

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE ATLANTIC OPERA, INC.

and

Case No. 10-RC-276292

MAKE-UP ARTISTS AND HAIR
STYLISTS UNION, LOCAL 789,
IATSE

BRIEF OF *AMICUS CURIAE*
SHRM, THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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SHRM, the Society for Human Resource Management, submits this brief, *amicus curiae*, responding to the order of the National Labor Relations Board (the “NLRB” or “Board”) in its December 27, 2021, Notice and Invitation to File Briefs (“Notice”) in the above-captioned matter.

INTERESTS OF AMICUS CURIAE

SHRM’s mission is to empower people and workplaces by advancing HR practices and maximizing human potential. As the voice of all things work, workers and the workplace, SHRM is the foremost expert, convener and thought leader on issues impacting today’s evolving workplaces. With more than 300,000 human resources and business executive members in 165 countries, SHRM impacts the lives of more than 115 million workers and families globally. A principal function of SHRM’s public policy objectives is to advocate for sound public policy that creates clearly defined standards benefitting all workers and workplaces. This is such a case.

SUMMARY OF ARGUMENT

Our members, many of whom are experts in talent acquisition, understand that in order to recruit and retain the best talent, especially during these challenging economic times, they must offer a myriad of work relationship options that provide the 21st-century worker the autonomy necessary to make the best decisions for them and their families. To that end, the availability of independent work is not only valuable to workers but necessary for businesses to compete in today’s global marketplace. The test for independent contractor status under the National Labor Relations Act, therefore, must preserve these opportunities for independent work that are necessary for our economy to function. The Board’s standard in *SuperShuttle* should be preserved as it appropriately takes into account these interests by supporting the independent work models needed in the workplace of today.

ARGUMENT

I. THE IMPORTANCE OF INDEPENDENT WORK IN THE MODERN WORKPLACE MUST BE TAKEN INTO ACCOUNT BY THE BOARD IN REVISITING *SUPERSHUTTLE*

A. Independent Work Is Emergent And Likely Here To Stay

Workers of every generation recognize that independent work provides opportunities for enhanced autonomy, flexibility, and work/life integration. Though independent workers come from every generation, nearly fifty percent of Generation Z and forty-four percent of Millennials engage in some form of independent work. The 2020 Freelance Forward Study commissioned by Edelman Intelligence for Upwork found that thirty percent of Generation X and twenty-six percent of Baby Boomers engaged in some form of independent work. *See* Freelance Forward Study, (published September 2020), available at <https://www.upwork.com/i/freelance-forward>. Certain workers in traditional freelance, consultant, contractor, direct sellers, and other decades-old industries have long flourished in independent relationships. The modern economy provides additional new opportunities for workers to engage and expand their economic opportunities with enhanced flexibility, freedom and different obligations and terms than are characteristic of employee relationships. The modern workplace must be allowed to meet the needs and preferences of workers for entrepreneurship and economic opportunities.

Given the prevalence of independent work, it is no surprise that workers engaged in independent work have a variety of reasons for doing so and see a variety of benefits from such work. Workers prefer flexibility because it allows them to choose for whom they provide services and opportunities to pursue multiple passions simultaneously. *See* Chasing Work: Jennifer O’Connell, Independent Women’s Forum, (last visited February 7, 2022), available at <https://www.iwf.org/chasing-work-jennifer-oconnell/> (“It didn’t matter what time I did work because I was talking to schools across the world,That allowed me flexibility during my day

to go teach my regular [yoga] classes for my part-time W-2 job and then come back and maybe work on an article, do interviews, or work on yoga certifications.”). Independent work affords workers the ability to care for members of their family. *See* Chasing Work: Karen Anderson, Independent Women’s Forum, (last visited February 7, 2022), available at <https://www.iwf.org/chasing-work-karen-anderson/> (“[I relied on] opportunities for me to work independently while still taking care of my elderly mother in her home.’ . . . With an elderly mom in her 90s, Anderson planned on having the flexibility to care for her mom once full-time care was needed.”). Flexibility and worker independence go together. When a worker can choose for themselves how, when, or where they work, they are able to set their own priorities.

B. SHRM’s Research Supports Sustaining the Independent Worker Model¹

In April 2019, SHRM and SAP SuccessFactors partnered on research surveys of independent contractors, employees, managers, and human resources professionals about independent contractor classification and the benefits of independent work for businesses and workers alike. Specifically, the research surveyed 940 independent contractors (referred to as “external workers”), 350 employees (referred to as “internal workers”), 424 managers who work with external workers and 1,175 human resource professionals in a broad variety of sectors, industries, organizational sizes, and geographic areas in the United States. (“Want Your Business to Thrive? Cultivate Your External Talent,” attached hereto as Exhibit A, p. 6, 10-11.)

The main concern voiced by human resource professionals was the desire for clarity and specificity around independent contractor classification. Nearly three-quarters of human resources professionals reported that they are somewhat concerned, concerned, or very

¹ SHRM submits for the record: SHRM’s 2019 White Paper entitled, “Want Your Business To Thrive? Cultivate Your External Talent,” attached hereto as Exhibit A.

concerned about the legal landscape of external work, with eleven percent reporting that they are very concerned. (Ex. A, p. 39.) When asked what was the biggest issue or challenge that they would like to see resolved related to external workers, many human resources professionals cited legal ambiguity regarding the use and management of external workers as their greatest concern.

The current legal climate regarding independent work is exceedingly unclear and, at times, contradictory. This ambiguity has caused organizations to shy away from providing training to external workers due to uncertainty in the interpretation of the Internal Revenue Service (IRS) guidelines stating that periodic or ongoing training about procedures and methods is strong evidence that the worker is an employee. Yet, the Occupational Safety and Health Administration's (OSHA) rules make staffing agencies and host employers jointly responsible for maintaining a safe work environment for temporary workers—including ensuring that OSHA's training requirements are fulfilled. SHRM's research shows that business and human resources professionals broadly avoid providing training, like safety and process training, to external workers. Forty-eight percent of human resources professionals reported providing training for all external workers, while thirty-eight percent reported providing training for only some of their workforce, and eleven percent indicated that they didn't provide any training for any external workers. (Ex. A, p. 26.)

It is no surprise, then, that SHRM's research found businesses want flexibility when they engage with independent contractors. Though it is often speculated that organizations turn to external workers to save money, less than twenty percent of human resources professionals indicated that their organization uses external workers to save money. Instead, some of the most cited reasons for utilizing external workers were access to specialized talent with specific skills or expertise (48%) and staffing specific projects and initiatives (48%). (Ex. A, p. 12.).

Companies highlighted the desire to offer benefits to independent workers to attract talent. When asked to speculate on which benefits might attract external workers to their organizations, managers and human resources professionals believed workers would want healthcare and paid time off benefits (Ex. A, p. 27.) Though independent workers often receive healthcare from an entity other than the businesses they engage with, healthcare was still the top benefit these workers cited as likely to motivate them to work for a company. (Id.) However, within the current legal landscape, businesses are hesitant to offer or otherwise pay for benefits without creating legal risk. See “When Gig Workers Want Benefits, Should You Offer Them?”, SHRM, July 25, 2019, available at <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/when-gig-workers-want-benefits-beware-the-risks.aspx>.

Aside from the above-cited concerns from businesses and human resources professionals, the survey also studied independent worker motivations and experiences with external work. The survey embraced the wide variety of independent work, by surveying workers engaged in a broad range of external work types including:

- Independent contract work - workers who find customers or companies either online or in-person who pay them directly to fulfill a contract or provide a product or service;
- Online task contract work - workers who are paid for doing tasks that are done entirely online and the companies they contract with coordinate payment for the work;
- Service delivery contract work - workers who are paid for performing short in-person tasks or jobs for customers who they meet through a website or mobile app;
- On-call contract work - workers who are paid for doing work where they are prequalified and placed in a pool of people who can be called on an “as-needed basis” to cover specific work shifts or assignments;

- Subcontractor work - workers who are paid by a company that contracts services out to other organizations; and
- Temporary work - workers who are paid by a temporary service or staffing agency that contracts time out to other organizations to perform temporary tasks and jobs.

(Ex. A, p. 6.) About half of these workers reported working with a contract company or agency that placed them in roles/assignments (49%), while half (50%) found their external work through some other means. The broad range of external work and the means through which workers obtain such work, by itself, supports the call for a consistent focus on the core elements of independent work.

The survey found independent workers hold a variety of reasons for engaging in external work. Almost one in five workers in the survey said they preferred external work, and forty-five percent explained that they saw advantages in both types of work but just happened to be doing external work. The most cited reasons for becoming an external worker were "being able to set my own schedule" (49%), "choosing how many hours I work" (40%), and "choosing my work location" (33%). (Ex. A, p. 18.)

Furthermore, according to the survey, most independent workers do not choose external work simply because they had no other options. Rather, nearly half of all external workers surveyed reported that "this is just the type of work I'm doing right now," and among the eleven percent of external workers who selected "other," the most common open-ended responses were "for supplemental income" and "to do something I enjoy." Workers engaged in independent contract work were the most likely to report a preference for external work.

HR professionals regularly turn towards independent recruiters as internal work opportunities become available. Nearly ninety percent of human resources professionals reported

that their organizations at least sometimes convert external workers to internal employees. Independent work allows prospective employees to determine whether a prospective employer is a good fit prior to deciding whether to accept an internal work role. Ultimately, SHRM's research is consistent with the Proposed Rule's emphasis on self-determination and flexibility as central to economic independence.

Independent work is a growing and essential part of the economy that is here to stay. Businesses and workers require clarity and consistency regarding the legal status of their relationship. Likewise, businesses and workers alike will benefit from the certainty provided by the Proposed Rule in that it will allow businesses to engage with independent workers in ways that benefit the workforce and society, including worker and customer safety training, anti-harassment training and skill development. SHRM submits these comments to aid the NLRB in understanding the makeup and nature of independent work and to ensure the Proposed Rule reflects the desires of workers and businesses for safety, flexibility, and compliance.

Agency rulings that embrace these modern work relationships reflect today's workplace and the economic opportunities available to workers who prefer the flexibility and freedom of providing work as non-employees to multiple businesses. Developing and communicating to businesses and workers rules that promote a positive business environment encourages innovation and allows workers to be provided certain information, guidance, and resources by businesses. This is good business and good for work, workers, and the workplace.

II. THE BOARD IS CONSTRAINED BY THE COMMON LAW TEST IN ITS REVIEW OF THE *SUPERSHUTTLE* RULING

The Board remains bound by the holding in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), in implementing the test for independent contractor status.² The U.S. Supreme Court in that case relied on the 1947 statutory amendment to the Act establishing Congress’s intent that the distinction between independent contractors and employees be determined by general agency principles, rather than a government agency test subject to administrative deference under the *Chevron* doctrine. “The obvious purpose of [the Taft-Hartley] amendment was to have the [National Labor Relations] Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.” *N.L.R.B. v. United Ins. Co.*, 390 U.S. at 256. The determination of employee or independent contractor status under the National Labor Relations Act is thus a question of pure common-law agency principles “involv[ing] no special administrative expertise that a court does not possess.” 390 U.S. at 260. *See Aurora Packing Co. v. NLRB*, 904 F.2d 73, 75–76 (D.C. Cir. 1990) (“Deference under the *Chevron* doctrine ... does not apply here because of the ... direction that the Board and the courts apply the common law of agency to the issue.”). Whereas agencies may otherwise reasonably alter their interpretation of the law if it is within the scope of the statutory delegation and the basis for revisiting and altering past precedent is explained, *See National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1001–1002 (2005), the Board is bound by the common law and must examine the non-exhaustive list of factors in the Restatement (Second) of Agency § 220 (1958), wherein no one of

² Section 2(3) of the National Labor Relations Act (“NLRA” or “Act”) provides that the term “employee” shall not include “any individual having the status of an independent contractor.” 29 U.S.C. § 152(3).

the following factors is determinative; however, over the years, the Board has wrestled with the application of these common law factors:

- (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
- (b) Whether or not the one employed is engaged in a distinct occupation or business.
- (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
- (d) The skill required in the particular occupation.
- (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
- (f) The length of time for which the person is employed.
- (g) The method of payment, whether by the time or by the job.
- (h) Whether or not the work is part of the regular business of the employer.
- (i) Whether or not the parties believe they are creating the relation of master and servant.
- (j) Whether the principal is or is not in business.

III. THE FED EX HOME DELIVERY STANDARD DOES NOT ALIGN WITH THE COMMON LAW TEST

The Circuit Courts have long recognized that the common law factors must be analyzed through the lens of entrepreneurial opportunity owned by the worker, which “better captures the distinction between an employee and an independent contractor.” *Corp. Exp. Delivery Sys. v. N.L.R.B.*, 292 F.3d 777, 780 (D.C. Cir. 2002). This test makes sense and follows the natural understanding of what it is to be an independent contractor: “The full-time cook and the executive are employees and the lawn-care provider is an independent contractor not because of the degree of supervision under which each labors but because of the degree to which each

functions as an entrepreneur — that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder.” *Id.* at 780. The importance of the entrepreneurial opportunity analysis was further emphasized by the Circuit Courts under the series of Fed Ex Home Delivery cases. In *FedEx Home Delivery and Local 25*, 351 NLRB No. 16 (2007), the Board’s finding that the employer’s refusal to bargain violated Section 8(a)(5) of the Act because the unit workers were employees, not independent contractors was not enforced. In *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) (FedEx I), the D.C. Circuit found that the drivers were independent contractors: “while all the considerations [of the common law formulation of independent contractor test] remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position represents the opportunities and risks inherent in entrepreneurialism.” Importantly, the court gave no deference to the Board’s analysis, finding that the definition of Section 2(3) employees is jurisdictional. It further found “particularly problematic” any uncertainty about independent contractor status under the NLRA and reasoned that it would uphold the Board’s decision only if the agency made a choice between “two fairly conflicting views.” *Id.* at 8.

Despite the Circuit Court’s holding, the Board reevaluated its independent contractor analysis in *FedEx Home Delivery*, 361 NLRB No. 55 (2014) and again held that the drivers are employees under the NLRA. The Board found that entrepreneurial opportunity represented merely “one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business.” 361 NLRB 610, 620. Citing, *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), the Board reaffirmed that independent contractor status should be evaluated in light of the non-exhaustive

common-law factors set out in the Restatement (Second) of Agency § 220 (1958), and that and all of the facets of the relationship must be assessed with no one factor being determinative.

In *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017)(*FedEx II*), the D.C. Circuit vacated another Board ruling that certain FedEx drivers in Connecticut are employees under the Act and stated that this case was “indistinguishable” from *FedEx I*. In reaching its decision, the D.C. Circuit noted that the Board admitted that the facts in both cases were “virtually identical” and the Board could not effectively nullify a prior Court of Appeals decision by asking a different panel to apply the same law to the same facts involving the same parties to give a different legal conclusion.

