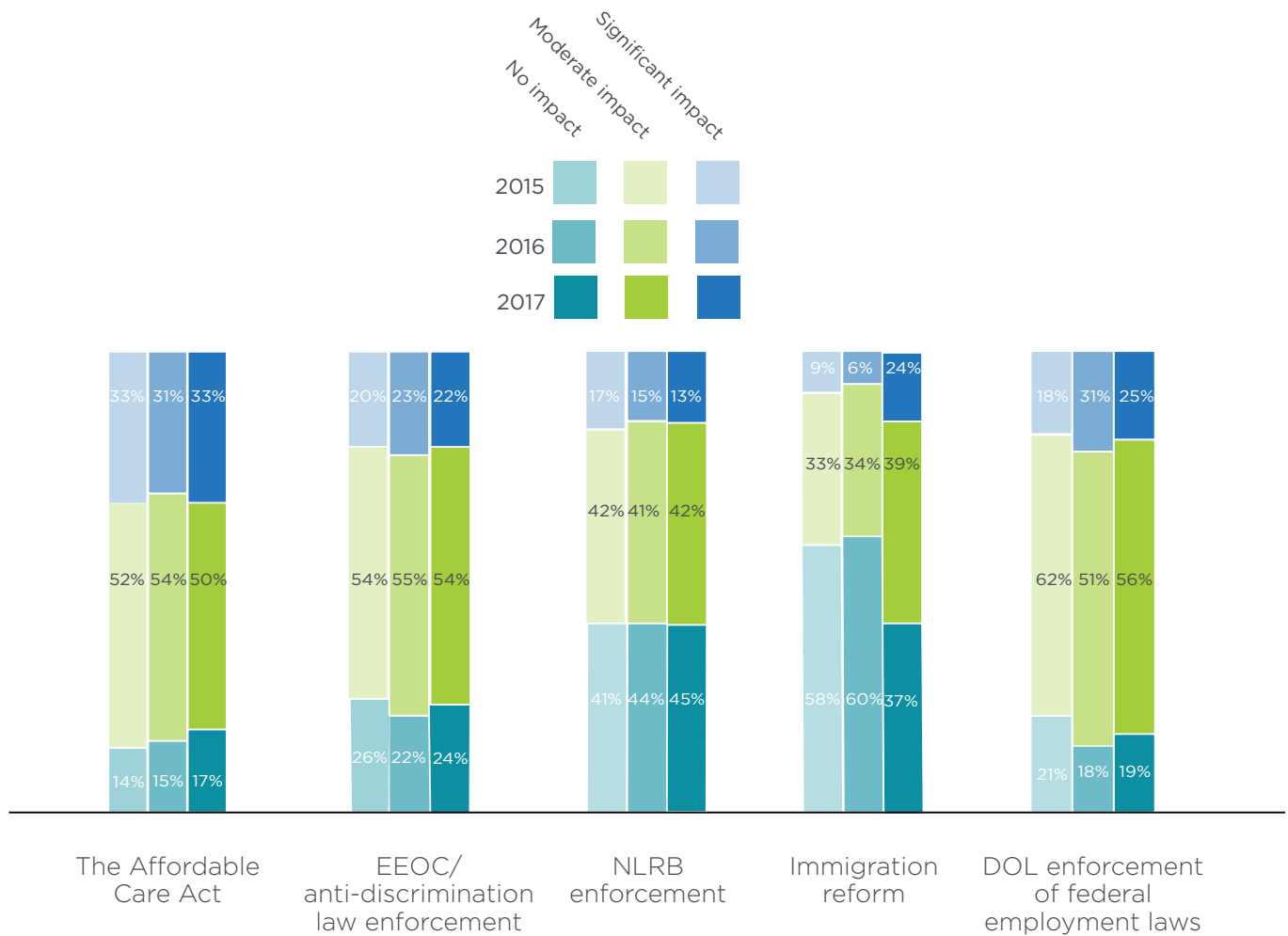
Specifically:

- Managing leaves of absences under the Family and Medical Leave Act (FMLA) was identified as the greatest challenge in providing reasonable accommodation to employees. The majority of respondents indicated difficulty with managing intermittent FMLA leave (**65 percent**) and leaves that extend beyond FMLA requirements (**55 percent**).

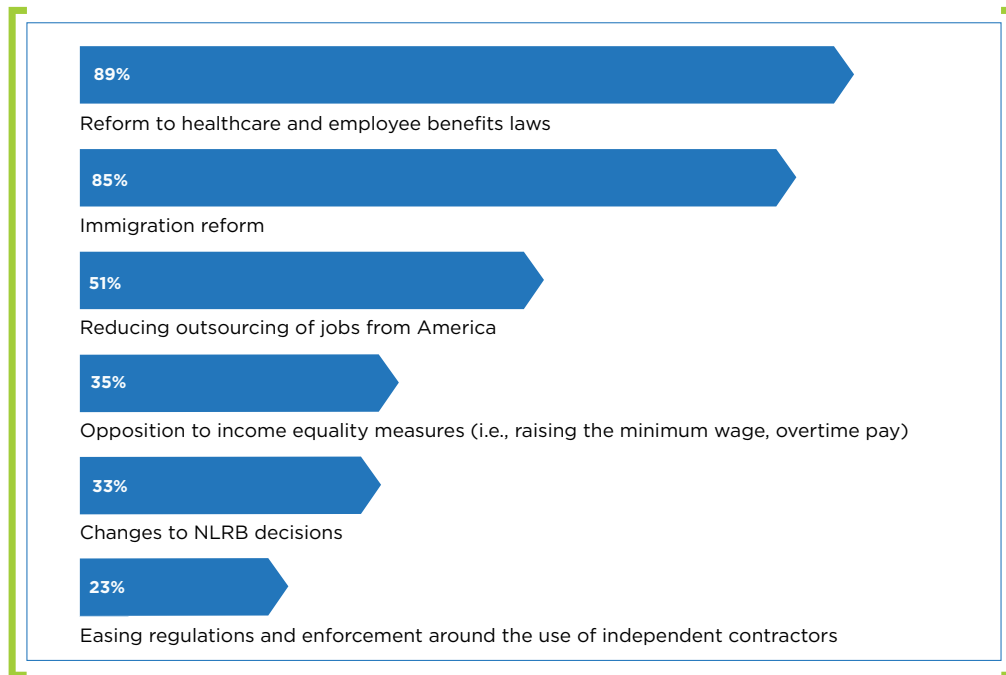
- Employers appear to be increasing their use of contingent workers, with nearly half of respondents using independent contractors, freelancers or temporary workers to staff up for short-term needs like contracts or seasonal demand (**35 percent**) or as part of their business model (**10 percent**).
- **Forty-three percent** of respondents said lack of sufficient resources for collecting, managing and analyzing data was a concern in using big data to improve workplace management. Another **31 percent** were concerned about the risk of violating discrimination laws and **23 percent** about legal risk associated with data privacy.
- A majority of respondents (**63 percent**) said their HR and IT departments are collaborating on information security policies to reduce data breaches that originate with employees. However, there still appears to be work to be done in guarding against and preparing for employee-initiated data breaches, as only **29 percent** had updated cyber-incident response plans, and just over half (**51 percent**) are providing additional training on cybersecurity risks and information security policies.
- Global data privacy issues are a significant concern for **56 percent** of employers doing business outside of the U.S. Respondents also expressed concern with varying standards for hiring and firing (**39 percent**), conducting multi-country investigations (**25 percent**) and uncertainty stemming from Brexit and the U.S. elections (**25 percent**).

