



December 13, 2022

By electronic submission: <http://www.regulations.gov>

Ms. Amy DeBisschop
Director, Division of Regulations, Legislation, and Interpretation
U.S. Department of Labor, Wage and Hour Division
200 Constitution Avenue NW, Room S-3502
Washington, D.C. 20210

RE: RIN 1235-AA43 - Independent Contractor Status under the Fair Labor Standards Act:
Notice of Proposed Rulemaking and Request for Comments

Dear Ms. DeBisschop:

[SHRM](#), the Society for Human Resource Management, and our 318,000+ HR and business executive members are experts in talent acquisition. Our members understand that to recruit and retain top talent, organizations must offer a myriad of options that provide modern workers autonomy to make the best decisions for themselves and their families. During these challenging, dynamic, and rapidly evolving economic times, providing independent work opportunities is not only valuable but necessary to compete in the global marketplace. We urge you to reconsider adopting the proposed rule published to revise the U.S. Department of Labor’s (“DOL” or “the Department”) regulation on the determination of employee or independent contractor status under the Fair Labor Standards Act (FLSA), published on October 13, 2022 (the “Proposed Rule” or the “2022 NPRM”) As noted in our previous comments,¹ SHRM supported DOL’s final rule on Independent Contractor Status under the FLSA published on January 7, 2021, and effective on March 8, 2021 (“2021 Rule” or the “Previous Rule”).²

The Previous Rule and the included core factors test provided a clearly defined standard to determine worker classification. By instructing courts on which predominant factors to focus on, the Previous Rule provided clarity, certainty, and consistency for American businesses and workers. In early 2021, when DOL proposed withdrawing the 2021 Rule, published just weeks prior, SHRM filed comments opposing the proposed withdrawal on April 12, 2021. SHRM emphasized that a return to the previous standard would leave our members without clear

¹ SHRM has attached as Exhibit A to these Comments the comments it filed with respect to DOL’s Proposed Rule on “Independent Contractor Status Under the Fair Labor Standards Act” on October 26, 2020.

² A White House Chief of Staff memorandum issued on January 20, 2021, “Regulatory Freeze Pending Review,” (“Reg. Freeze Memo.”), sought to delay the effective date of the Final Rule to March 21, 2021. SHRM notes that on March 4, 2021, DOL issued a notice entitled “Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date, (“Delay Rule”), 86 Fed. Reg. 12,535 (March 4, 2021) stated its intent to postpone the effective date of the Final Rule to May 7, 2021. SHRM further notes that whether DOL lawfully promulgated the Delay Rule was the subject of litigation in the U.S. District Court for the Eastern District of Texas in a lawsuit captioned *Coalition for Workforce Innovation et. al. v. Marty Walsh, et al*, 2022 WL 1073346, Civil Action No. 1:21-CV-130 (E.D. Tx. March 14, 2022). The Judge in that case enjoined the Rule, holding that its implementation violated the Administrative Procedure Act.

guidance on worker classification.³ DOL now proposes a new rule that promises a return to the era of uncertainty and confusion for HR professionals and business executives.

SHRM's concerns with the Proposed Rule stem from the belief that it does not account for the increasingly complex, modern economy. Members of every generation are choosing independent work. Nearly 50 percent of Generation Z and 44 percent of Millennials engage in some form of independent work.⁴ Independent work provides opportunities for enhanced autonomy, flexibility, and work/life integration. Certain workers in traditional freelance, consultant, contractor, direct sales, and other decades-old industries have long flourished in independent relationships. The modern workplace requires specificity, uniformity, and clarity when evaluating whether a worker is—or is not—an employee under the FLSA, and our members are instrumental in deciding how workers should be classified.

There are consequences to increased uncertainty in the employer/employee relationship. Some businesses have forgone providing independent workers with beneficial safety or anti-harassment training due to the risk of being deemed to have exerted too much control over these workers. Likewise, businesses that utilize independent workers have expressed concerns about offering benefits packages to these workers for fear of creating an employer/employee relationship. A final rule that makes clear businesses can provide training and benefits without creating an employment relationship is key to a thriving, modern workplace.