A key principle underlying the Circuit Courts’ decisions is that the Board in the *FedEx Home Delivery* cases declined to view entrepreneurial opportunity as an important principle in the inquiry and made clear that it would give weight to actual, not theoretical entrepreneurial opportunity. But that approach had been rejected by the courts and prior Board precedent. *FedEx Home Delivery*, 361 N.L.R.B. at 637 (“the ability to work for other companies” governs); *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497- 499 (D.C. Cir. 2009) (opportunity, and not practice, is controlling); *see also The Arizona Republic*, 349 N.L.R.B. 1040, 1045 (2007) (Board noting the existence of entrepreneurial opportunity despite the fact that most individuals did not exercise that ability, concluding that although “many [individuals] choose not to take advantage of [the] opportunity to increase their income does not mean that they do not have the entrepreneurial potential to do so”); *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995) (“it is the worker’s retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor.”). Therefore, without the Board viewing an independent contractor

case through the lens of entrepreneurial opportunity owned by the workers, it will be difficult to capture the distinction between an employee and an independent contractor.

IV. *SUPERSHUTTLE* IS CONSISTENT WITH THE BOARD'S MANDATE TO APPLY THE COMMON LAW FACTORS

The Board subsequently issued *SuperShuttle DFW, Inc.*, which overruled *Fedex's* alteration of the common-law test by diminishing the significance of entrepreneurial opportunity. 367 NLRB No. 75, at 1, 7 (2019). Now, “entrepreneurial opportunity is not an independent common-law factor,” but rather “a principle by which to evaluate the overall effect of the common-law factors on a putative contractor’s independence to pursue economic gain.” *Id.* at 9.

In *SuperShuttle*, the Union petitioned for a unit of franchisees who operate shared-ride vans for SuperShuttle Dallas-Fort Worth. *Id.* at 1. The Respondent claimed that the franchisees were independent contractors, and the Board agreed. *Id.* By determining that the franchisees had significant opportunities for economic gain and significant risk of loss, the Board looked at the following factors. First, the franchisees made a significant initial investment in their business by purchasing or leasing a van and entering into a Unit Franchise Agreement. *Id.* at 12. The total investment necessary to begin a franchise ranged from \$18,100 to \$40,500, which included the cost of the vehicle plus any other initial and weekly fees. *Id.* at 4 n.12. Second, the franchisees had total control over their schedule and were able to work as much as they chose, when they chose, and where they chose. *Id.* at 12. Third, they were able to keep all the fares they collect. *Id.* Finally, they had discretion in choosing to accept bids, “so they can weigh the cost of a particular trip (in terms of time spent, gas, and tolls) against the fare received.” *Id.* Moreover, in a footnote, the Board noted that even though the fares received were set by SuperShuttle, in reality, the fares were “set by the competitive airport transportation market, so even if franchisees could negotiate their own fares, those fares are unlikely to vary significantly from

SuperShuttle’s fares.” *Id.* at 13 n.27. Thus, the franchisees had significant opportunity for economic gain and significant risk of loss, which strongly supported finding independent-contractor status and it was not outweighed by any countervailing factors supporting employee status. *Id.* at 14-15.

V. THE BOARD’S APPLICATION OF *SUPERSHUTTLE* HAS BEEN BALANCED

A review of *SuperShuttle* and cases relying on it to determine independent contractor status reveals that the test is not a *carte blanche* basis for rejecting employee status. Rather, it presents a balanced approach that properly honors the common law factors without an overemphasis on a particular one.

With the adoption of the *SuperShuttle* standard, the Board has issued four decisions (including *SuperShuttle*) on how the Board evaluates the common-law factors through the prism of entrepreneurial opportunity: *SuperShuttle*; *Velox Express, Inc.*; *Intermodal Bridge Transport*; *Nolan Enterprises, Inc. d/b/a Centerfold Club & Brandi Campbell*. Overall, the cases reveal that the *SuperShuttle* standard has been applied judiciously by the Board—even one having the very same composition that established the *SuperShuttle* standard—finding in every case after *SuperShuttle* that the workers at issue were employees under the Act and thereby outlining the boundaries of the application of the economic opportunity component of the common law test.

1. *Velox Express, Inc.*

In this case, a driver brought unfair labor practice charges against her purported employer. Velox provided medical courier services and contracted the work to drivers who would collect and deliver the specimens. *Velox Express, Inc.*, 368 NLRB No. 61, slip op. at 1 (2019).

Here, unlike *SuperShuttle*, the Board’s evaluation of the common-law factors through the prism of entrepreneurial opportunity showed that the drivers had little opportunity for economic gain or, conversely, risk of loss. *Id.* at 3. First, the drivers did “not have the discretion to determine when and how long they work or to set their routes and the customers they service.” *Id.* Rather, Velox assigned routes with specific stops that drivers had to service on designated days and during specific time periods. *Id.* Second, the drivers did not have “a proprietary interest in their routes, and thus they cannot sell or transfer them, nor can they hire employees to service their routes.” *Id.* In fact, the drivers could not hire their own substitutes; they had to ask Velox for permission to take time off and Velox would provide a substitute whom it would pay directly. *Id.* n.10. Third, the only way that drivers could increase their income was by choosing a weekend route. *Id.* at 3. Similarly, the method for compensating the drivers did not afford them significant entrepreneurial opportunities because they received the same amount of compensation no matter their own efforts and initiative. *Id.* Therefore, the drivers did “not have any meaningful opportunity for economic gain (or run any meaningful risk of loss) through their own efforts and initiative” and were deemed employees under the Act. *Id.* at 4.

2. Intermodal Bridge Transport

In *Intermodal Bridge Transport* the Union brought unfair labor practice charges on behalf of drivers who leased trucks from the purported employer. *Intermodal Bridge Transport*, 369 NLRB No. 37, slip op. at 1 (2020). Applying *SuperShuttle*, the Board determined that the drivers were employees. *Id.* First, unlike in *SuperShuttle*, the drivers had “limited discretion to determine when they work, less discretion to decide what loads to haul, and no discretion to decide to work beyond the end of their shift.” *Id.* at 2. The drivers could choose which days to work and when to start, but *Intermodal Bridge Transport* assigned the drivers to either the day or night shift. *Id.* When they report to work, they had to choose their first assignment and then the

dispatchers controlled the flow of their work by providing assignments. *Id.* Second, the drivers did “not have their own routes, let alone a proprietary interest in routes that they can sell or transfer, nor can they hire employees to work in their stead.” *Id.* Third, Intermodal Bridge Transport controlled the drivers’ compensation and expenses. *Id.* at 2-3. Finally, the drivers did not have to make “a significant initial investment or take on a serious risk of loss to enter into a relationship” because the truck was provided by the Respondent, the truck was leased to the drivers for an assigned shift that they had to return at the end of their shift, the drivers only had to pay for the use of trucks on the days they choose to drive, and the drivers did not have any fixed weekly or monthly fees that they had to pay to Intermodal Bridge Transport. *Id.* at 3. On those facts, the drivers did not “have any meaningful opportunity for economic gain (or run any meaningful risk of loss) through their own efforts and initiative.” *Id.*

3. Nolan Enterprises, Inc. d/b/a Centerfold Club

Most recently, the Board held that dancers at a club were employees under the Act. *Nolan Enterprises, Inc. d/b/a Centerfold Club*, 370 NLRB No. 2, slip op. at 1 (2020). Unlike the high degree of autonomy afforded to the drivers in *SuperShuttle*, the club “exercise[d] significant control over the dancers’ day-to-day work (through extensive rules, expectations, supervision, fines, and penalties), their work environment, and the customer base.” *Id.* Furthermore, the dancers made minimal investment and had minimal economic risk. *Id.* Finally, the club’s revenue was tied to the dancers’ performance. *Id.* Thus, the dancers lacked sufficient opportunity for economic gain to render them independent contractors. *Id.*

Based on this overview of post-*SuperShuttle* cases, the Board’s analysis of the common law factors through the lens of entrepreneurial opportunity is not being used as a vehicle to deny Section 7 rights under the National Labor Relations Act.

VI. SUPERSHUTTLE STRIKES THE RIGHT BALANCE FOR PRESERVING INDEPENDENT BUSINESS MODELS

Myriad reasons exist for preserving the viability of the independent contractor model, which provides efficiencies that are not available in the employer-employee model. Certain types of business do not function within the typical constraints of the employer-employee relationship. As Professor James T. O'Reilly points out in his article juxtaposing entrepreneurs and agency regulation, "both smaller entrepreneurs and larger, more established firms know that one size does not fit all: flexibility and responsiveness to differing needs are very important to the success of the innovator-entrepreneur." James T. O'Reilly, *Entrepreneurs and Regulators: Internet Technology, Agency Estoppel, and the Balance of Trust*, 10 *Cornell J.L. & Pub. Pol'y* 63, 70 (2000). Not all types of work are available on a regular basis and in a steady stream between nine and five on weekdays. "[U]sing independent contractors gives companies advantages in handling uncertainty in demand and future conditions, as well as allowing the flexibility to scale up or down" Josh Eidelson, *FedEx Ground Says Its Drivers Aren't Employees. The Courts Will Decide*, *Bloomberg Businessweek*, Oct. 17, 2014 (citing Yale management professor James Baron) <https://www.bloomberg.com/news/articles/2014-10-16/fedex-ground-says-its-drivers-arent-employees-dot-the-courts-will-decide>. Moreover, not all types of work that align with the core service of a business can be efficiently performed with a set number of employees. For example, the classification of independent contractors is vital to platform-based businesses. *See* Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?*, 11 *Wm. & Mary Bus. L. Rev.* 733, 739 (2020). In addition, not all workers want to be controlled by or tied to an employer at the level the employer-employee relationship demands. "Fewer than 1 in 10 independent contractors said they would prefer a traditional work arrangement. Individuals who opt for independent contracting - who tend to be

older, highly educated individuals who work in relatively high-paying management, business, and financial operations occupations - have a strong desire to preserve personal choice in arranging the conditions of their employment.” *See* Karen R. Harned et. al., *Creating A Workable Legal Standard for Defining an Independent Contractor*, 4 J. Bus. Entrepreneurship & L. 93, 98 (2010) (internal quotations omitted). As the marketplace changes, both employers and individuals enjoy lower costs and increased satisfaction due to the independent contractor model. *See id.* at 98-99. This is especially true given that “[t]he rise of Millennials participating in the marketplace has created a demand for convenient, affordable services offered by individuals in the community. To name a few, Airbnb for lodging alternatives, TaskRabbit for odd jobs, and GrubHub for food delivery. These companies are attractive to workers because they offer more flexibility than a conventional job.” Richard B. Keeton, *An Uber Dilemma: The Conflict Between the Seattle Rideshare Ordinance, the NLRA, and for-Hire Driver Worker Classification*, 52 Gonz. L. Rev. 207, 276 (2017). These types of interests and efficiencies lead businesses to devise their business models, and most do not structure their businesses to circumvent the NLRA.

CONCLUSION

For the foregoing reasons, SHRM urges the Board to reaffirm the *SuperShuttle* independent contractor standard and to preserve the independent contractor model as a viable alternative in today’s work marketplace.

Respectfully submitted this 10th day of February, 2022.

SHRM, THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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EXHIBIT A

Want Your Business To Thrive?

Cultivate Your External Talent



SAP SuccessFactors 



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Executive Insights

- › The external workforce includes many different types of nontraditional work arrangements, including independent contractors, temporary workers, online task contract workers, freelancers, service delivery contract workers, on-call contract workers, subcontractor workers, and others.
- › Various estimates suggest that 16.5 million¹ to 56.7 million² U.S. workers currently work outside of traditional employer-employee arrangements. More than a third have an external job as a primary or secondary job.³
- › Despite a common belief that workers engage in external work because they can't find anything better, external workers have a variety of motivations. Almost one in five workers in our study said they preferred external work, and 45% explained that they saw advantages in both types of work but just happened to be doing external work. The most commonly cited reasons for becoming an external worker were "being able to set my own schedule," "choosing how many hours I work," and "choosing my work location."
- › Broadly, internal employees working alongside external workers did not think that external workers had changed their work experience. Although they expressed a slightly elevated concern over job security, job satisfaction, and their company's culture, they noted that working with external workers made their organization's performance better. Managers felt that the effect of external workers on their internal employees was generally neutral but felt more strongly than internal employees that external workers led to greater gains in worker productivity and organizational performance.
- › Managers and HR professionals both overestimated the extent to which the chance at an internal position or additional contract work motivated external workers, and somewhat underestimated external workers' interest in bonus compensation for good work.
- › Nearly one in five managers said that their organization was slightly effective or not at all effective at "attracting, sourcing, and selecting the right quantity and quality of external workers." One in five also felt that their organization was slightly or not at all effective at onboarding external workers.
- › Nearly nine in ten HR professionals agreed or strongly agreed that "external workers positively contribute to the business productivity of my organization." Yet HR, as a group, is quite worried about the legal implications of external work. Nearly three-quarters of HR professionals reported some level of concern and one in ten was very concerned.

1. <https://www.bls.gov/news.release/conemp.nr0.htm>

2. Freelancing in America: 2018, Freelancer's Union and Upwork, October 2018

3. The Gig Economy and Alternative Work Arrangements, Gallup, 2018

Introduction

Much has been written about the “gig economy” and the changing workplace over the last few years. While estimates vary broadly based on study methodology, somewhere between 16.5 million and 56.7 million U.S. workers currently work outside of traditional employer-employee arrangements. Gallup estimates that 29% of U.S. workers have an external job as their primary job, and 36% of all U.S. workers participate in nontraditional work as a primary or secondary job. It is common for people whose main work is as an internal employee to do external work as well. In fact, Deloitte reports that 64% of millennial full-time workers want to “do side hustles to make extra money.” While a strong economy and low unemployment seem to have tempered growth in full-time external work in the last year or two, they appear to have also made available more opportunities for part-time external work, so a holistic view of external nonemployee work suggests that it will only grow in the future. In a recent study of executives, 65% said that the external workforce is important or very important to operating at full capacity and meeting market demands.

While there have been several recent studies exploring the phenomenon of external workers in the last several years, most have either focused on a single component of the nontraditional workforce (e.g., the gig economy) or explored the issue from a single perspective (e.g., executives). In this research program, the Society of Human Resource Management (SHRM) and SAP sought to explore the topic quite broadly, incorporating all types of nonemployee work—which we call “external work”—from the points of view of managers, human resources professionals, internal employees who share their workplaces with external workers, and external workers themselves. Our goals were to explore the landscape of external work, reveal areas in which the constituencies had disparate views of external workers and external work, and find opportunities for organizations to improve business outcomes and the experience of external workers.

4. <https://www.bls.gov/news.release/conemp.nr0.htm>

5. Freelancing in America: 2018, Freelancer’s Union and Upwork, October 2018

6. The Gig Economy and Alternative Work Arrangements, Gallup, 2018

7. The Forces Reshaping How Work Gets Done, SAP Fieldglass/Oxford Economics, 2018

8. Freelancing in America: 2018, Freelancer’s Union and Upwork, October 2018; Agents of change: Independent workers are reshaping the workforce, Kelly Services, September 2015; The rise and nature of alternative work arrangement in the United States, 1995-2015, Katz & Krueger & Rand Corporation, March 2016; Independent Work: Choice, necessity and the gig economy, McKinsey Global Institute, October 2016; The Gig Economy and Alternative Work Arrangements, Gallup, 2018; External Workforce Insights 2018: The Forces Reshaping How Work Gets Done, SAP Fieldglass/Oxford Economics, 2018

Who Are External Workers?