WORKPLACE REGULATION

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



Question: Which of the following issues impacting employers do you think will be a priority during the first year of the Trump administration? (check all that apply)



Question: Which of the following labor and employment changes under the Obama administration would you like to see repealed or revised under the Trump presidency? (check all that apply)



Respondents identified a range of issues they believe will represent the Trump administration's priorities in 2017, with the vast majority anticipating a focus on reforming healthcare and employee benefits law (89 percent) and immigration policies (85 percent). Similarly, roughly half of respondents expressed hope that a host of labor and employment initiatives from the Obama administration would be repealed or revised by the new administration.

However, as a practical matter, respondents do not seem to expect much change over the next year, as evidenced by the relatively consistent perceived impact of various regulatory issues on the workplace from the 2016 to 2017 survey, including the ACA and enforcement by the EEOC, NLRB and DOL. Immigration reform was the exception, with 63 percent expecting an impact on their workplaces over the next 12 months, up from 40 percent in the 2016 survey. The sentiments expressed in this year's survey mirror the 75 percent and 67 percent of respondents that anticipated

an impact in our 2012 and 2013 surveys, respectively, when immigration reform was a high priority for the Obama administration.

Among specific Obama administration policies that respondents would like to see repealed or revised, the NLRB "quickie election" rule made the top of the list. Given the relatively small number of employers impacted by the rule, this finding may be a reflection of the vast number of changes from the NLRB to workplace law during the Obama years. According to a [study](#) by Littler's Workplace Policy Institute and the Coalition for a Democratic Workplace, the Obama NLRB overturned a total of 4,105 collective years of precedent in 91 cases and rejected an additional 454 collective years of law by adopting comprehensive new election rules.

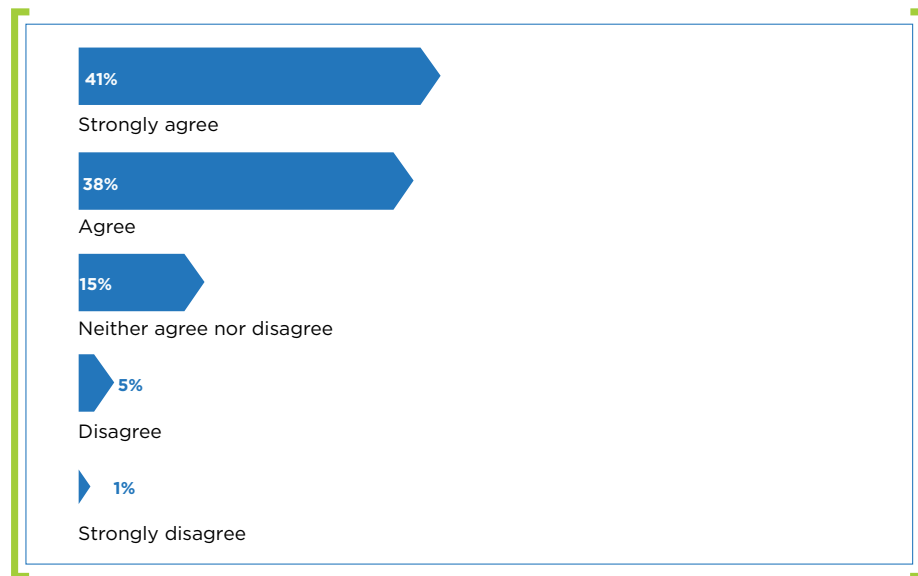
After the "quickie election" rule, respondents would most like to see changes to or repeal of the EEOC's revised EEO-1 reporting requirements, the NLRB's expanded definition of a "joint employer," the DOL rule revising overtime regulations and the ACA.



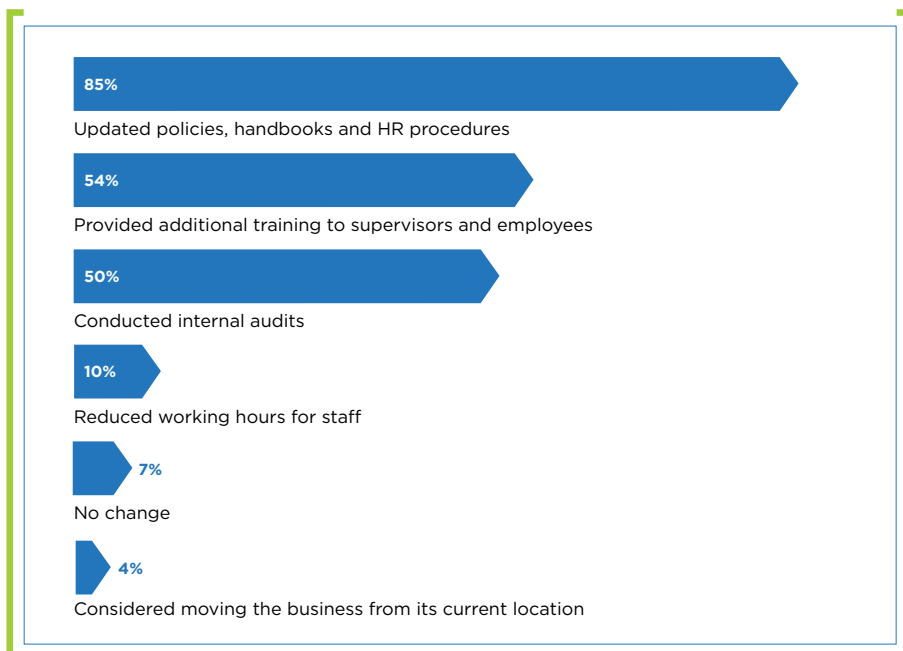
Michael Lotito
Co-Chair of
*Littler's
Workplace
Policy Institute*

“It seems surprising that respondents would not anticipate more of a near-term impact on their workplaces given the profound changes now occurring in Washington, D.C. However, the general climate of uncertainty and delays in appointments to government agencies may have led respondents to conclude that it will be at least a year before they start to see how the president's agenda is carried out and personally feel an impact in their workplaces.”