As the leading voice of all things work, workers, and the workplace, SHRM is attuned to the “on-the-ground” implications of agency rulemaking and generally focuses its comments on these practical aspects of the regulatory process. The 2021 Rule specifically advised that “the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible.” 29 CFR 795.110. Therefore, SHRM on behalf of our 318,000+ members and the undersigned SHRM Affiliates respectfully submits the following comments in response to the U.S. Department of Labor Wage and Hour Division’s (“WHD” or the “Division”) notice of proposed rulemaking and request for comments regarding Independent Contractor Classification under the Fair Labor Standards Act (the “FLSA” or the “Act”), 29 CFR Parts 780, 788, and 795 (Oct. 13, 2022).⁵

I. SUMMARY OF MAIN POINTS

SHRM supported the 2021 Rule’s interpretation of the economic realities test. The Previous Rule focused on a framework wherein a worker’s status was determined by first assessing two core factors, followed by consideration of additional, tie-breaking factors, only if necessary. This test provided our members with a more certain and focused analysis than the Proposed Rule’s return to an all-encompassing test wherein HR professionals must decide what factors to

³ SHRM has attached as Exhibit B to these Comments the comments it filed with respect to DOL’s Proposed withdrawal of the Rule on “Independent Contractor Status Under the Fair Labor Standards Act,” 86 Fed. Reg. 1168 (January 7, 2021)

⁴ The 2020 Freelance Forward Study commissioned by Edelman Intelligence for Upwork found that 30% of Generation X and 26% 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>.

⁵ SHRM also submits for the record: SHRM’s 2019 White Paper entitled, “Want Your Business To Thrive? Cultivate Your External Talent,” attached as Exhibit C.

prioritize out of a myriad of factual potentialities. The more focused framework provided HR with a clearer rubric for classifying independent contractors. When proposing what became the 2021 Rule, “[t]he Department believe[d] this proposed approach would improve the clarity and predictability of the economic reality test;” SHRM continues to believe the same thing. *Id.* Below SHRM lists its concerns with the Proposed Rule and the potential return to an ambiguous analysis, which will limit our members’ ability to effectively build the dynamic workplaces the economy demands.

A. HR Professionals and Business Executives did not Have an Opportunity to Work with the Current Rule Before DOL Withdrew it.

The expeditious withdrawal of the 2021 Rule limited DOL’s ability to evaluate its impact on worker classification. The repeal of the 2021 Rule may be viewed as arbitrary and capricious because the Department lacks evidentiary support for any perceived detrimental effects. SHRM supported and continues to support the 2021 Rule’s clear and actionable direction for HR practitioners.

B. The New Multi-Factor Test May Prevent Employers from Providing Appropriate Training and Certain Benefits.

SHRM, as the voice of HR professionals and business executives, is concerned with an organization’s ability to assist not only employees of a given company but also workers classified as independent contractors. Ensuring the success and well-being of all workers, whether employees or independent contractors, benefits the economy as a whole. For example, training in health and safety, and anti-harassment training (both of which can be mandatory), are being provided on a more frequent basis and are beneficial to workplaces across the nation. Such training facilitates establishing safe and respectful work environments. However, out of caution, HR professionals may decide not to offer such training to independent contractors if doing so risks a finding of worker control and, ultimately, risks misclassification. Similarly, the Proposed Rule disincentivizes employers from offering their independent workers certain benefits—such as portable health benefits—due to fear that the Department will claim misclassification. While many independent workers do not want the “employee” designation and the lack of flexibility this classification entails, those same workers undoubtedly benefit from certain training and select benefits.

C. Reality Should Supersede Theory.

The realities of independent work should supersede any theoretical construction of a rule governing worker classification. While basing its multi-factor test on the idea that it encompasses the totality of the circumstances and thereby provides the best analytical framework to evaluate worker classification, the on-the-ground realities of independent work are not captured by the Proposed Rule’s test formulation. Courts may be well situated to engage with numerous factors in a *post hoc* analysis of the matters before them, but the same is not true of our members, who must make daily and frequent forward-facing decisions on how to classify their workers. The Proposed Rule will result in HR professionals and business executives spending even more time and resources to

attempt to appropriately classify workers, which—despite the stated goals of the Proposed Rule—could increase the misclassification of workers, particularly for small businesses that have limited HR departments (or even HR departments of one). Many of these smaller businesses already have fewer resources and limited time. Under the Proposed Rule, they will be further stretched by requirements to analyze each fact potentially impacting their workers’ relationships with their businesses to determine the workers’ classifications. And they will need to do so without the benefit of the clear, core-factor guidance provided by the 2021 Final Rule. The Proposed Rule does not consider the other laws and regulations with which HR professionals (many of whom will be tasked with conducting worker classification analyses) must already ensure compliance, and employers may not have the resources to obtain legal counsel or experienced consultants to facilitate worker classification determinations. Without a clear standard and with a focus on potentialities rather than realities, the Proposed Rule may very well lead to an increase in the misclassification of workers and additional confusion for all stakeholders.