Who are External Workers?

Types of External Workers

We looked at six broad categories of external work for this study.⁹ It is important to note that a given worker may perform more than one type of external work (figure 1).

In this study, 940 external workers sourced from National Opinion Research Center's (NORC's)

national representative AmeriSpeak® Panel were surveyed about their experiences as external workers. Their responses were weighted to reflect the U.S. adult general population. (See Survey Methodology for more complete information.)

Respondents represented a broad range of external work types (figure 2), and both full and part-time

FIGURE 1 Types of External Workers

Independent contract work	Workers find customers or companies either online or in person who pay them directly to fulfill a contract or provide a product or service. Examples include an independent consultant or a freelance worker.
Online task contract work	Workers are paid for doing tasks done entirely online and the companies they contract with coordinate payment for the work. Examples include transcribing information, completing surveys, or completing online personal assistant activities such as booking appointments.
Service delivery contract work	Workers are paid for performing short in-person tasks or jobs for customers who they meet through a website or mobile app. Examples include using your own car to drive people from one place to another, delivering something, or doing someone's household tasks or errands.
On-call contract work	Workers are paid for doing work where they are prequalified and placed in a pool of people who can be called "on an as needed basis" to cover specific work shifts or assignments. This may vary from working a few hours to working several days or weeks in a row. Examples include substitute teachers and construction workers supplied by a union hiring hall.
Subcontractor work	Workers are paid by a company that contracts services out to other organizations. Examples of work include security, landscaping, computer programming, construction, project management, or maintenance.
Temporary work	Workers are paid by a temporary service or staffing agency that contracts time out to other organizations to perform temporary tasks and jobs. Examples of work include manual labor, administrative tasks, and other activities that can be performed with little or no advanced training.

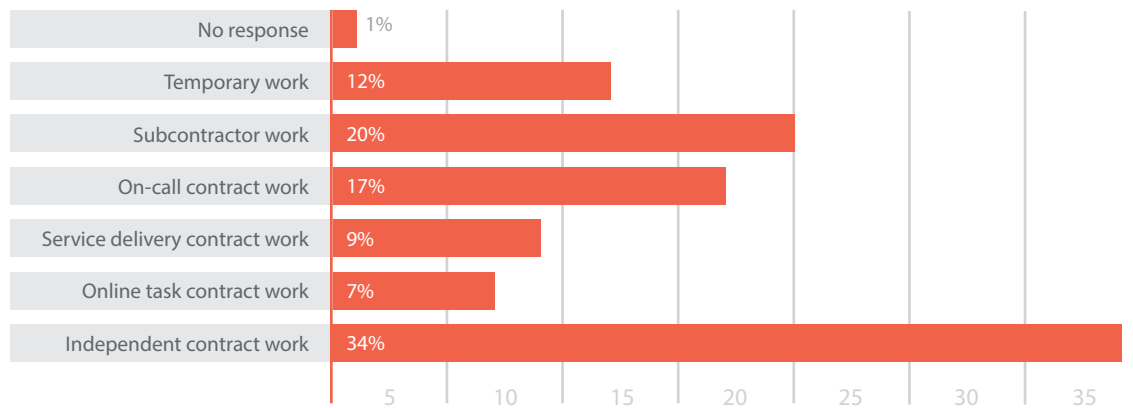
9. The Gig Economy and Alternative Work Arrangements, Gallup, 2018

workers. While independent contractors were the largest portion of our sample, each of the six categories of external work were represented.

About half of external workers reported working with a contract company or agency who places them in roles/assignments (49%), while half (50%) found their external work through some other means.

FIGURE 2

Which of the following most accurately describes the majority of the external work that you do?



External worker motivations

External workers were asked why they do external work, and were provided four options (figure 3). Contrary to common perceptions, the majority of external workers do not say that they are engaged in external work because they can't find better work. Nearly half of all external workers reported that "this is just the type of work I'm doing right now," and among the 11% of external workers who selected other, the most common open-ended responses were "for supplemental income" and "to do something I enjoy." Temporary workers were the only group for whom "I'd prefer an internal job" reached the same level as "this is just the kind of work I'm doing right now." Independent contract workers

were most likely to report a preference for external work, not surprising given that this group includes many highly skilled blue- and white-collar workers for whom independent contractor work often offers autonomy, flexibility, and generous compensation.

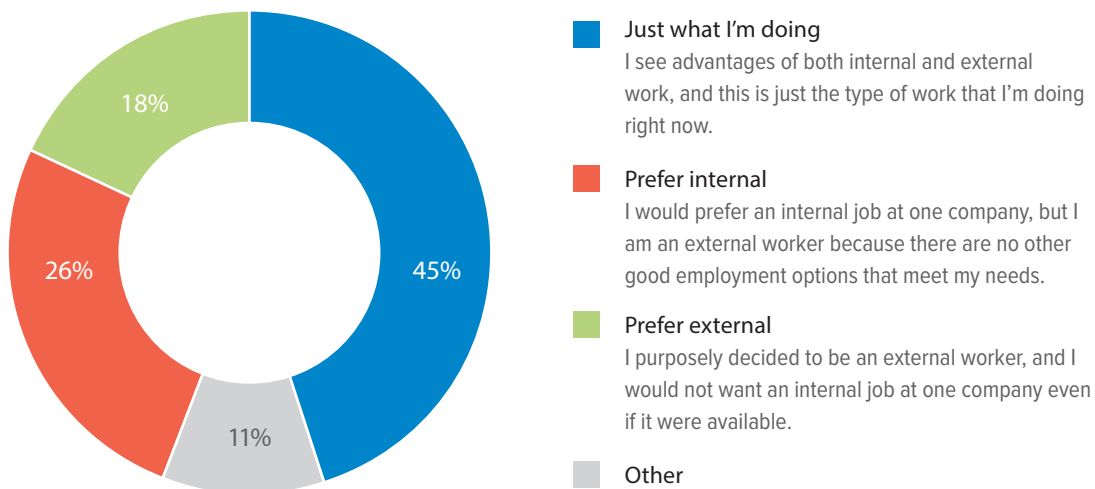
Smaller subgroups of internal employees who were former external workers (N=119), internal employees considering external work (N=74), and internal employees not considering external work (N=155) were asked about the reasons for those decisions. In all cases, their responses reflected a largely realistic view of external work as providing greater flexibility and autonomy, but less job security and stability.

Workers' perceptions of external worker compensation were much less aligned. Although about a third of external workers reported that they can make more money as an external worker, about 42% of those who gave up external work to become an internal employee did so for better pay, and 49% of those employees who are considering external work believe that they would have better pay as external workers.

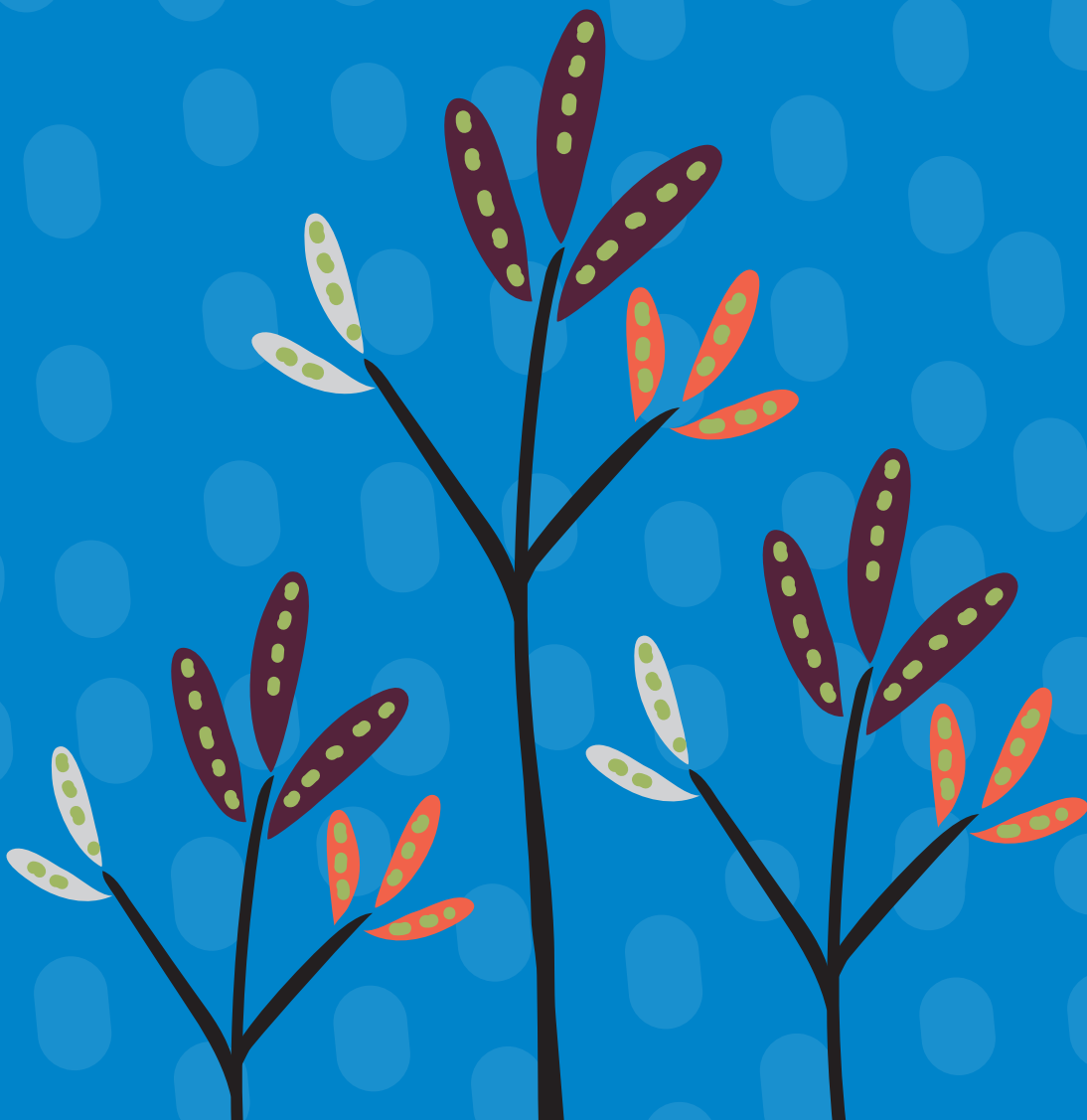
Interestingly, benefits were valued much more by former external workers (62%) than by those content with internal work (43%). For those who left external work, only better job security and stability (68%) exceeded benefits as a reason for change.

FIGURE 3

Why external workers do external work



Who We Asked— Other Stakeholders



Who We Asked— Other Stakeholders

In addition to the external workers we've already introduced, we gathered the perspectives of internal employees, managers, and HR professionals in our exploration of the external work landscape. In the following sections, we'll introduce you briefly to each of these groups and their perspectives on the external workforce. As we discuss the external worker lifecycle later in this paper, we'll return to these groups to explore their varied perspectives on external work and external workers.

About the Internal Employees

We asked a group of 350 internal employees sourced from NORC's AmeriSpeak Panel to share their thoughts about external work and external workers. Just over a third had done external work at some time in the past. Of those who had never done external work, 30% have considered it.

We also asked them about their experience with external workers. Only 22% reported no experience working with external workers at all, while 5% said they had a lot of experience. Just over 40% of internal employees reported that their organization currently employs external workers, with the

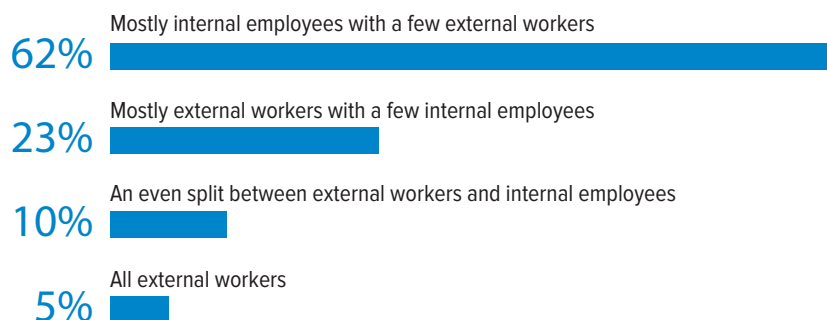
remainder nearly evenly split between those whose organizations don't use external workers and those who don't know if their organization utilizes external workers.

About the Managers

We included a group of 424 managers who supervise external workers sourced from NORC's AmeriSpeak Panel. The majority manage mostly internal employees, but nearly 40% manage teams comprised of at least half external workers (figure 4). Further, 62% of managers surveyed reported that they have quite a bit or a lot of experience supervising external workers.

FIGURE 4

What is the general composition of the team you've managed over the past 12 months?



We also looked at the broad types of work that managers reported their organizations are using external workers for, as we suspected that there might be notable differences in organizations that allocate different kinds of work to external workers. Physical tasks were selected by nearly half (48%) of managers, but almost as many (45%) indicated that their organizations use external workers for knowledge-based tasks. Almost 30 percent (29%) indicated their organizations use external workers for customer service tasks, and almost a quarter (24%) indicated that their organizations choose to outsource entire functions (e.g., call center, security, or IT).

Finally, as a measure of the change in use of external workers, we asked managers how the number of external workers they supervise has changed over time. Results were very balanced: about half (49%) report the number to be about the same, while about a quarter (27%) said they have fewer external workers, and another quarter (23%) said they have more.

About the HR Professionals

Our understanding of the view of external workers held by HR professionals was informed by a SHRM survey that included a total of 1,175 members in a broad variety of sectors, industries, organization size, and parts of the United States. Of those members surveyed, 83% reported that their organization uses external workers.

Of those who reported not using external workers, the most popular response (50%) when asked “Why does your organization not use external workers?” was a simple preference for internal employees. Only 7% indicated that they do not hire



external workers because of legal risk or difficulty maintaining compliance.

The appeal of external workers among organizations not already using them was minimal; only 15% of HR professionals from these organizations thought that using external workers would probably or definitely add value. Only one in five HR professionals in organizations not using external workers wished they had the option of using them. But more than two-thirds of those HR professionals nonetheless acknowledged that doing so would allow them to access talent with special skills or expertise.

Among the 975 HR professionals who reported that their organization uses external workers, almost half (46%) indicated that they have quite a bit or a lot of experience with external workers. In most organizations, external workers make up a small portion of the workforce. Ninety percent of HR professionals said that external workers make up less than 20% of their workforce, and more than half said that external workers comprise less than 5% of their workforce.