Question: To what extent do you agree with this statement: The host of new or amended labor and employment requirements at the state and local levels has created challenges for our organization in complying with a patchwork of rules and regulations.



Question: Due to changes in state and local laws impacting employers, which of the following actions has your company taken in the last year? (check all that apply)



The patchwork of state and local rules and regulations is creating compliance challenges for the vast majority of employers (79 percent), leading them to take a range of actions. Over the last year, most respondents have updated their policies, handbooks and HR procedures (85 percent), while roughly half have provided additional employee training (54 percent) and conducted internal audits (50 percent).

At the end of March, more than 400 labor- and employment-related measures were under consideration across state legislatures. The month of March alone also saw four state Supreme Court rulings on

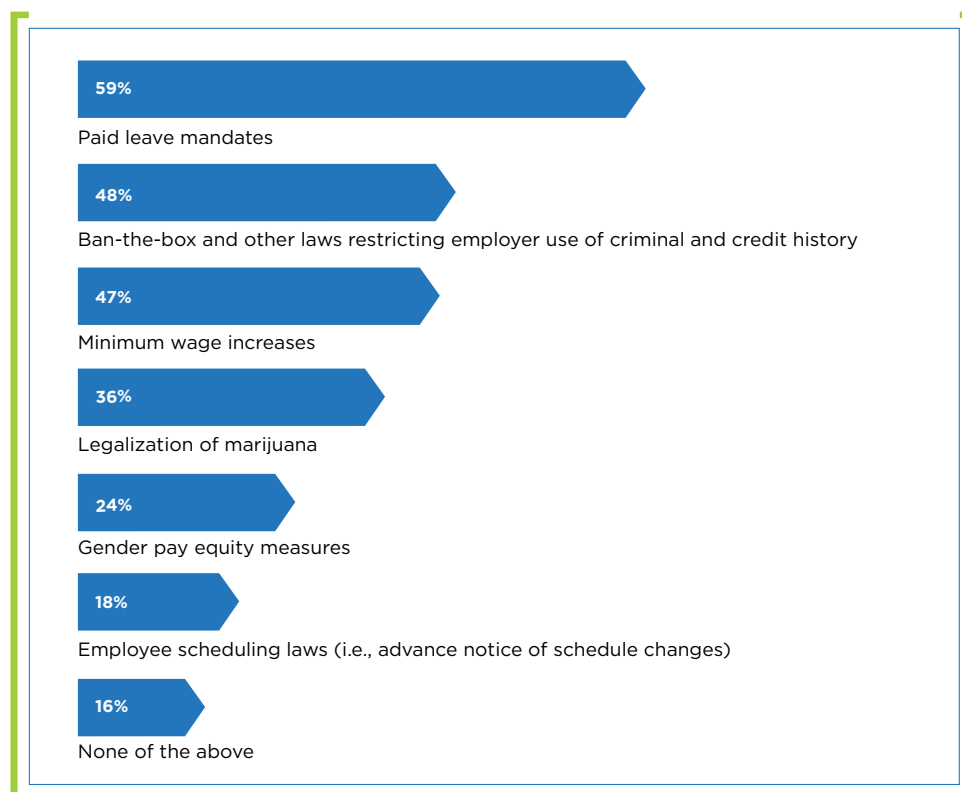
minimum wage laws. The results of those rulings vary by state, but it is clear that employers trying to keep up with measures across jurisdictions will continue to have their work cut out for them. If there is any hope for more consistency, it may emanate from the recent surge of preemption bills under consideration in various states. At least half of the states have already passed measures precluding localities from imposing various types of additional requirements on private-sector employers; at least a dozen new preemption measures are currently pending.



Michael Lotito
*Co-Chair
of Littler's
Workplace
Policy Institute*

“As states and municipalities continue to propose and enact a dizzying array of rules and regulations, it is no wonder employers are struggling with the increasingly fragmented landscape of employment laws. With the Trump administration working to overturn labor and employment rules and to reduce regulations at the federal level, employers can expect a continued increase in new regulations impacting the workplace at the state and local levels.”

Question: In which of the following areas have laws recently been enacted at the state or local level that impact your business? (check all that apply)