D. The DOL’s Discussion of, or “Guidance” on, the Various Factors Inappropriately Tilts the Analysis Toward Employee Classification.

SHRM’s research demonstrates that independent work is not only growing, but large swaths of workers prefer an independent-working relationship. Nearly 3 in 5 independent workers work for multiple companies or customers, and approximately 50 percent state it is a lifestyle choice.⁶ However, as explained in further detail below, the Proposed Rule offers sub-textual guidance that clearly influences the analysis towards classifying workers as employees, even when that is not a worker’s preference.

II. SHRM FINDINGS ON THE BEHAVIOR AND PREFERENCES OF INDEPENDENT WORKERS AND BUSINESSES’ INCREASING RELIANCE ON INDEPENDENT WORK

As noted above, independent work is integral to the modern economy. In 2022, SHRM conducted a survey fielded electronically to a random sample of 956 HR professionals from active SHRM members and 1,018 independent workers from a third-party online panel from October 18, 2022, to November 1, 2022. *See* DOL Independent Contractor Ruling Survey Results (2022 Survey), attached as Exhibit (Ex.) D. The 2022 Survey’s questions were specifically geared toward the DOL’s proposed “totality of circumstances” standard for classifying independent workers. The 2022 Survey found that nearly 75 percent of respondents’ organizations utilize independent workers. *Id.*

Additionally, SHRM conducted a survey of independent contractors, employees, managers, and HR professionals in April 2019 in collaboration with SAP Success Factors (2019 White Paper) about independent contractor classification and the benefits of independent work for businesses and workers. Specifically, the research surveyed 940 independent contractors (external workers), 350 employees (internal workers), 424 managers who work with external workers, and 1,175 HR

⁶ SHRM 2022 DOL Independent Contractor Ruling Survey Results, (Exhibit D).

professionals in a broad variety of sectors, industries, organizational sizes, and geographic areas in the United States.⁷ *See* Ex. C at pp. 6, 10-12.

The primary concern voiced by HR professionals is the **need for clarity and specificity** around independent contractor classification. In 2019, nearly three-quarters of HR professionals reported they were somewhat concerned, concerned, or very concerned about the legal landscape of external work, with 11 percent reporting that they were very concerned. *See id.* at p. 39. When asked to identify the biggest issue or challenge 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. The 2021 Rule clarified the ambiguity by restricting the test in the first instance to focus on two core factors.

The withdrawal of the 2021 Rule creates a more unstable legal climate. The 2019 survey demonstrated that this instability might cause organizations to shy away from providing training to external workers due to uncertainties in interpretation. While Internal Revenue Service guidelines state that periodic or ongoing training about procedures and methods is strong evidence that the worker is an employee, the Occupational Safety and Health Administration (OSHA) holds staffing agencies and host employers jointly responsible for maintaining a safe work environment for temporary workers. This includes ensuring OSHA's training requirements are fulfilled.

While more workers choose independence, the fear of misclassification may [reduce](#) their opportunity to receive helpful workplace training or benefits like paid sick leave. *Only* 17 percent of those surveyed in 2022 said they would not be interested in additional benefits, while 65 percent said they would be interested in additional benefits. In fact, nearly two-thirds of independent workers indicated an interest in additional benefits—even if that means a lower pay rate. As such, SHRM suggests that any final rule make clear that businesses can offer trainings and benefits without disrupting the classification of an independent worker.

The 2022 Survey found independent workers are most satisfied with areas related to the flexibility independent work offers, such as (a) the location(s) they can work, (b) their working schedules, (c) having control in setting their work schedules, and (d) choosing the type of work they take on. The 2019 White Paper found independent workers have a variety of reasons for engaging in external work. The most cited reasons for becoming an independent worker were “being able to set my own schedule” (49%), “choosing how many hours I work” (40%), and “choosing my work location” (33%). *See* Ex. C at p. 18; *see also* Ex. C at pp. 10-11.

Independent work is an essential part of the economy that necessitates clarity and consistency regarding the legal status of the relationship between independent workers and employers. Likewise, businesses and workers will be hampered by the lack of certainty provided by the Proposed Rule in that it will not allow businesses to engage with independent workers in ways that benefit the workforce and society. For example, businesses will be precluded from providing worker and customer safety and anti-harassment training. SHRM respectfully submits these comments to aid the Division in understanding the makeup and nature of independent work and

⁷ Independent contractors, employees, and managers were sourced from National Opinion Research Center's national representative AmeriSpeak® Panel.

to ensure the Proposed Rule reflects the desires of businesses and workers who have clearly expressed their desire for independent work.