Though it is often speculated that organizations turn to external workers to save money, less than 20% of HR professionals indicated that their organization uses external workers to save money. Instead, the

three most commonly cited reasons for utilizing external workers were the following:

- Flexibility to increase and reduce workforce based on business demands **(53%)**
- Access to specialized talent with specific skills or expertise **(48%)**
- Staff specific projects and initiatives **(48%)**

In fact, our results suggest that external work can be a gateway to internal work—almost nine of ten HR professionals report that their organizations often (21%) or sometimes (67%) convert external workers to internal employees.

Different Points of View



Different Points of View

We asked external workers, managers, and HR professionals parallel questions about the kind of external work they primarily do (external workers) and the kinds of external workers in their organizations (managers and HR). We believe it is important to point out the differences in the kinds of external work with which each of these groups are familiar, as these varied perspectives will no doubt influence their thinking about and experience of the stages of the external worker lifecycle.

While external workers are influenced by others around them, their thoughts about external work are grounded in their own experiences. Likewise, managers who supervise several or many external workers will have a perspective from interacting with different kinds of external workers and observing how they fit into teams. HR professionals are likely

to have the broadest view of external work in organizations, but not all external workers come into organizations through HR. In fact, the number of HR professionals who reported that their organizations bring external workers in through a combination of means was nearly as great as the number who reported that external workers come through HR only (figure 5). Nonetheless, more than three-quarters (77%) of HR professionals reported that HR's role in hiring external workers was appropriate, with 20% wishing that HR had a larger role.

These varied experiences lead to some striking differences. While temporary workers were one of the smallest groups represented in the external worker survey, they dominated the external workers reported in workplaces by both managers and HR. Online task contract work, service delivery

FIGURE 5

Which of the following groups are involved in the hiring of external workers in your organization?

- Through HR only
- Through a combination of more than one department or function
- Through another function, without the involvement of HR (e.g. Procurement, Operations)
- Operational managers bring in external workers directly

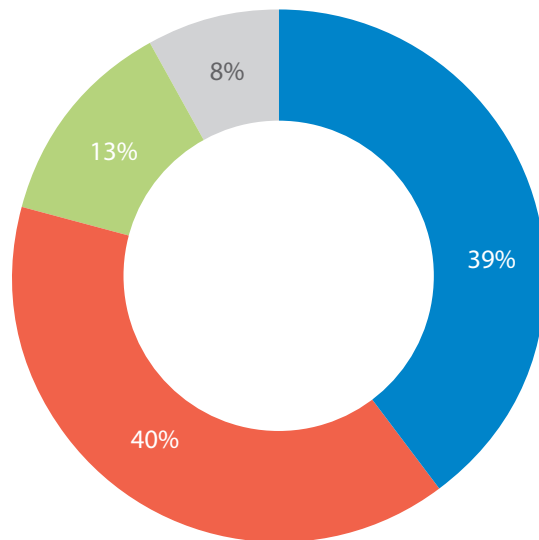


FIGURE 6

Workers: What is the primary type of external work you do?
 Managers: Which types of external workers have you managed in the last year?
 HR: Which types of external workers does your organization use?



contract work, and on-call contract work were all reported more often by managers than by HR, likely reflecting the fact that workers in these categories are more likely to enter an organization through direct manager hires or procurement than through a traditional HR pathway. We caution the reader to bear in mind these different points of view when evaluating the other findings of this study. That being said, we undertook this research to investigate the full spectrum of organizations' and workers' experience of external work, so the questions

we've asked are generally applicable across all different types of external workers/work, with the conclusions drawn being broad in nature. Further, where there are notable differences based on type of external worker, type of external work, or organization, we have noted these accordingly. If they aren't noted, the findings that have been shared and conclusions that have been drawn are generally applicable to the external workforce and organizations that employ them.

The External Worker Lifecycle



The External Worker Lifecycle

Each of the groups we talked to during this project has a different perspective on the stages of the external worker lifecycle, but the stages of the lifecycle are important to all of the stakeholders in external work (figure 7).

Planning

For an individual, he or she needs to engage in a decision-making process about whether to pursue internal or external work. When asked to identify the factors that made them decide to become an external worker, the top three reasons external workers identified all addressed flexibility—setting one’s own hours, schedule, or work location (figure 8). As evident in the chart below, responses indicating that the worker had little choice in becoming an external worker were the least endorsed.

For workers looking for increased flexibility, external work may have greater appeal than an internal position, and organizations hoping to reap the benefits that an external workforce provides (most notably, organizational flexibility) must be aware

that flexibility is often also crucial to those they are employing as external workers (figure 8).

From the organizational point of view, effective organizations plan which kind of work or roles make strategic sense to fill with external workers. We asked HR professionals about how external workers were distributed in their organizations and learned that, in most organizations, external workers are concentrated in certain functions (figure 9).

The skills of an organization’s current internal workforce and possible external talent pool are also key to effective “total workforce” planning. About 60% of HR professionals report that they use external workers to fill skills gaps in their internal workforce, but 45% of them also feel that there is a skills shortage among external workers. Most HR professionals (52%) report that their organization hasn’t had difficulty recruiting external workers in the last year, and 50% reported that it is somewhat or extremely easy to hire external workers (figure 10).

FIGURE 7

The external worker lifecycle

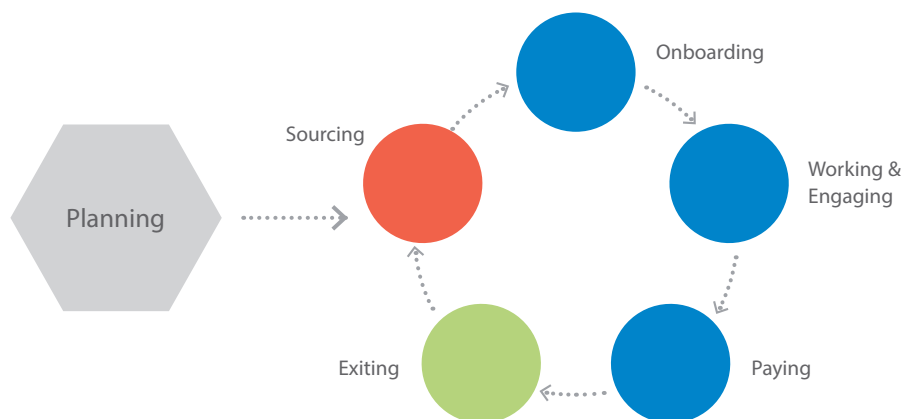


FIGURE 8

Please select the top three most important factors that made you decide to become an external worker.

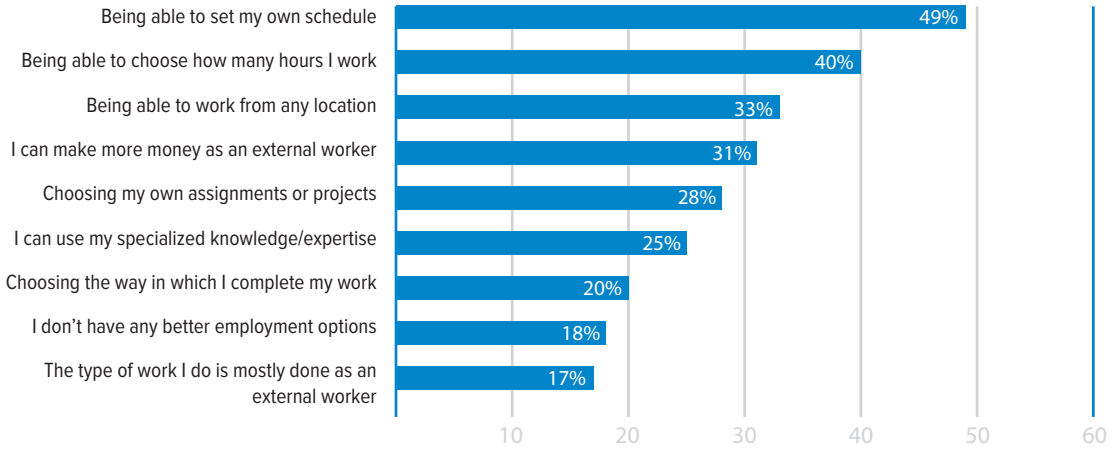


FIGURE 9

Generally, what has been the distribution of external workers across your organization in the past 12 months?

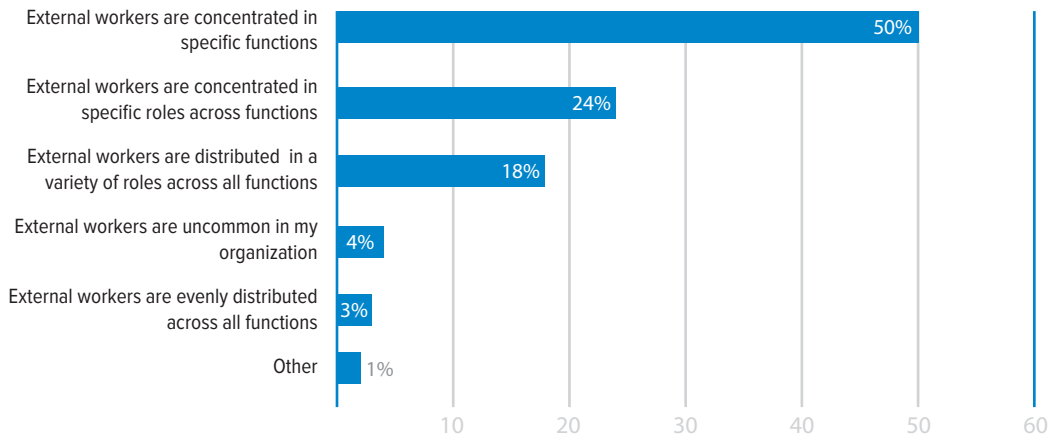


FIGURE 10

Difficulty hiring external workers



Sourcing

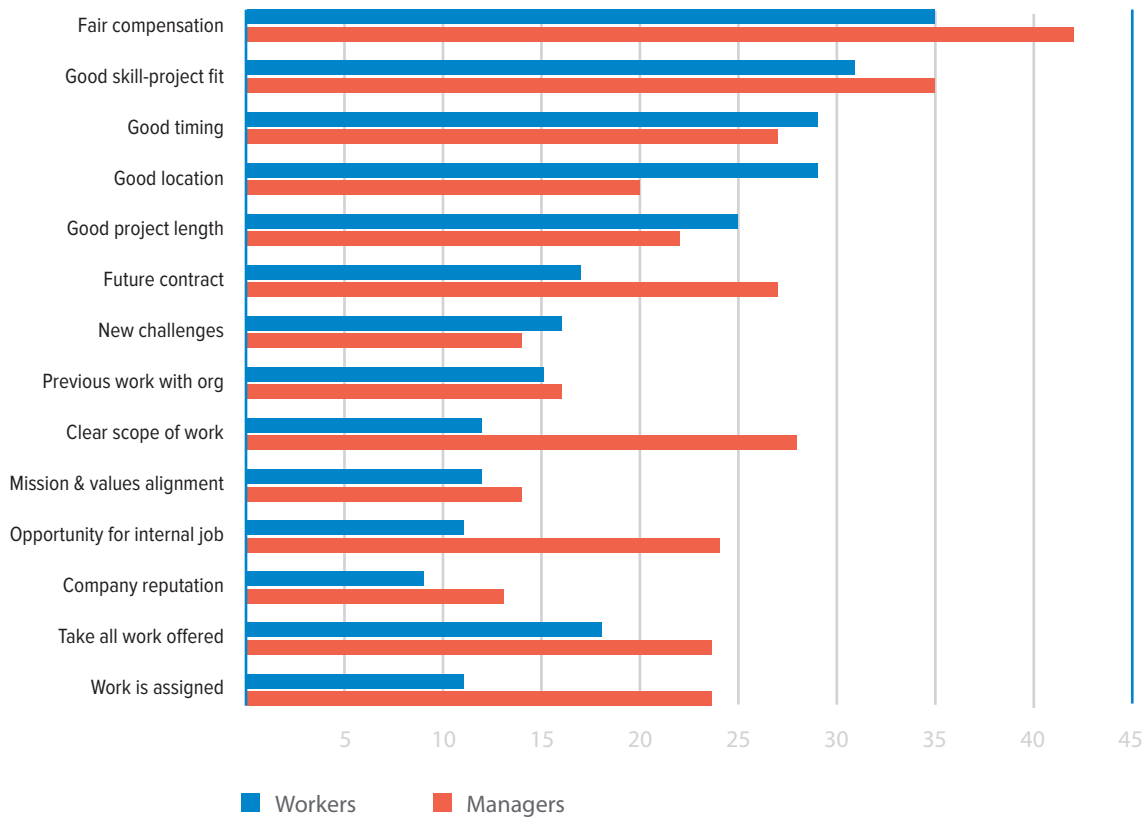
As external work is, by nature, temporary, the sourcing of external workers by organizations and sourcing of work by external workers are ongoing processes for both constituencies. HR professionals report that they use a wide variety of methods for sourcing external workers, in part reflecting the diversity of external work roles. The majority of HR professionals (59%) report that their organization uses several hiring or talent agencies, and nearly a third (31%) report that personal connections with

external workers are important. The use of web platforms (e.g., Upwork, Fiverr) was cited by 9% of HR professionals.

In order to evaluate the degree to which external workers and those who manage them are aligned in understanding the motivations of external workers, we asked them about the three most important factors that they value (as external workers) or thought external workers value (as managers) when deciding to take a specific project or assignment (figure 11).

FIGURE 11

Three things that are most important to external workers when they decide to take a specific project or assignment



In general, external workers and their managers are fairly well aligned in their perspectives, but there are some striking differences. Managers underestimated the extent to which location is important to external workers. They greatly overestimated the extent to which external workers are motivated by the chance to do more work at their organization (27% of managers versus 17% of external workers) and by the chance to become an employee (24% of managers versus 11% of external workers). Finally, although 28% of managers thought that external workers want a clear scope of work, only 12% of external workers cited this as one of their top three motivations. Instead, along with good location, external workers prioritize fair compensation, a good fit between their skills and the project, and good timing when selecting a role or assignment.

Onboarding

Even organizations with robust onboarding for new

internal employees may fall short when it comes to orienting and socializing new external workers. Less than half of external workers (44%) report that most workplaces make a point to make them feel welcome when they begin a new assignment or project, and 11% report that most workplaces do nothing to make them feel welcome. Less than half of HR professionals (47%) report that they have a standard onboarding process for external workers, and 11% report that they have no onboarding. Interestingly, among those organizations with external worker onboarding, 61% say they provide similar onboarding to that used with internal employees.

Managers and external workers are fairly well aligned on what new external workers need to get started, both citing “training necessary to help them do their work” and “opportunity to get to know the people they will be working with” as the most important prerequisites (figure 12).

FIGURE 12 Three factors that are most important in helping new external workers get started



Working and Engaging

When we look at the extent to which external workers, their internal employee colleagues, and managers view their treatment by internal employees and supervisors, the differences, though not large, are quite striking (figures 13 and 14).

External workers feel more strongly about their treatment, being both more likely to say they are treated well and more likely to say they are not treated well, as compared to the views of internal employees and managers.