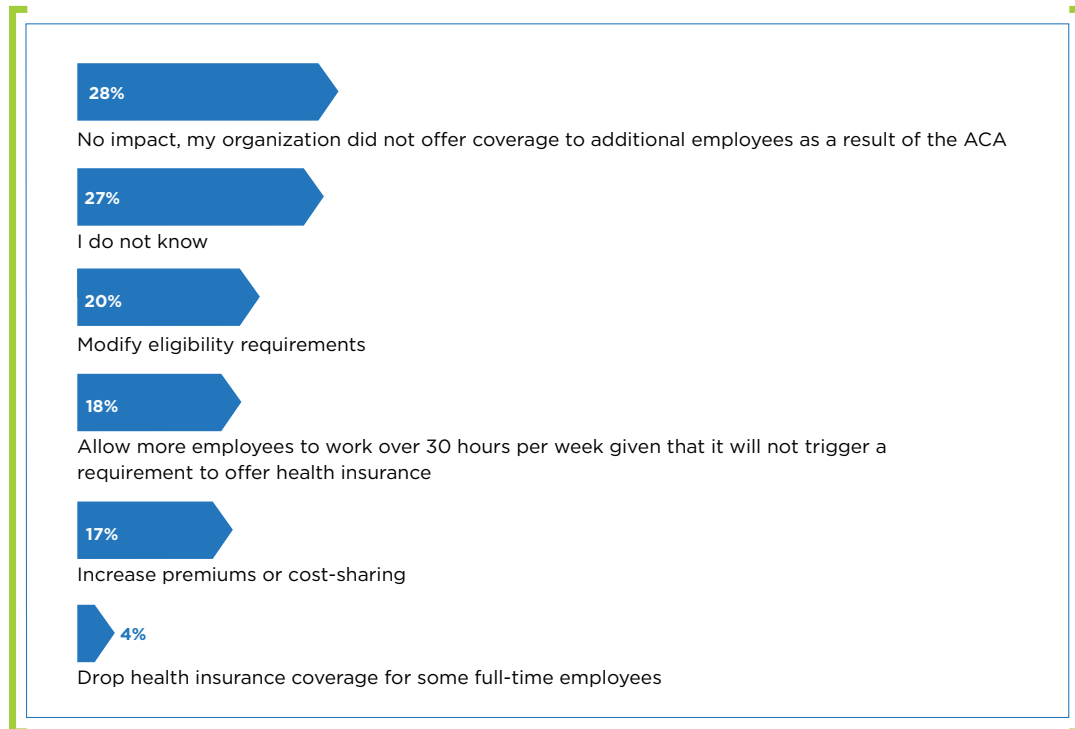
Further complicating the compliance challenges at the state and local levels is that recently enacted laws cover a broad spectrum of issues. Respondents to our survey indicated feeling the most impact from paid leave mandates (59 percent), closely followed by background check restrictions (48 percent) and minimum wage increases (47 percent). Only 16 percent of respondents indicated not being impacted by the myriad of new state and local laws.

New paid leave mandates have been hitting employers from every direction in recent years. Since 2011, seven states and Washington, D.C., have enacted paid sick leave laws. Four states now have paid family leave mandates on the books and, as of the end of March, there were approximately 45 bills pending across the states that would protect employee leave time.

Since 2010 when Massachusetts became the second state to enact a law requiring employers to wait until later in the hiring process to ask about criminal history, the ban-the-box movement has spread like wildfire at the state, county and city levels. Employers with multi-state operations have found it particularly challenging to stay ahead of the ever-growing list of legal restrictions on consideration of criminal backgrounds and credit histories for hiring and other employment decisions.

As minimum wage remains a predominant issue all over the country, from heavily populated states to small towns in rural areas, employers are feeling the impact of changes across the various states and municipalities in which they operate.

Question: Which of the following changes do you anticipate within your organization if the Affordable Care Act's employer mandate is repealed? (check all that apply)



Ilyse Schuman
*Co-Chair of
Littler's
Workplace
Policy Institute*

“Employers face even more questions about the future of the ACA, as well as the extent to which the administrative process can and will be used to change aspects of the law, than when they responded to our survey. In this environment, employers can continue to expect a certain level of uncertainty surrounding employer-sponsored health coverage in the months ahead.”

Even though responses to our survey were collected *before* Republicans withdrew the American Health Care Act in late March, employers were already feeling a great deal of uncertainty regarding the impact of repealing the ACA's employer mandate. More than a quarter (28 percent) indicated that they did not anticipate an impact at all, and another 27 percent said they did not know what the impact would be.

As Republicans continue to work to pass a healthcare bill, the administration can also take steps to weaken the employer mandate through

the administrative process. For instance, President Trump's Executive Order 13765 was intended to scale back aspects of the ACA that may fiscally burden states, individuals, healthcare providers and insurers, among others.

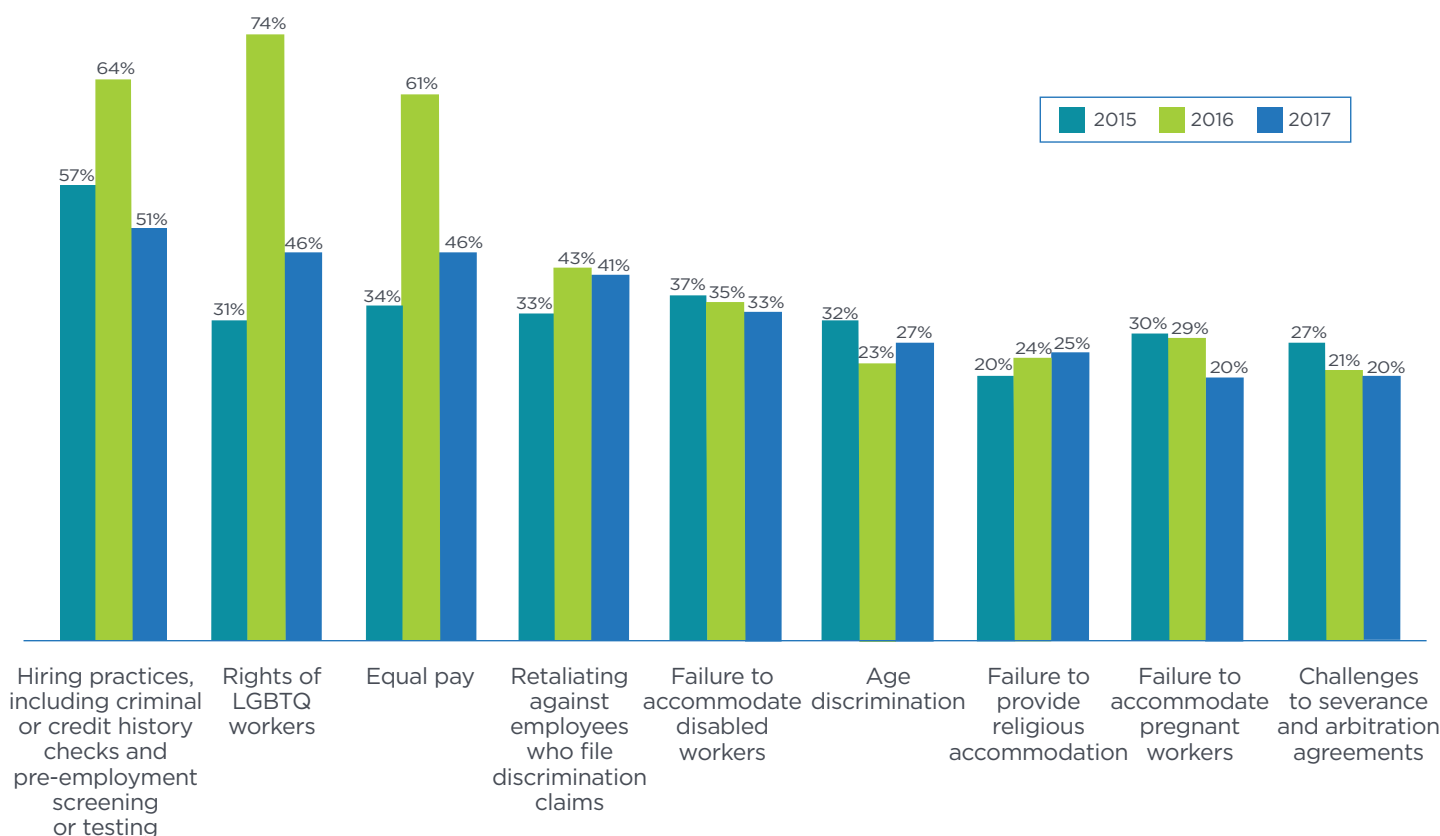
Only 4 percent of respondents anticipated dropping coverage for some employees if they were relieved of the ACA's employer mandate. That said, the fact that 18 percent of respondents would allow more employees to work over 30 hours a week if the mandate were repealed shows one way it is hurting businesses.