III. COMMENTS

A. The 2021 Rule Recognized Longstanding Case Law Precedent for the Economic Realities Test.

The 2021 Rule recognized the longstanding significance of the economic realities test and that its elements dated back to the United States Supreme Court's decision in *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947) and subsequent decision in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324-326 (1992), which stated the scope of employment under the FLSA is determined by the economic reality of the relationship at issue. The 2021 Rule facilitated workers' and businesses' ability to accurately structure and maintain their relationships by providing directness in the applications of the test's factors. In this way, the 2021 Rule addressed Judge Frank H. Easterbrook's criticism that the economic realities test "is unsatisfactory both because it offers little guidance for future cases and because any balancing test begs questions about which aspects of 'economic reality' matter and why." *Sec. of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1988) (Easterbrook, J. concurring). By designating core factors for consideration, the 2021 Rule provided clear direction in employing the economic realities test, while also acknowledging the *actual* realities of the modern economy. Accordingly, employers now prioritize certain factors within the economic realities test when analyzing worker classifications, with "[t]he nature and degree of control the worker has over the terms and conditions of their employment (61%)" leading the polling. Ex. D.

Unfortunately, the Proposed Rule implies that unexecuted contractual rights may be more important than real-world practices. Comprehensive consideration of the various factors in the Proposed Rule will require HR professionals to speculate on how WHD or a court may interpret each individual criterion. This will surely result in inconsistencies in application and the resulting confusion will lead to continued uncertainty for employers and workers. SHRM strongly suggests that DOL reconsider its decision to apply a complex and confusing interpretation of the economic realities test and, instead, provide guidance and allow time to analyze the clarity provided by the 2021 Rule in determining whether a worker is or is not an employee.

B. The Proposed Rule Misconstrues the Factors and DOL Improperly Promotes Employee Classification.

The Proposed Rule limits workers' right to contract as they choose, even when there is evidentiary support to demonstrate many independent contractors purposefully decide to engage in these relationships. *See, e.g.*, Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements News Release (May 2017) ("79 percent of independent contractors preferred their arrangement over a traditional job."). Many workers prefer the flexibility that comes with independent work. Yet, the Proposed Rule would undercut their ability to work independently by holding a thumb on the analytical

scale towards employment, rather than an independent, professional relationship. The Proposed Rule does not reflect the realities of contract negotiation. Independent workers want flexibility and freedom to be in business for themselves. Therefore, independent workers freely understand and negotiate their arrangements with businesses to incorporate flexibility into the relationship.

Below is an analysis of all seven factors of the Proposed Rule with suggestions for DOL to improve and/or return to the 2021 Rule's approach to the factor(s).

1. *Opportunity for Profit or Loss Depending on Managerial Skill*

The first factor listed within the Proposed Rule directs the court to consider the opportunity for profit or loss depending on managerial skill, which is to be considered equally alongside the other stated factors. This consideration is not new, as the 2021 Rule designated opportunity for profit or loss as one of two core factors and includes investments as a sub-factor. This formulation reflected the modern economy, in which many independent contractors perform knowledge-based jobs that require little investment in materials or equipment. Contrary to the 2021 Rule, the Proposed Rule harkens back to more traditional concepts in developing a flawed analysis of this factor.

DOL lists “facts” that “can be relevant” when considering this factor; these “facts” push toward classifying workers as employees and further confuse the classification analysis. The Agency identifies one such fact as “whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space.” Proposed 29 CFR 795.110(b)(1). Evaluating material purchases and the need for brick-and-mortar space does not account for the realities of the modern economy.

Another fact DOL identifies is “whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed.” *Id.* The ability to determine whether, when, and where to work implies independence and should indicate a contractor relationship. The Proposed Rule confusingly suggests “[s]ome decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.” *Id.* Managing the amount of work performed by determining the projects accepted and the time allotted to maximize profit inherently relates to the opportunity for profit and should warrant an independent contractor classification.

The economic reality is that a worker who can profit by taking other jobs is more independent—and therefore less economically dependent on the employer—than an employee who cannot. The ability to make that choice should point to an independent relationship. However, the Department's analysis considers a fact that—at least to DOL—seems to predetermine the existence of an employment

relationship and tips the scale toward classifying workers as employees under the Proposed Rule.