FIGURE 13 Internal employees treatment of external workers

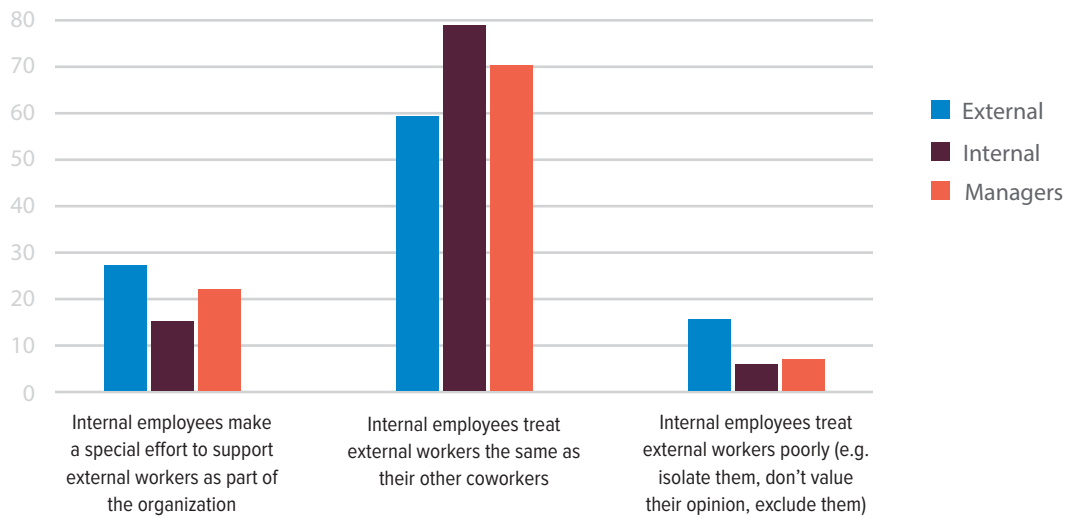
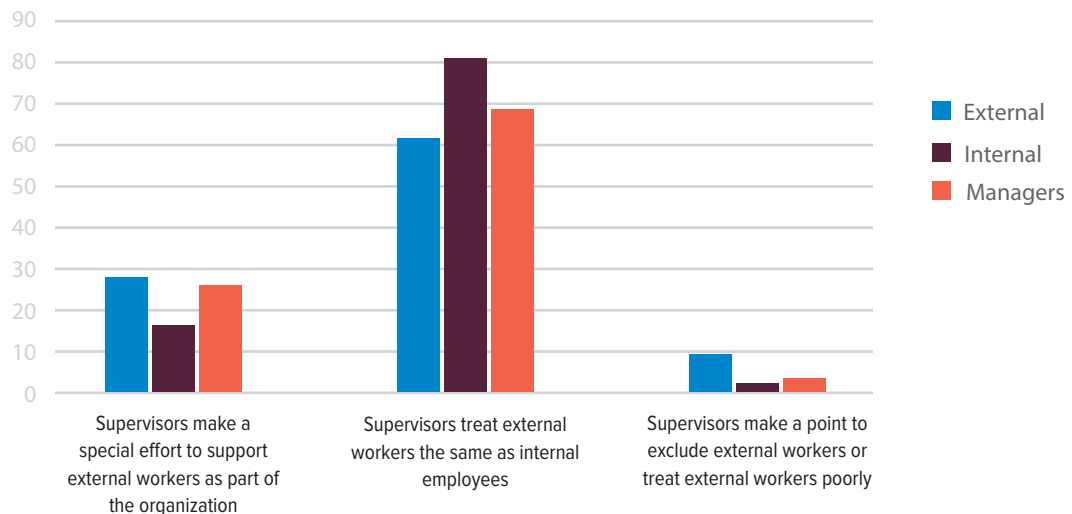


FIGURE 14 Supervisor treatment of external workers



We asked external workers both how important it is for them to feel valued by and connected to the company or individual they are working for and how often they feel valued and connected. More than half (54%) rated it as very important or absolutely essential, and although only 14% reported that they always feel valued, another 59% reported that they feel valued very often or often.

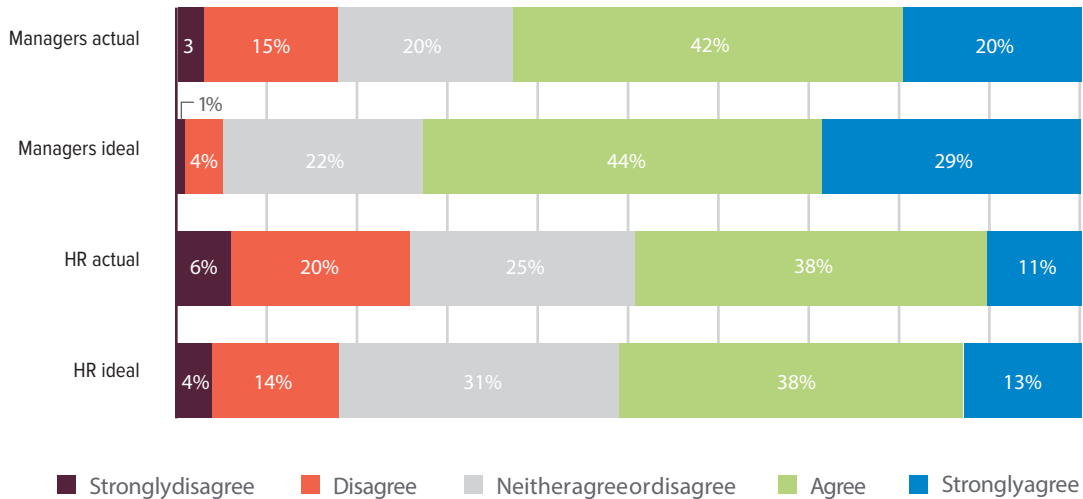
Even those external workers who work with others in a company setting have varied levels of interaction with the internal employees of the company they are working for. About a quarter of external workers

said they interact sometimes, often, or very often, respectively, 19% said always, and only 5% said they never interact with internal employees.

We asked both managers and HR about how integrated external workers and internal employees are on teams within their organizations, and the extent to which they thought complete integration was ideal. Endorsement of complete integration was high in both groups, though the managers felt more strongly that integration is ideal, and also agreed more strongly that this is the current situation in their teams (figure 15).

FIGURE 15

To what extent do you agree that external workers and internal employees are completely integrated within teams at your organization?



Actual = Managers'/HR's perception that external workers and internal employees are completely integrated on a single team

Ideal = Managers'/HR's belief that complete integration of external workers and internal employees on teams is ideal

To understand what motivates external workers, we asked those workers and managers about the top three things that encourage external workers to perform at their best. Both groups cite “being recognized for contributions at work” as the most motivating factor by a considerable margin, and

place high priority on “receiving feedback on my performance,” although managers seemed to overestimate external workers’ interest in becoming employees and being involved in team activities (figure 16).

FIGURE 16

Three factors that encourage external workers to perform their best



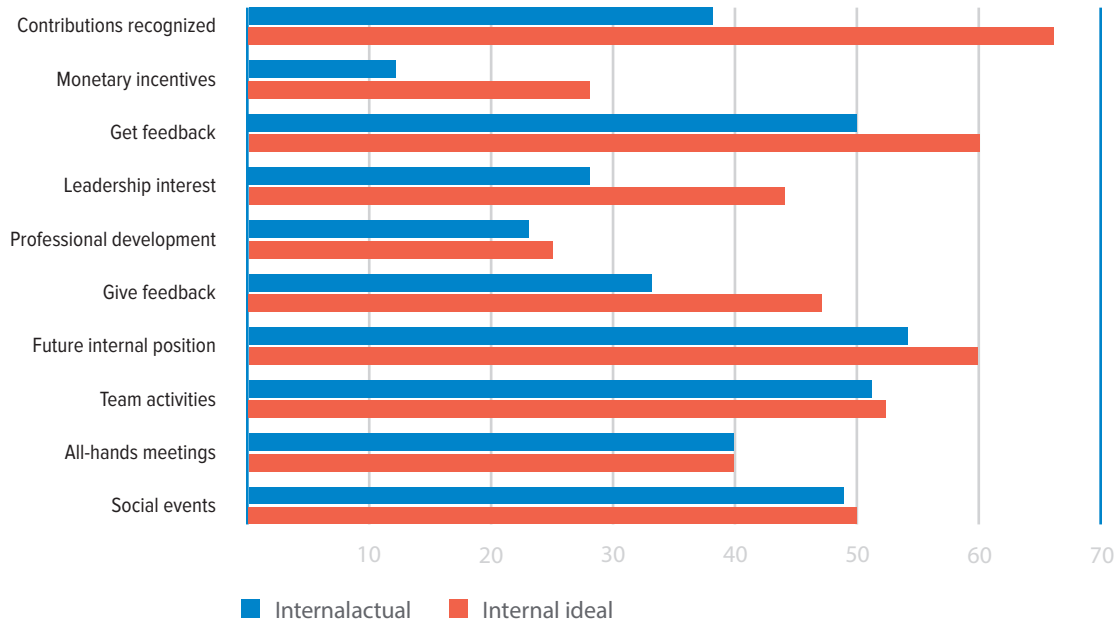
Internal employees’ views on what should be made available to external workers vs. what is made available

Similarly, we asked internal employees which of these things they thought should be made available to external workers, and which are actually available to external workers. In all cases, they believed that external workers are being given these things at

rates equal to or lower than what internal employees thought they should get. Although only 28% of internal employees thought external employees should get bonuses for meeting performance or productivity targets (monetary incentives), only 12% say that external workers do get these bonuses (figure 17).

FIGURE 17

Which of the following should be (ideal) and are (actual) made available to external workers in your organization?



As external workers, managers, and internal employees all placed a high priority on external workers getting feedback, we wanted to know how organizations actually handle performance management for external workers. The largest group of HR professionals (35%) said that their organization leaves performance management up to individual managers, while another quarter reported that they give performance feedback to a third party (e.g., staffing agency). A small number (5%) said that their organization has a system just for external workers.

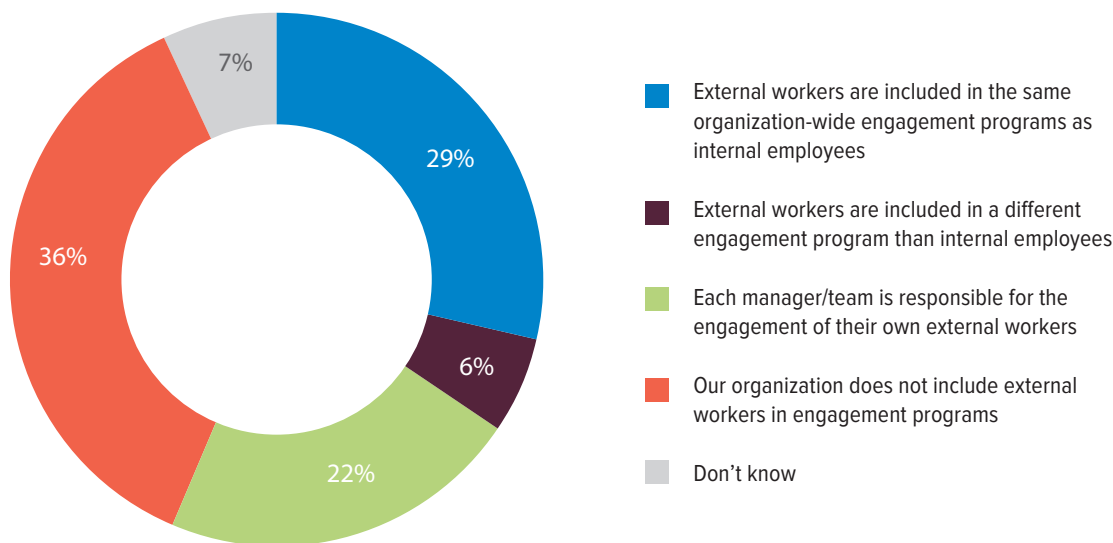
We also wondered what HR did for the engagement of external workers. This was an area in which there was little agreement across organizations. A similar number of organizations included external workers

in engagement programs, excluded them, or left engagement up to managers. Only a small number (6%) had engagement programs specific to external workers (figure 18).

The final element of the external worker experience concerns when something goes wrong. We asked HR professionals if they have “a specific process in place to handle issues that external workers may face (e.g., conflict management, discrimination).” Again, organizations were rather evenly split: 27% use the same policies as for internal employees; 26% refer the problem to a third party (e.g., staffing agency); and 23% have formal policies that apply specifically to external workers. A small number (9%) have no policies or practices to handle external worker issues.

FIGURE 18

How does your organization handle engagement programs for external workers?



Paying

Compensation of external workers can be a fraught issue for the workers and the organizations where they work. First, from the worker perspective, external work has the potential to pay more in some circumstances but can also come with less job and financial security. To better understand the financial worries of external workers, we asked them to what extent they agreed with the following statements:

- As an external worker, money challenges are not a concern for me.
- As an external worker, I feel confident that I have enough money and financial resources to retire comfortably.
- I feel secure about my future as an external worker.

No strong picture emerged; respondents were roughly evenly divided between agreement,

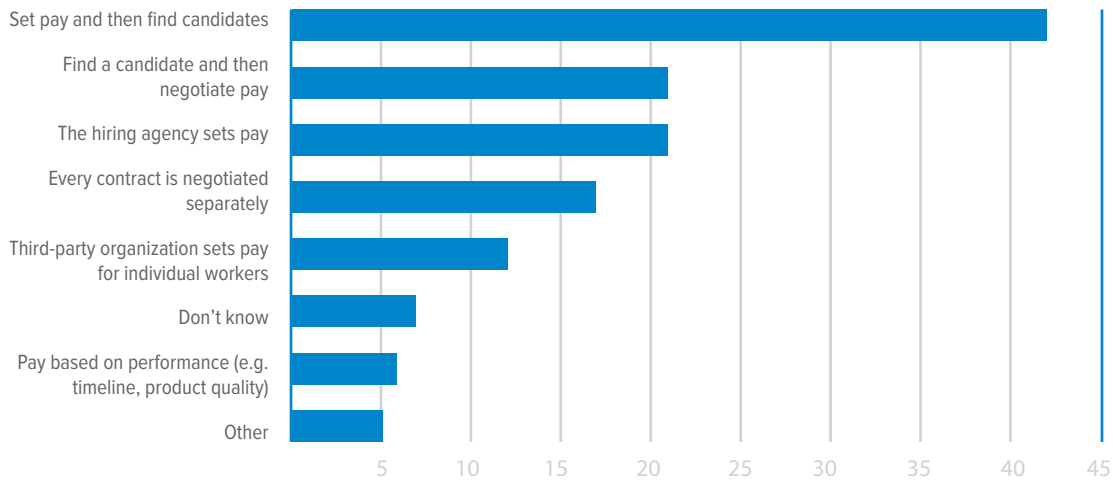
disagreement, and a neutral position across the three statements, conveying, once again, that external workers have very different perceptions about their experiences working in this capacity.