Steven Friedman
*Co-Chair of
Littler's Employee
Benefits Practice*

“The vast majority of respondents that would continue to provide coverage despite revisions to the employer mandate indicates that employers are committed to providing health insurance for their full-time employees. However, the results suggest that a repeal of the mandate would give employers more flexibility to set work schedules based on the needs of the business, without fear of triggering a requirement to provide health insurance.”

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)



Our 2016 survey found employers anticipating a sharp rise in the volume of discrimination claims related to LGBTQ workers and equal pay issues. This year we saw those expectations curtailed, almost certainly as a result of the change in administration and shifts in the balance of power in Congress. However, the number of respondents expecting increased enforcement in these areas remains substantially higher than in the 2015 survey, demonstrating that pay equity and LGBTQ rights are issues that will remain top-of-mind for employers.

Given that the EEOC will remain in a Democratic majority until after Commissioner Jenny R. Yang's term ends on July 1, 2017,

discrimination based on sexual orientation will continue to be a key enforcement priority. Furthermore, courts are actively addressing LGBTQ rights in the workplace, with the Seventh Circuit Court of Appeals recently creating a circuit split in finding that sexual orientation is protected under Title VII of the Civil Rights Act.

While nearly half of respondents expect the EEOC to prioritize equal pay in the workplace, employers can also anticipate closer scrutiny of pay practices at the state level and from the plaintiffs' bar. Legislation enacted in California, New York, Maryland and Massachusetts heighten employers' obligations to justify pay differences based on gender, and more states

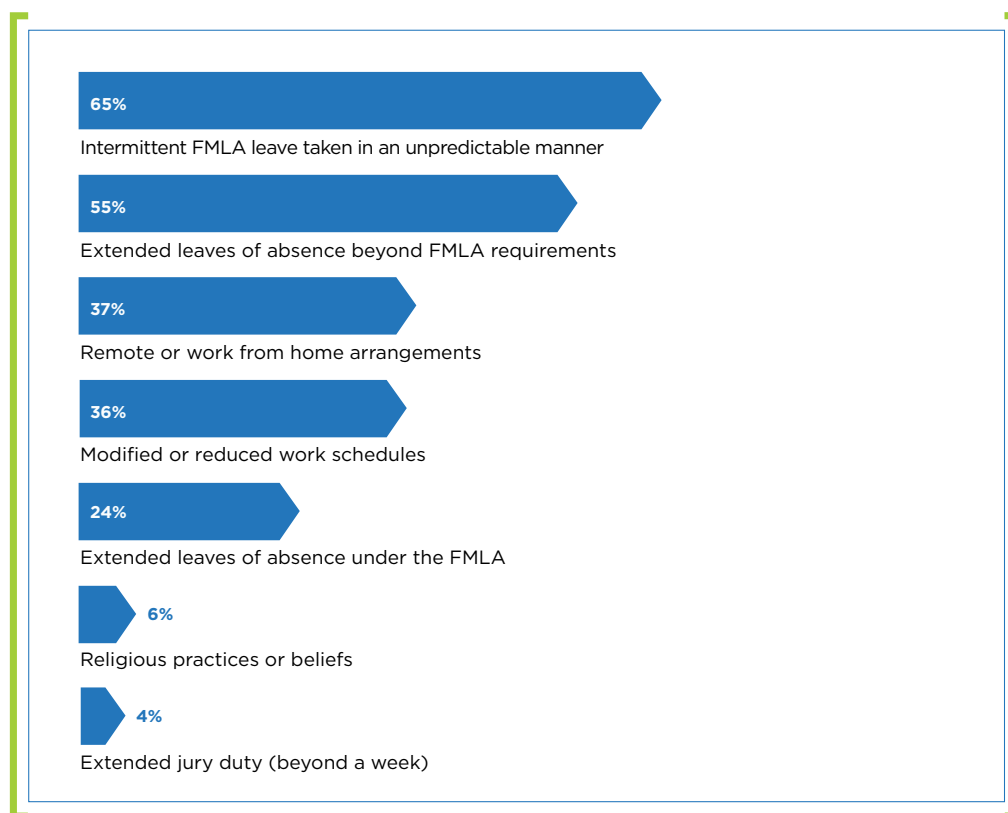
are expected to follow. Pay equity also has cultural momentum, with celebrities, athletes and politicians on both sides of the aisle picking up the torch, which could embolden female workers to take legal action.

Hiring practices – including the consideration of criminal or credit history in the hiring process and pre-employment testing or screening practices – ranked as the area where respondents anticipate the most discrimination claims in the next year. Indeed, in response to the private bar’s reluctance to bring

hiring-related claims, the EEOC has stepped in to fill the void in recent years. According to Littler’s 2016 [Annual Report](#) analyzing EEOC developments, from 2011-2015, such claims made up 25 percent of successful conciliations of systemic EEOC investigations and 23 percent of systemic lawsuit resolutions – both higher percentages than any other issue. And the commission’s Systemic Enforcement Report lists eliminating barriers in recruiting and hiring as its top priority for 2017-2021.