2. *Investments by the Worker and the Employer*

As noted above, investments were a sub-factor of the opportunity for profit or loss factor under the 2021 Rule, and SHRM supports the 2021 Rule’s approach. With this factor now considered separately, and on an equal analytical footing with other factors, DOL suggests that the tools necessary for workers to perform their jobs, including an owned or leased vehicle, do not constitute the kind of “capital or entrepreneurial” investments that “indicate independent contractor status.” 2022 NPRM at 62240. Further, the Proposed Rule explains “the worker’s investments should be considered on a relative basis with the employer’s investments in its overall business.” Proposed 29 CFR 795.110(b)(2). But the NPRM then acknowledges “that a worker’s investment need not be (and rarely ever is) of the same magnitude and scope as the employer’s investment,” 2022 NPRM at 62242. This indicates—again—the rule’s predilection for finding an employer-employee relationship. If “worker’s investment[s are] . . . rarely of the same magnitude and scope as the employer’s,” *id.*, then this factor skews towards employment during an analysis of worker classification.

3. *Degree of Permanence of the Work Relationship*

SHRM identified concerns with the 2021 Rule regarding the issue of permanence. Similarly, DOL’s current interpretation of the permanence of the work relationship factor does not speak to the independence or voluntariness of the business-worker relationship in any meaningful way and will, instead, promote instability in contracting. Accordingly, SHRM asks the Department to either revise the permanence factor as set forth below or eliminate it entirely.

SHRM requests that DOL revise the Proposed Rule to indicate the lack of permanence when independent workers and businesses enter into one or more contracts of a specific duration, regardless of whether said contracts or terms are repeated or sporadic and regardless of whether performance relevant to the contract is sporadic within a specified term. A term of specific duration, whether or not it is continuous with other specific terms, is evidence of independence. A relationship of indefinite duration, however, does not exist simply because parties have continued to contract with each other over a series of defined terms. Indefiniteness is determined by the absence of any term whatsoever. To this end, the Proposed Rule improperly focuses on the length of the relationship in the discussion of the permanence factor.

The Proposed Rule is also unclear on how courts should resolve the “permanence” issue when a worker and business have a seemingly continuous relationship but the work within that relationship is sporadic. SHRM recommends any Final Rule promulgated by DOL explicitly indicate that work is not permanent, regular, or continuous when a worker stops or starts at will or takes on

as many projects as the worker pleases within a long-term contract. Flexible work within a lengthy relationship is a sign of independence rather than dependence. Because a focus on permanence either confuses or undermines the nature and public policy benefits of independent work, SHRM suggests that the relationships between workers and businesses that adhere to the contracting structure and contained elements of independent business relationships should be considered in a revised factor that looks at the relationship of the parties. In codifying this factor, the Division should consider the following: (1) the existence of a written agreement between the parties; (2) a specific term of that agreement, whether in terms of years or specific beginning and end dates; (3) an agreement that states the rights and obligations of both parties; (4) an agreement that is subject to negotiation and an agreement that is entered into voluntarily by both parties; and (5) an agreement that allows for the workers to choose as many or as few projects as desired.

4. *Nature and Degree of Control*

The Proposed Rule demotes the nature and degree of control exercised by the hiring entity from a core consideration of the 2021 Rule to equal footing with other previously subordinate factors. This is certain to lead to confusion for HR professionals tasked with assessing whether a worker can be properly classified as an independent contractor. The Proposed Rule, therefore, ensures that HR professionals, who are already stretched thin given the myriad laws and regulations governing the workplace, will be saddled with a complex decision-making process.

In addition, the Proposed Rule adopts an antiquated view of economic independence in its consideration of a worker's ability to work for others under the control factor. The 2022 NPRM suggests that a worker who "holds multiple lower-paying jobs for which they are dependent on each employer for work to earn a living" resembles an employee, whereas a worker who works multiple jobs "due to their business acumen and entrepreneurial skills" is more akin to an independent contractor. *Id.* At 62252. However, low-wage earners may, in fact, *gain* independence by maintaining the flexibility to work with multiple hiring entities. Indeed, contract work may provide these workers with control over their schedules, providing the ability, to maximize their earnings and better attend to their personal obligations. The Proposed Rule fails to recognize that this is precisely the arrangement the modern worker seeks.

The Proposed Rule improperly repudiates the 2021 Rule's de-emphasis on whether a company requires a service provider to comply with legal and safety standards, to carry insurance, or to meet contractually agreed-upon deadlines or quality control standards. This serves the interests of neither service providers nor their clients. Companies and service providers alike stand to benefit from clear standards applicable to the delivery and quality of services. It makes little sense that a company paying for a specific service could not communicate its expectations to a service provider without running the risk of a misclassification

finding. Moreover, requiring service providers to comply with legal and safety obligations, as well as to maintain insurance, is not a manifestation of control. Companies are obligated, legally as well as ethically, to maintain a safe working environment that ensures the health of their employees, their partners, and their customers. The Proposed Rule will deter some companies from upholding their obligations in this respect by holding the specter of a misclassification finding over their heads for simply trying to do right by the people who make their businesses viable. This might be an unintended or unanticipated consequence.