Second, from the organizational perspective, HR professionals were asked how their organizations “set appropriate pay for external workers.” The diversity of responses seems to reflect the wide variety of external workers that organizations engage, although setting pay prior to finding candidates was by far the most common response (figure 19).

While the current regulatory landscape curtails the options that organizations have for providing compensation beyond just pay, we wanted to know what external workers would most value, and what organizational representatives believed they would most value if all options were open. There were some notable differences.

FIGURE 19

Which of the following methods does your organization employ to set appropriate pay for external workers?



Managers and HR thought healthcare benefits would be more appealing to external workers than they conveyed; we hypothesize that many people who become external workers have benefits from another source. On the other hand, external workers expressed a greater interest in retirement benefits than managers or HR expected.

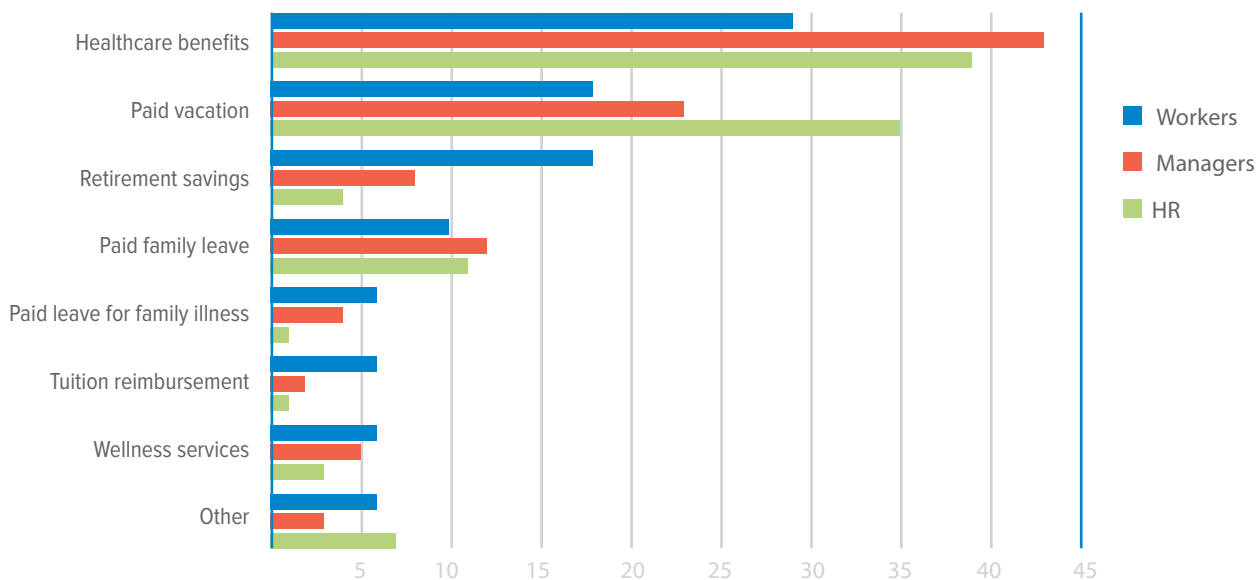
Organizations have opportunities to compensate workers in ways other than pay. For example, other studies suggest that independent workers may find it harder than internal employees to find opportunities to develop new skills and that opportunities for self-improvement are often cited as appealing by external workers. We asked HR professionals if their organizations “have professional development opportunities (e.g., mentoring, stretch assignments) for external workers.” Although 65% responded that they don’t provide professional development opportunities,

19% reported providing them for some external workers and 8% for all external workers.

Organizations have shied away from providing training to external workers due to ambiguity in interpretation of the Internal Revenue Service (IRS) guidelines stating that periodic or ongoing training about procedures and methods is strong evidence that the worker is an employee. Yet the Occupational Safety and Health Administration (OSHA) rules make staffing agencies and host employers jointly responsible for maintaining a safe work environment for temporary workers—including ensuring that OSHA’s training requirements are fulfilled. We asked HR professionals if their organization “provides training (e.g., safety, process/procedure) for external workers.” Only 11% of HR professionals indicated that they didn’t provide training for any external workers; 38% provide training for some; and 48% provide training for all external workers.

FIGURE 20

Which one of the following benefits, if provided in addition to pay, do you believe would most motivate you/external workers to work for a certain company?



Exiting

In discussions with HR professionals and business leaders, it became clear that few organizations do much planning for the end of an external worker engagement. Even organizations that have invested effort in the employee exit experience have often overlooked the external worker’s exit, even though an inherent feature of using external workers is frequent and planned exits.

We asked external workers to reflect on their experiences ending their assignments and exiting organizations. The chart below shows the three statements to which external workers responded (figure 22). Three-quarters of external workers said that all three statements applied at least somewhat, and more than a third reported that they applied a

great deal. Yet, less than a third of HR professionals (30%) report that their organization maintains contact with previous external workers. This suggests that organizations might quickly see value in developing systems to allow them to keep track of and stay in contact with prior external workers.

When we look at the exit experience of an external worker from the organizational and worker perspectives, we once again find managers and HR somewhat out of step with external workers (figure 21). While the chance at another contract with the company was one of the two things that external workers most value, both managers and HR overestimated its importance, and they underestimated the importance of a bonus (drastically, on the part of HR). And managers did

not think that external workers value being thanked as much as they actually do (figure 22).

Although external workers don't say that providing feedback to their worksite is a top priority, HR professionals have shared anecdotes about how

valuable the information is that they gain from external workers during exit interviews. Yet, only 41% of HR professionals indicate that their organizations do exit interviews with external workers. For many organizations, interviewing departing external workers may be a missed opportunity.

FIGURE 21

How much do the following statements apply to you as an external worker?

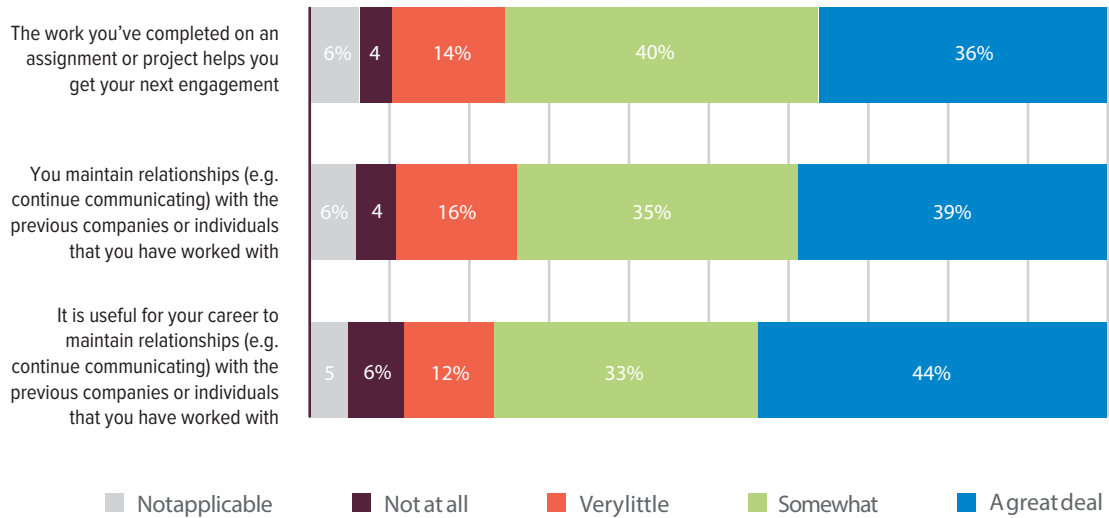
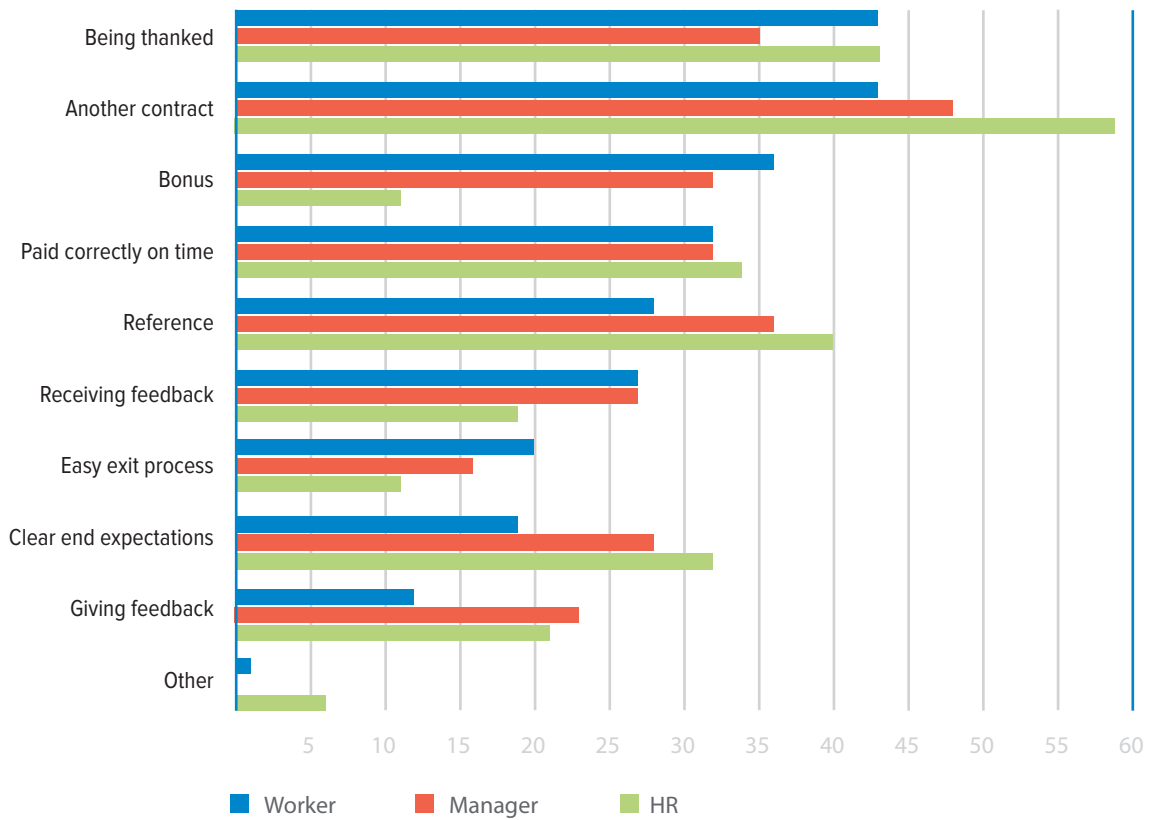


FIGURE 22

Top three things that make external workers feel the most positive about a work experience



Perceptions of Risk/ Reward in the Use of External Workers



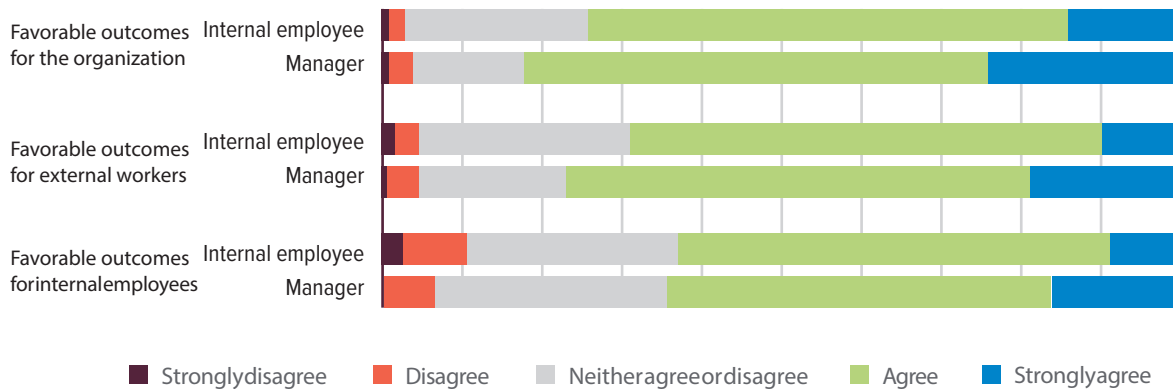
Perceptions of Risk/Reward in the Use of External Workers

We asked internal employees and managers to evaluate whether the use of external workers leads to favorable outcomes for their organizations, external workers, and internal employees. Managers were more strongly positive than internal employees

but, with the exception of a few concerns among internal employees about whether external workers lead to favorable outcomes for them, both groups had only very small negative sentiments (figure 23).

FIGURE 23

To what degree do you agree that your organization’s use of external workers leads to favorable outcomes?



The Internal Employee View

We asked internal employees if they have had a positive experience working alongside external workers, and 58% of them agreed or strongly agreed that they had. An additional 36% neither agreed nor disagreed.

We also wanted to know to what extent internal employees find external workers to be a threat. Overall, the main theme was that internal employees

only 5% have had a negative experience working with external workers

do not think that external workers have changed their work experience very much. Many noted that working with external workers has made their organization’s performance better. There were

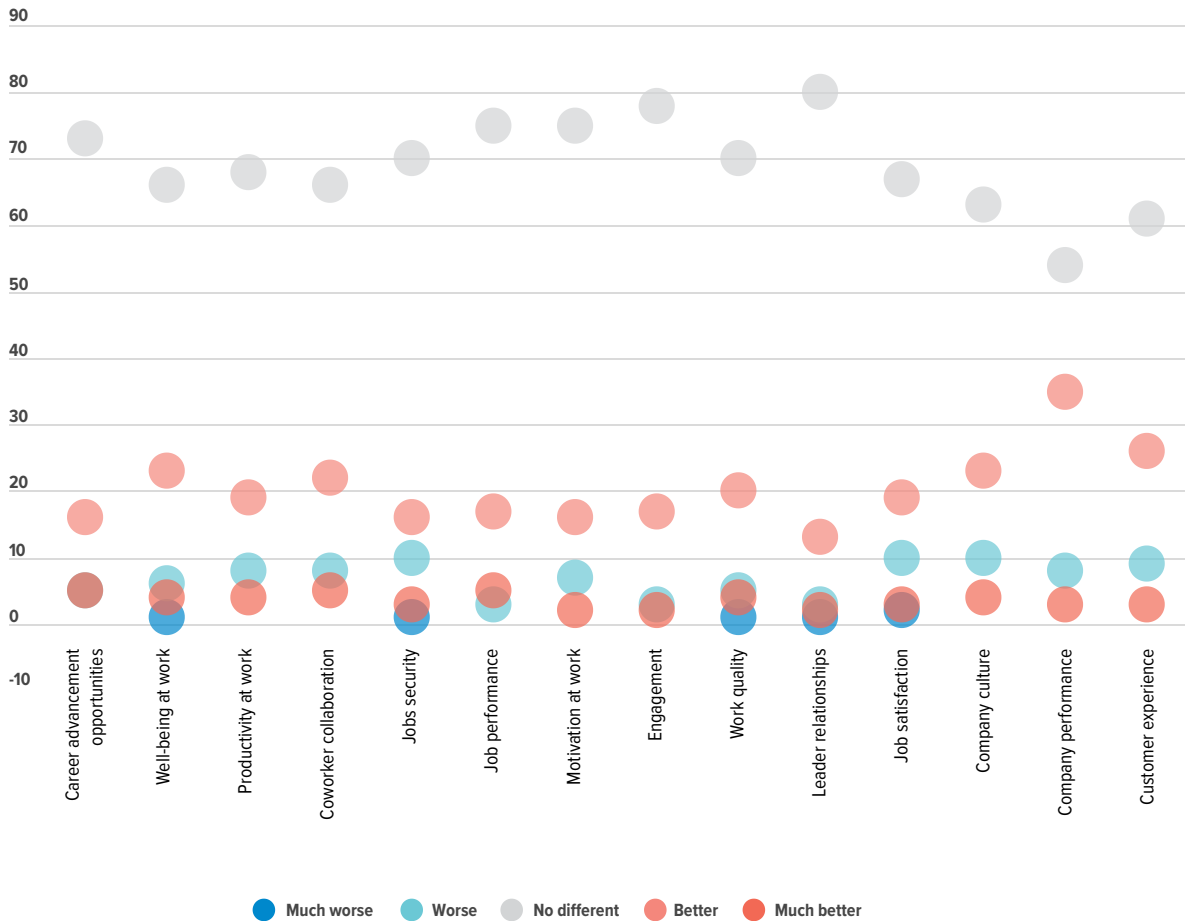
three areas in which internal employees expressed somewhat elevated concern that external workers are making their experience worse: job security, job satisfaction, and their company’s culture (figure 24).