WORKFORCE MANAGEMENT

Question: Which of the following accommodation requests from employees have you found most difficult to accommodate? (check all that apply)



As employers continue to grapple with providing reasonable accommodations to employees and avoiding potential liabilities, managing leaves of absences under the Family and Medical Leave Act (FMLA) emerged as the area presenting the greatest challenge. The majority of employers indicated difficulty with managing intermittent FMLA leave (65 percent) and leaves that extend beyond FMLA requirements (55 percent).

A substantial percentage of employers also expressed difficulty with accommodating

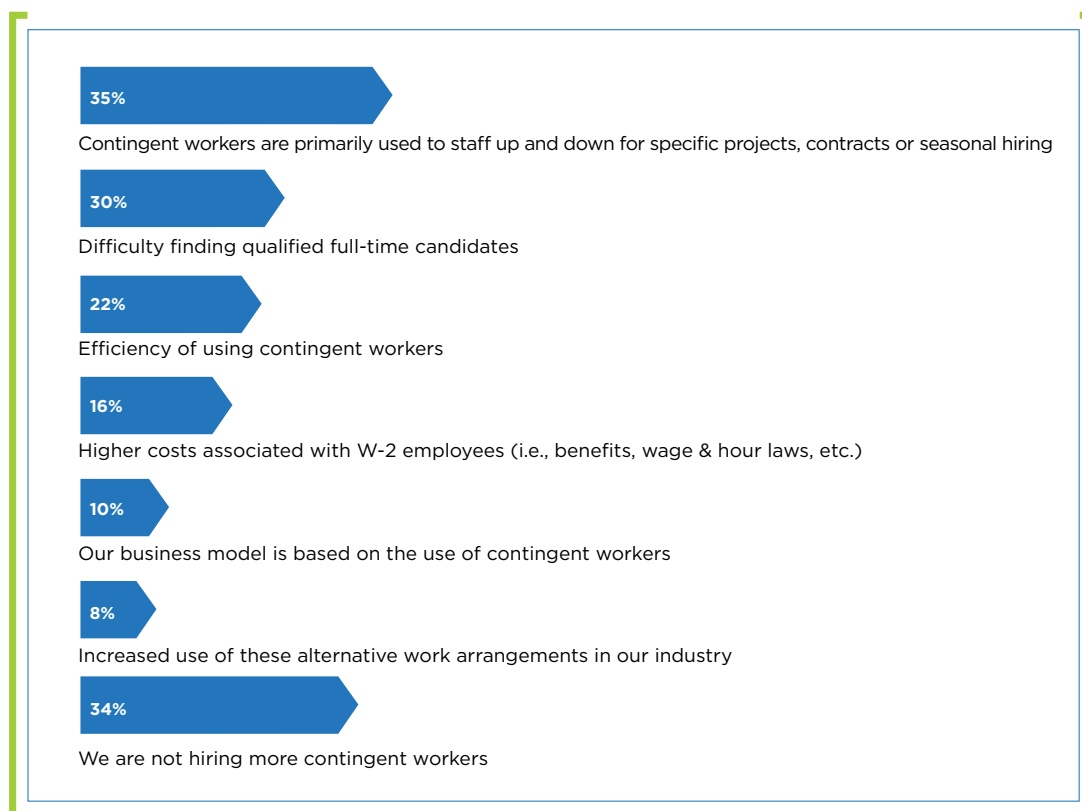
flexible work arrangements, including remote or work-from-home arrangements (37 percent) and modified or reduced schedules (36 percent). The increasingly common practice of employees requesting flexible work is creating a whole new layer of challenges for employers in terms of legal considerations, such as tracking hours worked for non-exempt employees to comply with the Fair Labor Standards Act, and practical issues, such as ensuring individuals with family responsibilities arrange for care to minimize disruptions.



Barry Hartstein
*Co-Chair of
Littler's EEO
& Diversity
Practice*

“Nothing is more disruptive to the operation of a business than unpredictability. When employees taking intermittent FMLA leave are repeatedly and unexpectedly out of the office, employers have to scramble to cover their responsibilities and manage potential resentment from those who are inevitably asked to do more. And while the disruption to the business and potential for FMLA abuse is high, if not done properly, terminating employees for these reasons creates a high risk of attracting disability and FMLA lawsuits.”

Question: Which of the following factors have caused your company to use more independent contractors, freelancers and/or temporary workers? (check all that apply)



Taken together, the survey responses suggest that employers are increasingly using independent contractors – continuing a trend we’ve been seeing for several years. Only about a third said they were *not* increasing their use of contingent workers. And nearly half said contingent workers were a part of their workforce, with 10 percent noting their business model is predicated on contingent-worker use and 35 percent indicating using contingent workers to staff up or down based on workflow needs for specific projects or seasonal hiring.

While employers are increasingly looking to contingent workers due to the difficulty of finding qualified full-time candidates (30 percent) and the efficiency of the model (22 percent), the percentages suggest that the contingent worker is generally supplementing,

rather than replacing, the traditional W-2 employee. This is further evidenced by the only 16 percent that cited higher costs associated with W-2 employees as a reason to look to contingent workers.

The 34 percent that indicated not hiring more contingent workers could suggest that employers remain cautious about using independent contractors or freelancers due to the complexity of complying with various federal and state laws, as well as fear of misclassification lawsuits.

Among large-cap company respondents, the use of contingent workers to staff up or down for specific projects or seasonal hiring was more prevalent (47 percent), and fewer reported that they are not hiring more contingent workers (26 percent).

Question: Which of the following (if any) are concerns of your company in analyzing data to improve workforce management decisions (such as employee hiring or performance evaluations)? (check all that apply)



As the big-data revolution sweeps through every corner of industry, many employers are coming to the realization that while they may possess large amounts of data, extracting insights that inform and improve decision-making requires significant investment. That is reflected among our respondents, 43 percent of whom said lack of sufficient resources was one of their top concerns in leveraging data analytics for workforce management.

While respondents expressed concern with the legal risks in violating discrimination laws (31 percent) and related to employee privacy (23 percent), as the use of big data continues to grow, employers are becoming increasingly comfortable with utilizing data analytics in

workforce management in a way that complies with relevant laws. Still, it is critical that employers ensure compliance with the myriad laws that govern workplace data analytics to avoid the risk of costly litigation. Employers can also limit their risk and gain the protection of attorney-client privilege by working with outside law firms that have the substantive expertise and technological capabilities to provide data analytics services.