5. *Integral Part of the Employer's Business*

Employers and HR professionals were surprised by the inclusion of this factor in the 2022 NPRM. SHRM recommends that any Final Rule promulgated by the DOL exclude this factor from the classification test. SHRM maintains the 2021 Rule correctly excluded this factor from consideration. As the 2022 NPRM notes, the analysis accompanying the 2021 Rule deemed whether the work performed is integral to the hiring entity's business to be a superfluous factor. The reason for this is plain. Generally, companies hesitate to engage workers to provide services that are *not* "critical, necessary, or central" to their businesses. The fact that a company has decided to allocate resources to pay for a worker's services confirms the value of the worker's services to the company. However, that is not necessarily indicative of employment status.

SHRM respectfully requests that DOL maintain the 2021 Rule's consideration of the degree to which the worker's services are part of an integrated unit of production as a secondary factor. In the Supreme Court's decision in *Rutherford*, the court held that meat boners at a meat processing plant were employees based, not on the fact that their work was closely related to the company's primary business, but rather "the circumstances of the whole activity." *Rutherford*, 331 U.S. at 730-731. Based on the common-sense framework set forth in *Rutherford*, HR professionals and business executives are well-equipped to assess the extent to which a worker is integrated into a company's operations.

6. *Skill and Initiative*

The Proposed Rule purports to convert a standard consideration utilized by myriad independent contractor classification tests—the degree of skill required by the work—into an assessment of a worker's business acumen. This is not only a drastic departure from a well-settled standard, but it also negates the Proposed Rule's decree that a worker's *opportunity* for profit or loss based on their managerial skill is relevant to their classification as an employee or an independent contractor.

7. *Additional Factors*

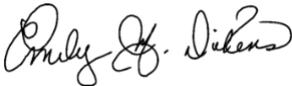
The Proposed Rule puts unknown "additional factors" on equal analytical footing as the other, more well-established factors—such as control. The inclusion of the

catchall “additional factors” reflects the serious lack of clarity the Proposed Rule would bring. *See* 2022 NPRM at 62236 (“This totality-of-the-circumstances analysis considers all factors that may be relevant and, in accordance with the case law, does not assign any of the factors a predetermined weight.”). Providing such vague, ill- or undefined “additional factors” equal weight as the more established factors creates greater risk of inconsistency in how the rule would be interpreted by SHRM’s members and the courts.

IV. CONCLUSION

SHRM appreciates the opportunity to offer these comments on the Proposed Rule. Independent work is an integral part of the economy. Businesses and workers should not be hindered by outdated and restrictive rules and regulations. SHRM urges the Department to reconsider adopting the Proposed Rule and rescinding the 2021 Rule. The 2021 Rule, if given the opportunity, will promote efficiency, flexibility, and freedom for all participants in the economy.

Sincerely,



Emily M. Dickens
Chief of Staff, Head of Public Affairs & Corporate Secretary

SHRM State Councils

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EXHIBIT A

October 26, 2020

By electronic submission: <http://www.regulations.gov>

The Honorable Cheryl Stanton
Administrator, Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

RE: RI 1235-AA34--Independent Contractor Status under the Fair Labor Standards Act: Notice of Proposed Rulemaking and Request for Comments

Dear Administrator Stanton:

The Society for Human Resource Management's (SHRM) mission is to create better workplaces where businesses and workers thrive together. Our 300,000+ HR and business executive members impact the lives of more than 115 million workers and their families. 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 employment options that provide the 21st century worker the autonomy necessary to make the best decisions for them and their families. To that end, independent work is not only valuable, but necessary to compete in today's global marketplace

Independent work is here to stay. While every generation is choosing independent work, nearly 50% of Generation Z and 44% of Millennials engage in some form of independent work.¹ Workers of every generation recognize that independent work provides opportunities for enhanced autonomy, flexibility, and work/life integration. Certain workers in traditional freelance, consultant, contractor, direct sellers, and other decades-old industries have long flourished in independent relationships. As the modern economy provides new opportunities for these and other workers to engage and expand their economic opportunities with enhanced flexibility and freedom, the modern workplace must be allowed to meet this worker demand and provide greater economic opportunities for all. The modern workplace also needs specificity and uniformity in the ability to determine whether a worker is or is not an employee under the Fair Labor Standards Act (FLSA).