Finally, we asked internal employees to tell us how likely they would be to take several actions, based

on their experience working with external workers. Less than a quarter of internal employees said that they were likely or extremely likely to look for external work themselves, but 44% of them would be likely or extremely likely to recommend that their organization hire an external worker to fill a needed role.

FIGURE 24

In your overall experience, what effects have external workers had on you and your organization?



The Manager View

One of our interests with managers was to learn how different they found the experience of managing external workers from that of managing internal employees. We asked them to consider the external workers that they've been managing in the last twelve months and rate their level of agreement on a number of statements. While a quarter of managers (26%) agree or strongly agree that legal requirements limit their ability to manage their external workers, and a third (32%) don't find it easy to engage and motivate their external workers, managers of blended teams generally report positive experiences managing external workers (figure 25).

We also asked managers to select the top three benefits and challenges of using external workers. Managers were most pleased with the flexibility and agility that external workers bring to their teams, but they also acknowledged that turnover and transitions, logistics, and cultural alignment of external workers all presented management challenges (figures 26 and 27).

We also asked managers to evaluate the effect of external workers on their internal employees and organization, much as we asked the internal

employees themselves. Managers, like internal employees, generally saw no difference in the experience, but did report greater gains in worker productivity and organizational performance than did internal employees (figure 28).

To better understand how effective managers find their organizations' use of external workers, we had them evaluate each phase of the external worker lifecycle. At least half of managers rated their organization as very or extremely effective with each stage of the lifecycle except staffing and onboarding. Nearly one in five managers (17%) said that their organization was slightly effective or not at all effective at sourcing, defined for managers as "Attracting, sourcing, and selecting the right quantity and quality of external workers." One-fifth (20%) also felt that their organizations were slightly or not at all effective at onboarding (figure 29).

These results are more alarming when paired with the information that nearly one-quarter of managers (24%) selected sourcing as the most critical stage for an organization to have an effective external workforce process, and another 14% said that onboarding was the most critical stage (figure 30).

FIGURE 25

Considering the external workers you've managed in the last 12 months, rate your agreement with the following statements

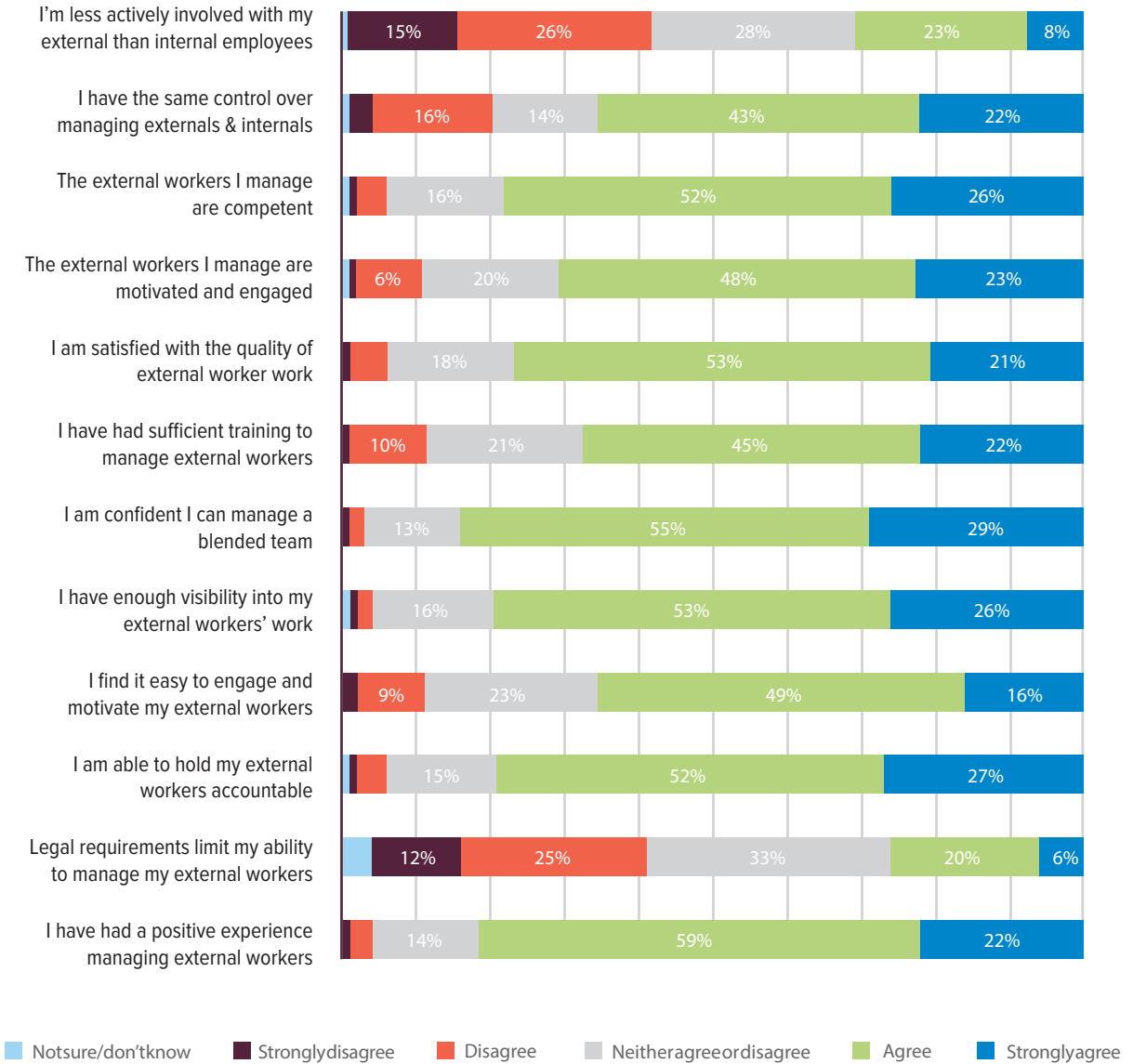


FIGURE 26

Please select the top three benefits of using external workers

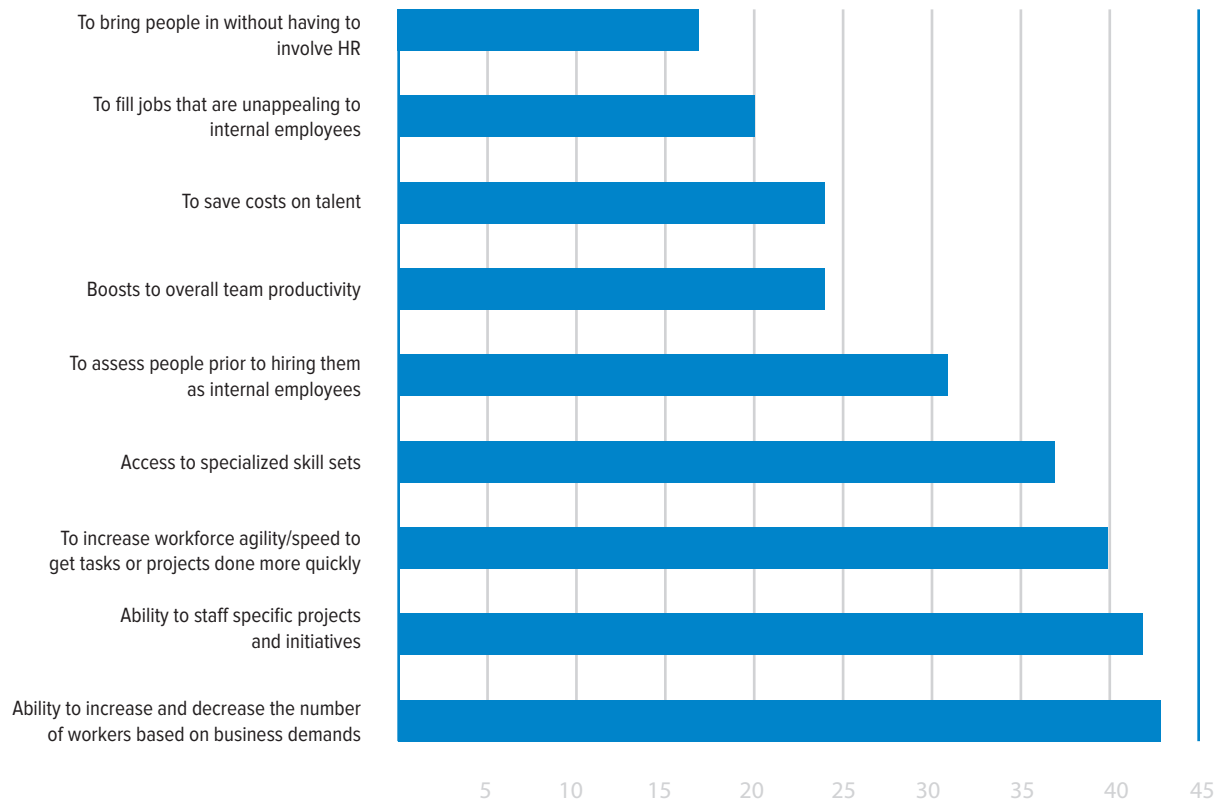


FIGURE 27

Please select the top three challenges of using external workers

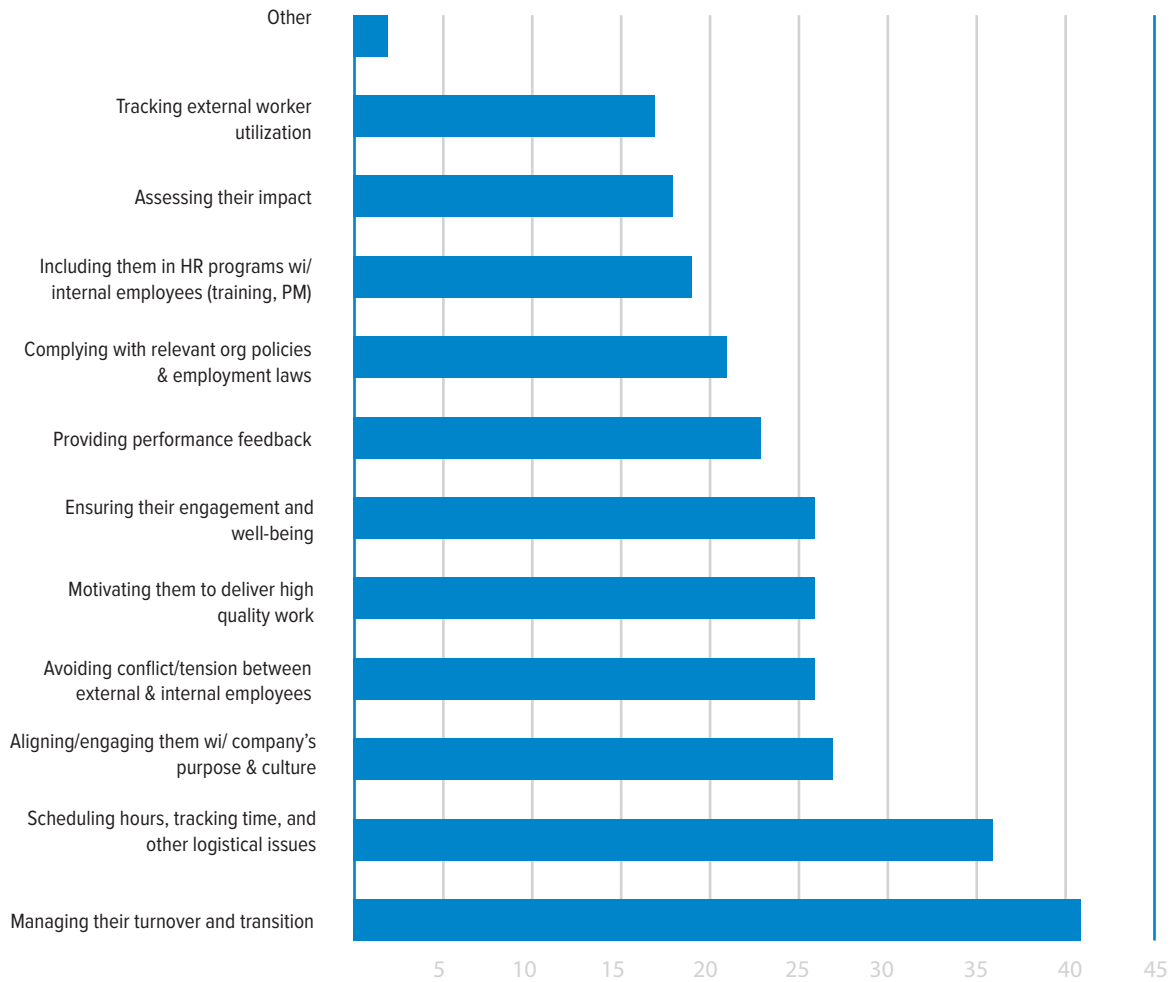


FIGURE 28

In your overall experience, what effects have external workers had on your employees and your organization?