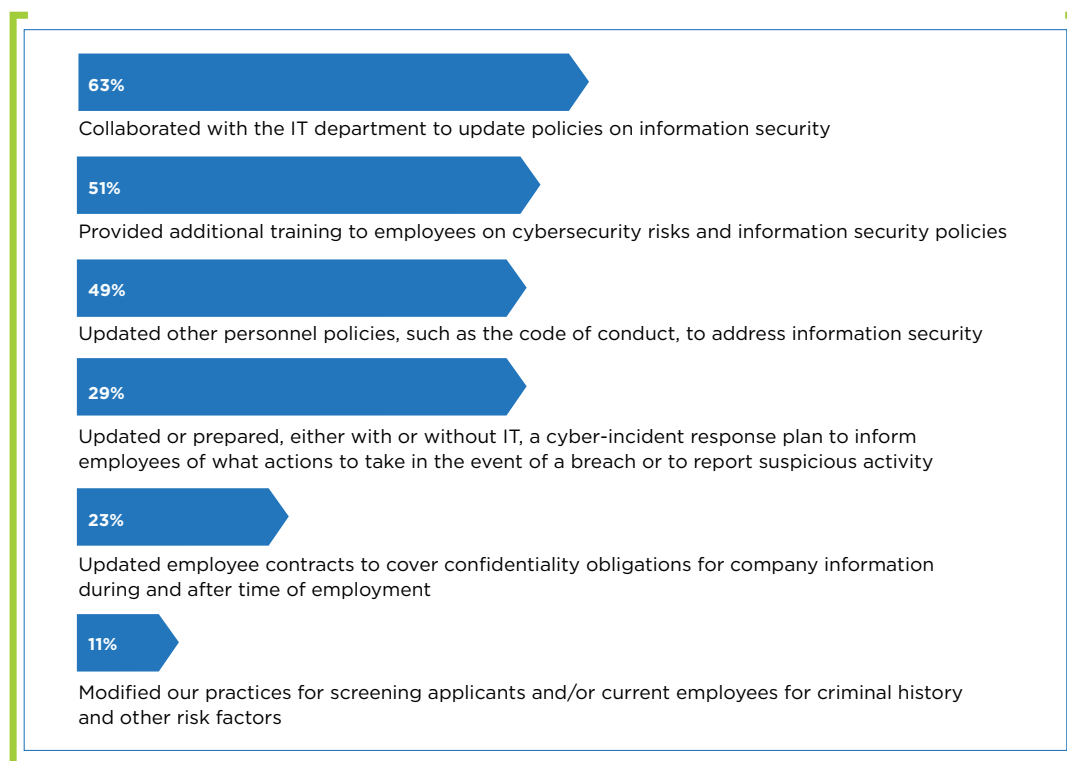
The increasing comfort level with allowing data to be collected and shared helps explain why only 23 percent of respondents identified the impact on company culture or violation of employee trust as a concern associated with big data. As we all grow more and more

accustomed to apps, websites and companies harvesting our data, those concerns may continue to diminish.

In looking at feedback from large-cap organizations, respondents expressed less

concern about having sufficient resources (36 percent), but greater concern with the legal risks in violating discrimination laws (38 percent) and associated with data privacy (34 percent).

Question: What steps has your HR department taken to reduce the risk of data breaches that originate with employees? (check all that apply)



As the volume of data breaches originating with employees continues to grow, the majority of respondents (63 percent) said their HR and IT departments are collaborating on information security policies. However, the much lower percentages of employers utilizing cyber-incident response plans, updating employee contracts to cover confidentiality obligations, and modifying screening practices suggests that HR professionals could be thinking more broadly about how to mitigate the risk of security breaches.

The percentage of respondents whose organizations prepared cyber-incident response plans (29 percent) is less than half of that who collaborated with IT on information security

policies. In addition, only 23 percent appear to view confidentiality agreements as an opportunity to educate new hires about specific actions they are required to take to protect corporate information. And only 11 percent indicated using the background check process to identify job applicants who may pose a threat to confidential corporate information.

While many HR departments seem to recognize the importance of cybersecurity training, only a slight majority (51 percent) indicated providing additional training to employees. Establishing information security policies that speak to employees is a critical first step toward reducing the risk of a data breach, but even the most comprehensive policies will

not be effective unless employees are trained on them. For example, in “the first quarter of 2017, hundreds of companies were [victimized by W-2 phishing scams](#) that resulted in HR and payroll

professionals sending employees’ W-2 forms to scammers in response to an apparent request from a senior executive. Many of these breaches could have been avoided with effective training.