Regulations that embrace these modern work relationships reflect today's workplace and economic opportunities available to workers who prefer the flexibility and freedom of providing work as non-employees to multiple businesses in a way that allows them meaningful self determination as to their work opportunities. 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 benefits work, workers and the workplace.

To that end, SHRM respectfully submits the following comments in response to the U.S. Department of Labor Wage and Hour Division's (the "WHD" or the "Division") notice of proposed

¹ The 2020 Freelance Forward Study commissioned by Edelman Intelligence for Upwork found that 30% of Generation X and 26% 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>.

rulemaking and request for comments regarding Independent Contractor Status under the Fair Labor Standards Act (the “FLSA” or the “Act”), 85 Fed. Reg. 60600 (Sept. 25, 2020) (the “Proposed Rule”).

I. SUMMARY OF MAIN POINTS

SHRM supports the Division’s interpretation of the economic realities test, specifically the focus on a framework whereby a worker’s status is determined by assessing the two Core Factors first, followed by consideration of additional, tie-breaking factors. However, as detailed below, SHRM suggests the Division consider revisions to the Additional Factors to better reflect the essence of independent work and further suggests additional illustrative examples as guidance to businesses and workers.

SHRM recommends that the Final Rule make clear that the Core Factors should serve as the main focus for an assessment of whether a worker is an employee. The Proposed Rule states that if the Core Factors point in the same direction (either that the individual is an independent contractor or an employee), there is a “substantial likelihood” that the worker has that status. This, however, does not promote enough consistency to meet the demands of the modern workplace. Independent workers and businesses require ease of analysis that sets clear expectations on worker status.

SHRM asks that the Proposed Rule be revised to ensure that if the Core Factors indicate the same status of the worker, no further analysis is necessary; Additional Factors should only be consulted to break a tie between the Core Factors. By increasing the weight of the Core Factors, workers and businesses will have clear expectations and stable ground on which to build workplace relationships.

SHRM asks that the Proposed Rule also be revised to reflect the realities of contract negotiation. Independent workers want flexibility and freedom to be in business for themselves. As such, these workers freely understand and negotiate their arrangements with businesses with the understanding that this flexibility is built into the relationship. For this reason, **SHRM recommends the Proposed Rule be revised to acknowledge that workers often bargain for rights that they never exercise, but their choice not to exercise that right should not be used to further constrain their flexibility.** Put another way, an independent worker should not be found to be an employee simply because they choose not to exercise a right they bargained for and retain.

SHRM believes the Proposed Rule should be revised to make clear that businesses may provide trainings and protocols as well as benefits that enhance the workplace for all workers without the risk of becoming an independent worker’s employer. These policies can have an overall positive impact on the workplace and workers, regardless of whether a worker is an employee or an independent worker. Outdated or irrelevant notions of control should be removed so all can benefit from a positive workplace.

Cultivating a positive workplace culture is a key priority for American businesses. Workplace culture translates directly to worker engagement, commitment, satisfaction, health, safety, and overall business success.² With a majority of Americans believing there is a “crisis”

² See SHRM Foundation’s Effective Practice Guideline Series (2016), Creating a More Human Workplace Where Employees and Business Thrive (Nov. 7, 2019 11:17 AM)

of incivility,³ organizations need the freedom to maintain standards of civility and respect, unhampered by outdated precedent that has permitted incivility, disrespect, and even racial and gender slurs to go unchecked in the workplace. Likewise, all workers, whether independents or employees, deserve workplaces free from discriminatory, offensive, abusive, and profane behavior and language.

Safety and anti-harassment trainings are examples of beneficial trainings that some businesses forgo with respect to independent workers, at the risk of being deemed to have exerted control over these workers. Likewise, businesses that utilize independent workers see real risk in offering benefit packages to these workers. A Final Rule that makes clear businesses can provide training and benefits without creating an employment relationship is key to a thriving, modern workplace.

SHRM also submits for the record: SHRM's 2019 White Paper entitled, "Want Your Business To Thrive? Cultivate Your External Talent," attached hereto as Exhibit A; "External Workforce Insights 2018: The Force Reshaping How Work Gets Done", SAP, 2018, attached hereto as Exhibit B; and "The Gig Economy and Alternative Work Arrangements", Gallup, 2018 attached hereto as Exhibit C.