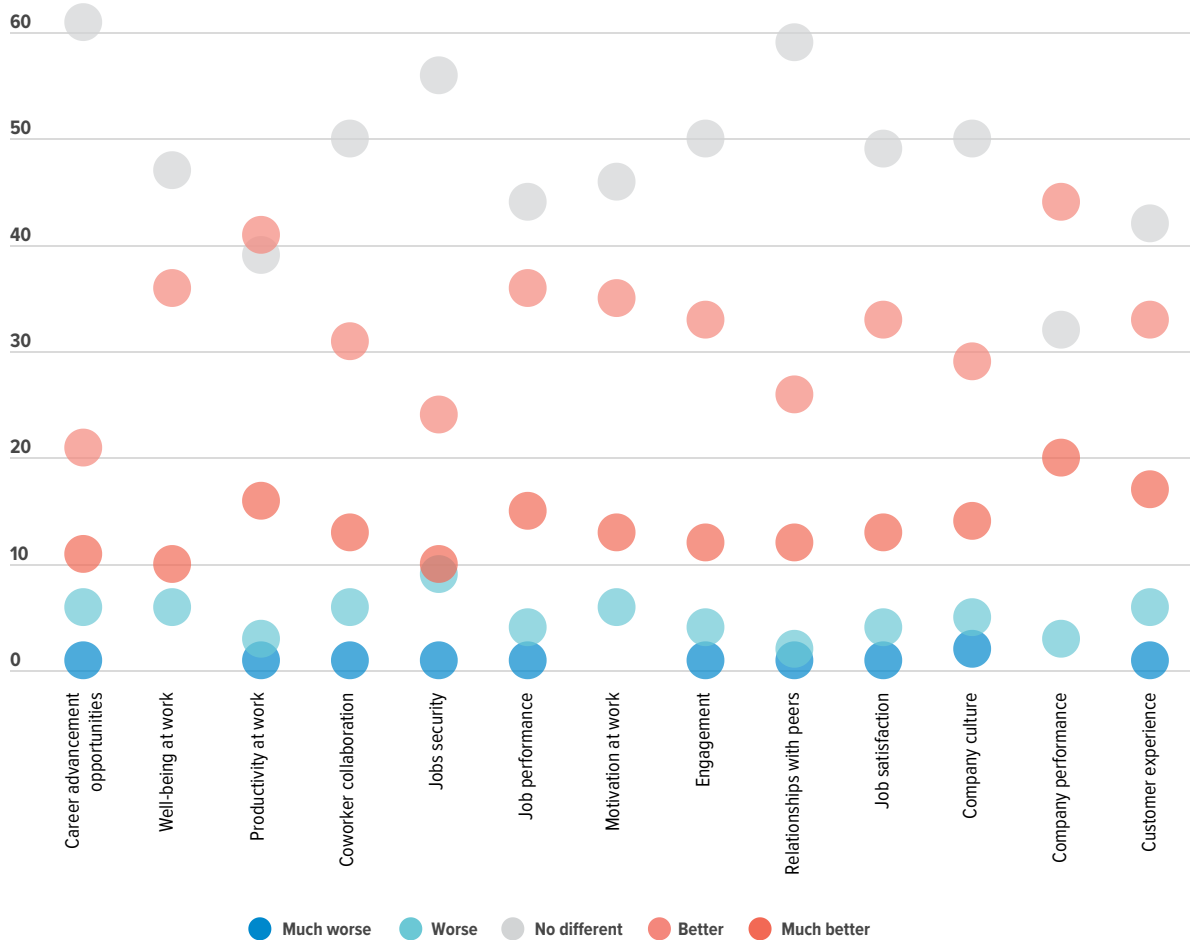


FIGURE 29

Please rate your company's effectiveness with each of the following stages of the external worker lifecycle

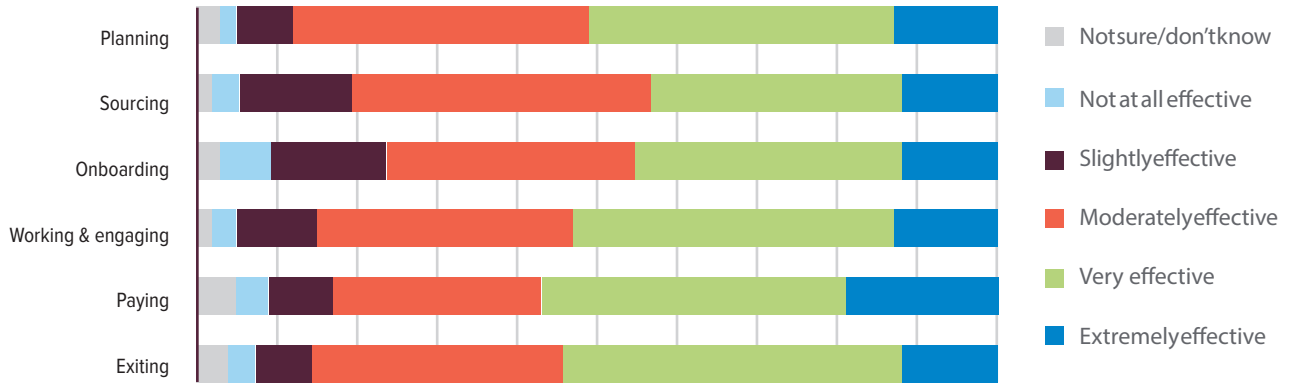
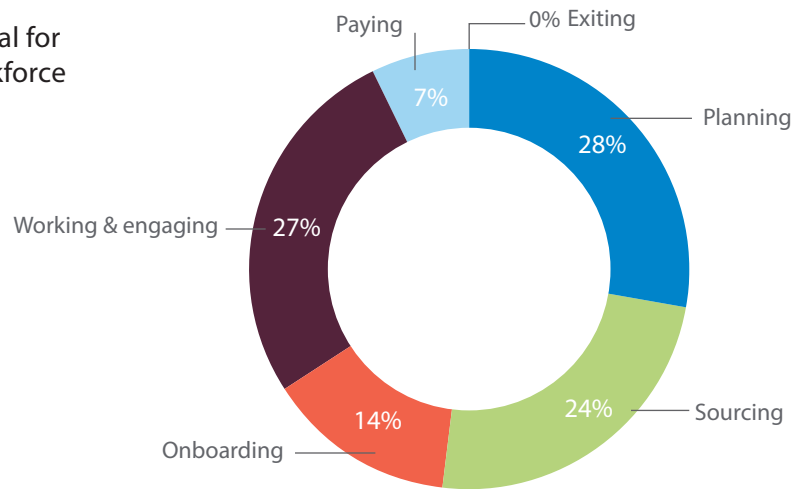


FIGURE 30

Which stage is most critical for an effective external workforce business strategy?



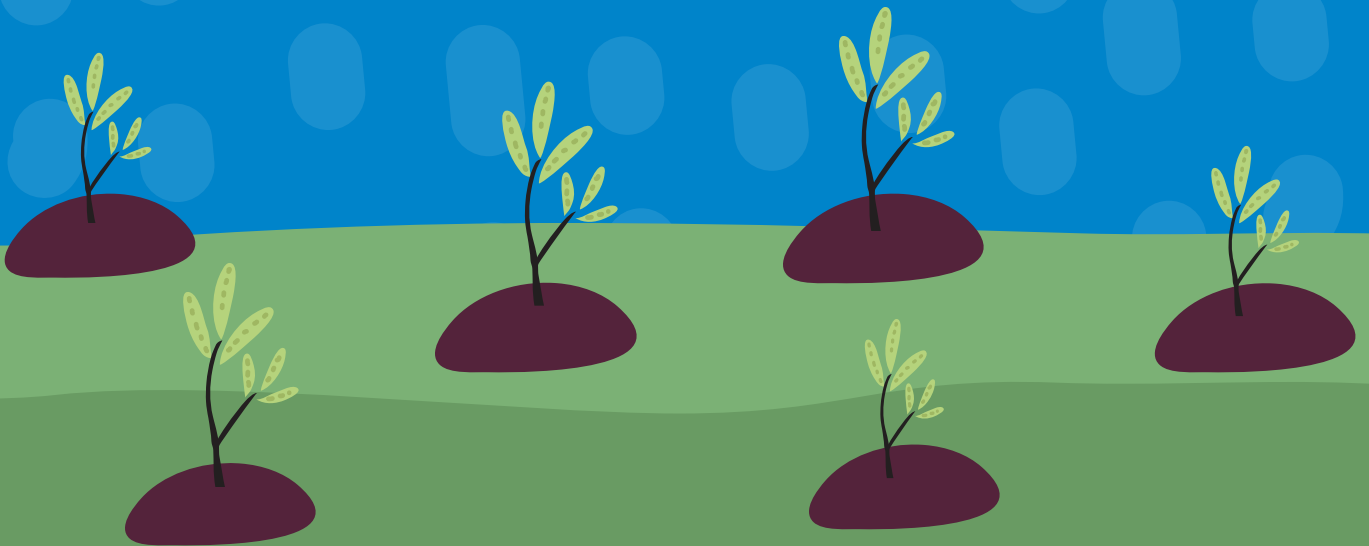
The HR View

Nearly nine in ten HR professionals (88%) agreed or strongly agreed that “external workers positively contribute to the business productivity of my [their] organization.” Yet HR, as a group, is quite worried about the legal implications of external work.

Nearly three-quarters of HR professionals reported that they are somewhat concerned, concerned, or very concerned about the legal landscape of external work, with 11% reporting that they are very concerned. While HR is among those responsible for making sure that organizations comply with

external worker employment law, in 84% of organizations, this is a shared responsibility. More than a quarter of HR professionals cited staffing agencies (32%), managers (27%), and legal (25%) as responsible, and another 8% felt that external workers themselves are among those responsible for compliance. When asked what was the biggest issue or challenge that they would like to see resolved related to external workers, many HR professionals cited legal ambiguity regarding the use and management of external workers as their greatest concern.

Are You Ready for Your External Workforce?



Are You Ready for Your External Workforce?

We at SHRM and SAP believe that the external workforce is a central part of the future of work. As organizations strive to respond to a world of work in which flexibility and agility are instrumental for competitiveness, external workers will be a key element of their success. Those organizations that view their external workforce as an essential part of their human capital and plan and prepare for the strategic use of external workers will be more successful than those whose use of external workers falls outside of their strategic objectives and HR practices.

Based on the results of the survey research program described here, along with focus groups conducted with HR professionals across the country and interviews with business leaders, SHRM and SAP are developing an External workforce management toolkit. This toolkit will enable organizations to understand the current maturity of their approach to external workforce management and engagement, and create policies, programs, and practices that maximize organizational results while fostering positive outcomes for external workers, their internal employee colleagues, and their managers.

The toolkit will include:

FOUNDATIONS

[The external workforce maturity model](#)

A framework to help you understand the current maturity of your external workforce strategy, and which areas to focus on given your current state.

[The external worker experience](#)

A profile of who external workers are, including their motives, preferences, and experiences inside companies, to dispel stereotypes and help organizations understand how they can best manage and engage this part of their workforce.

[The business case for investing in your external workforce](#)

Suggestions for how to build a business case for investing in your external workforce that speaks to the unique needs of your organization.

STRATEGY

[External workforce strategy and governance](#)

Best practices for creating an external workforce philosophy, strategy, and governance model.

[Legal facts versus myths about your external workforce](#)

How to deal with the complexity and ambiguity of law around the external workforce, including how to balance rewards and risks effectively.

THE EXTERNAL WORKER LIFECYCLE

[Planning](#)

Why organizations hire external workers and tips for making that decision-making process more strategic and effective. Decision tree for choosing an external worker versus an internal employee for any given role.

Sourcing

Best practices for creating an external worker employment brand, and how external workers may impact your internal employee employment brand. Sourcing analytics that companies should utilize for their external workforce.

Onboarding

Best practices for onboarding your external workforce.

Working and Engaging

Guidance for managers on how best to manage a blended workforce. Metrics for measuring and

managing the work of external workers. Best practices for engaging your external workforce.

Paying

Considerations for external worker compensation.

Closing

Best practices for exiting your external workforce.

The “External workforce management toolkit—Strategies and tactics for optimizing your external workforce” will be available at externalworker.com.

A decorative banner with a dark red, rounded rectangular shape, outlined in black. The banner is set against a blue background with a pattern of lighter blue, rounded rectangular shapes. On the left and right sides of the banner, there are stylized plant illustrations with green stems and black, dotted, circular heads. The banner contains the text "Survey Research Methodology" in white, bold, sans-serif font.

Survey Research Methodology

Survey Research Methodology

The surveys of managers, external workers, and internal employees were conducted by NORC at the University of Chicago for the Society for Human Resource Management (SHRM) and SAP. Data were collected using the AmeriSpeak Panel. Supplemental sample was obtained from a nonprobability sample source, Lucid.

The AmeriSpeak Panel is NORC's probability-based panel designed to be representative of the U.S. household population. During the initial recruitment phase of the panel, randomly selected U.S. households were sampled with a known, non-zero probability of selection from the NORC National Sample Frame and then contacted by U.S. mail, email, telephone, and field interviewers (face-to-face). The panel provides sample coverage of approximately 97% of the U.S. household population. Those excluded from the sample include people with P.O. Box only addresses, some addresses not listed in the USPS Delivery Sequence File, and some newly constructed dwellings.

This study was offered in English-only and self-administered on the web. Interviews for this survey were conducted between April 9 and April 22, 2019. A sample of U.S. adults age 18+ who were either currently employed, or not currently employed but potentially seeking employment, was selected from NORC's AmeriSpeak Panel for this study. Respondents who indicated that they were currently

employed and met one of the following criteria qualified to complete the survey.

- External workers—workers who complete contract-based or temporary assignments for companies or other people. These workers are often referred to as “contingent workers,” “gig workers,” “contractors,” and “temps,” though there are many labels for these workers. They might be employed by a contracting organization (for example, a contractor company or staffing agency) who helps them find assignments or they might work for themselves.
- Internal (non-management) employees—employees who are employed full or part-time by one organization on a more permanent basis. Employees are paid directly as part of the organization's payroll.
- Internal (management) employees who have managed external workers within the past 12 months.

In total, NORC collected 1,714 interviews, with 1,612 from the AmeriSpeak Panel and 102 from the Lucid Panel. The screener completion rate is 23.8%, the weighted recruitment rate is 34.2%, the survey completion rate is 46.3%, and the weighted household panel retention rate is 85.1%, for a cumulative response rate of 3.2%. The overall margin of sampling error is +/- 4.2 percentage points at the 95% confidence level, including the

design effect. The margin of sampling error may be higher for subgroups.

The survey of HR professionals was conducted by SHRM. Twenty thousand SHRM members were invited to complete the survey and interviews were

conducted between March 28 and April 28, 2019.

Interviews were conducted in English on the web, and 1,178 HR professionals completed the survey.

The survey completion rate was 5.9% and the survey margin of error is $\pm 2.85\%$ at a 95% confidence level.

The data were not weighted.

About the Partners

About the Partners

SHRM, the Society for Human Resource Management, creates better workplaces where employers and employees thrive together. As the voice of all things work, workers and the workplace, SHRM is the foremost expert, convener, and thought leader on issues impacting today's evolving workplaces. With 300,000+ HR and business executive members in 165 countries, SHRM impacts the lives of more than 115 million workers and families globally.

The SAP SuccessFactors HCM Suite helps customers deliver exceptional workplace experiences at every moment that matters, use intelligence to strengthen engagement across the entire workforce, and join a community defining the future of work. The industry-leading SAP SuccessFactors solutions help more than 6,700 customers around the world turn purpose into performance.