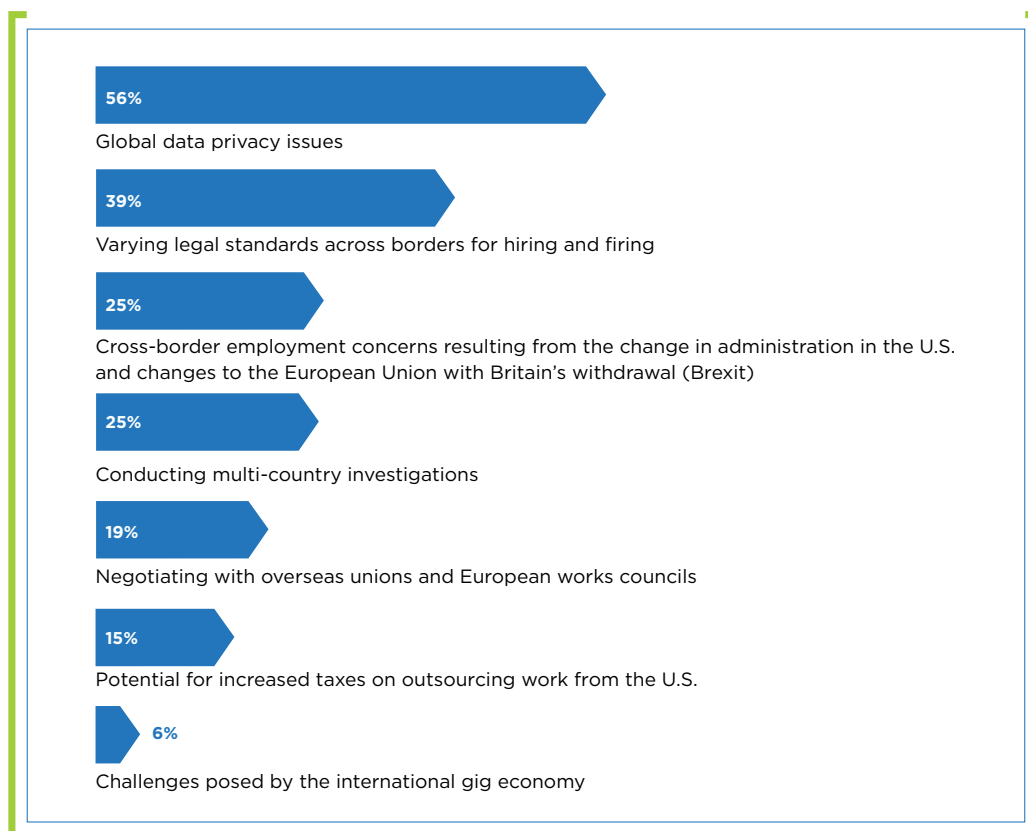


Philip Gordon
*Co-Chair of
Littler's Privacy
and Background
Checks Practice*

“It is encouraging to see HR collaborating with IT on policy development. Information security policies prepared only by IT often focus on technical safeguards, such as firewalls, patching and encryption. Involving HR in the process helps to address the human elements of information security, such as keeping passwords confidential and not leaving laptops and other devices unattended. However, employers can take further steps to guard against and prepare for employee-initiated data breaches, including ensuring all employees are trained on policies and establishing cyber-incident response plans so that employees know how to recognize or report a security incident.”

Question: Which of the following are of significant concern to your company in operating or doing business outside of the U.S.? (check all that apply)

This chart reflects feedback from respondents with large-cap organizations



Among respondents from large-cap organizations, global data privacy was a key area of concern for a majority of respondents (56 percent) in doing business across borders.

The differing legal standards for hiring and firing across borders was named a concern by 39 percent of respondents. This reflects the heightened formality of hiring and firing procedures in many jurisdictions outside the U.S. For instance, failing to take prompt action to terminate employment for “cause” in some jurisdictions means the employer loses the right to do so, and employers outside the U.S. are often handcuffed by the risk of unjust dismissal claims, which may impose liability where a termination does not rise to the level of “cause.”

A quarter of respondents also cited concerns with conducting multi-country investigations – likely due in large part to the expansion of domestic and overseas laws protecting whistleblowers from retaliation – and with uncertainty stemming from Brexit and the U.S. elections – including the stability of labor and employment laws, as well as immigration and trade policies.

Perhaps surprisingly, gig-economy challenges, such as workplace flexibility and the increased use of independent contractors, were identified as concerns by only a small percentage of respondents. It could be that employers have already found ways to adjust, given the prevalence of these issues.



Philip Berkowitz

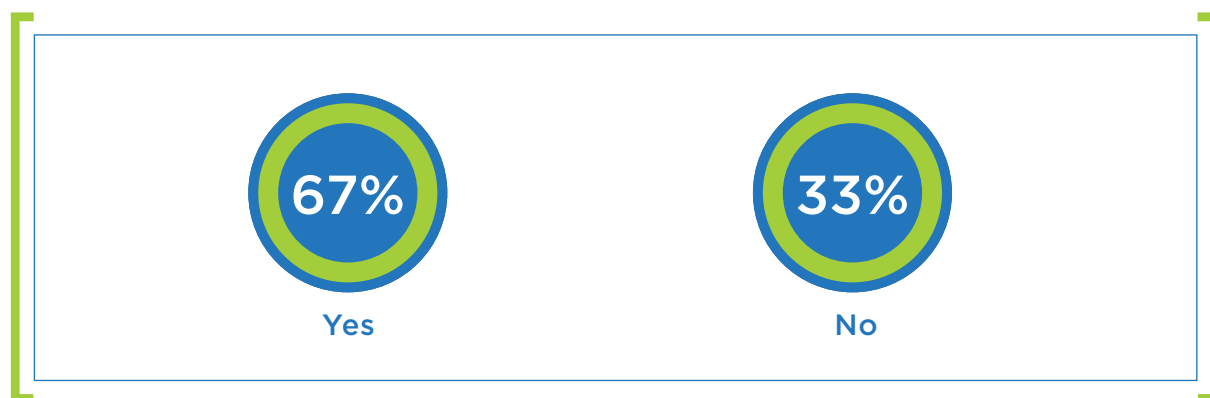
*U.S. Co-Chair
of Littler's
International
Employment Law*



Much of the concern surrounding global data privacy issues likely stems from the significant restrictions on sharing personal data of employees in Europe and in the many countries that impose stricter rules than the U.S. Even with Privacy Shield clarifying the standard for transatlantic data transfers, this area continues to pose challenges for U.S. multinationals.”

Question: In recent years, has your company made a greater effort to foster diversity and inclusion in the workplace?

This chart reflects feedback from respondents who indicated being aware of their firm's diversity and inclusion efforts



The majority of respondents (67 percent) indicated a greater emphasis in recent years on fostering diversity and inclusion in their workplaces. When asked to provide examples of new or innovative tactics within their companies, respondents most commonly mentioned efforts to recruit underrepresented groups through various means – from targeted advertisements to attendance at job fairs to focusing on bilingual applicants. “As community demographics change, we are hiring more employees who have Spanish as a first or proficient second language,” one respondent said.

Training, particularly at the management level, was also a common approach. “We conduct cultural diversity, harassment

and discrimination training annually to all employees, including transgender education,” one respondent said. Several respondents noted specialized training regarding LGBTQ equality in the workplace, and some mentioned consulting with LGBTQ employees on workplace issues. “We bring them into discussions, to guide us on how to handle any employee concerns,” noted one respondent.

Many organizations, often through internal employee resource groups, are also hosting diversity and cultural awareness events where employees can discuss difficult topics. One respondent’s organization facilitated discussions of “concepts such as implicit bias and white privilege at heritage potlucks.”

METHODOLOGY AND DEMOGRAPHICS

In February and March of 2017, 1,229 professionals primarily based throughout the U.S. and from a wide variety of industries completed Littler's Executive Employer Survey via an online survey tool.

Respondents included:

- Human resources professionals (52 percent)
- In-house attorneys/corporate counsel (41 percent)
- C-suite executives or other professionals (7 percent)

Companies represented were of a variety of sizes:

- Large cap; greater than \$4 billion in market capitalization (19 percent)
- Mid cap; \$1 billion to \$4 billion in market capitalization (23 percent)
- Small cap; less than \$1 billion in market capitalization (58 percent)