II. SHRM RESEARCH AND FINDINGS ON THE BEHAVIOR AND PREFERENCES OF INDEPENDENT WORKERS AND BUSINESSES' INCREASING RELIANCE ON INDEPENDENT WORK

In April 2019, SHRM and SAP SuccessFactors collaborated to conduct a research study of independent contractors, employees, managers, and human resources professionals on the subject of 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,⁴ 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 primary concern voiced by human resources professionals is the need for clarity and specificity around independent contractor classification. Nearly three-quarters of human resources 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. (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

<https://www.shrm.org/foundation/ourwork/initiatives/building-an-inclusive-culture/Documents/Creating%20a%20More%20Human%20Workplace.pdf> ("SHRM Guideline Series").

³ SHRM Study, Dori Meinert, (Mar. 20, 2017) How to Create a Culture of Civility, (Nov. 7, 2019, 10:35 AM) <https://www.shrm.org/hr-today/news/hr-magazine/0417/pages/how-to-create-a-culture-of-civility.aspx> ("SHRM Civility Study").

⁴ Independent contractors, employees, and managers were sourced from National Opinion Research Center's (NORC's) national representative AmeriSpeak® Panel.

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.

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 20% of human resources professionals indicated that their organization uses external workers to save money. Instead, some of the most commonly 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 in order to attract talent. Managers and human resources professionals, when asked to speculate on which benefits might attract external workers to their organizations, believed workers would want health care 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, health care 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 out of fear that they cannot do so 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 these concerns expressed by 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 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 “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 who places 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 Proposed Rule’s 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 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" (49%), "choosing how many hours I work" (40%), and "choosing my work location" (33%). (Ex. A, p. 18.)

Furthermore, according to the survey, the majority of independent workers do not choose external work simply because they have 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 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" was selected at the same frequency as "this is just the kind of work I'm doing right now." (Ex. A, p. 7.) Workers engaged in independent contract work were the most likely to report a preference for external work.

Relatedly, the survey suggests that external work can lead to internal work. Nearly 90% of human resources professionals reported that their organizations, at least sometimes, convert external workers to internal employees. Ultimately, SHRM’s research is consistent with the Proposed Rule’s emphasis on self-determination and flexibility as central to economic independence.

Worker and business preference for independent work is on the rise for many of the reasons cited in SHRM’s research. SHRM’s findings are supported by further research conducted by SAP and Gallup. In 2018, SAP conducted a survey of 800 senior executives, including C-suite leaders, chief procurement officers, and chief human resources officers, and found that businesses are becoming more and more reliant on an external workforce.⁵ The study found that businesses are spending nearly 44% of all workforce spending on external workers, that 65% of businesses say the external workforce is important or very important to operating at full capacity to meet market demands, and that 68% of businesses say the external

⁵ See SAP Study at <file:///S:/Departments/Government%20Affairs/Issues/Diversity%20and%20Inclusion/2020/EO%20in%20EI%20training/SAP-Fieldglass-External-Workforce-Insights-2018.pdf>

workforce is important or very important to developing or improving products and services. (Ex. B, p. 4.) Likewise, Gallup found in a 2018 study⁶ that 36% of all U.S. workers participate in the so-called “gig economy” in some capacity, while finding that 29% of all U.S. workers have some sort of alternative work arrangement as their primary job, including a quarter of all full-time works and roughly half of all part-time workers. (Ex. C, p. 2.)

Independent work is here to stay and because it is a growing and essential part of the economy businesses and workers require clarity and consistency regarding the legal status of their relationship. Likewise, businesses and workers 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 as a whole, including worker and customer safety training and anti-harassment training. SHRM submits these comments to aid the Division in understanding the make-up and nature of independent work and to ensure the Proposed Rule reflects the desires of workers and businesses for safety, flexibility, and compliance.

III. COMMENTS

A. The Economic Realities Of A Worker’s Relationship With A Company Are Best Determined By Prioritizing The Nature And Degree Of Control Over The Work And The Worker’s Opportunity For Profit And Loss Over All Other Factors.

The modern workplace needs specificity and uniformity in the ability to determine whether a worker is or is not an employee under the FLSA. Currently, the business community and workers are left applying numerous factors in a variety of ways that is mired in uncertainty and, therefore, unnecessary risk. As the Division sets forth clearly in the Proposed Rule, a proper reading of whether a worker is an employee of a business turns on “whether the individual is or is not, as a matter of economic fact, in business for himself.” Proposed Rule at 60603 (quoting *Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. 1981).) Over time, however, courts have grown reliant on “economic dependence” tests that lack key guidance on which factors predominate, resulting in “inconsistent approaches and results.” (See Proposed Rule at 60605 (collecting cases).)

For this reason, SHRM supports the Division’s prioritization of key factors in the Proposed Rule. By emphasizing which factors should be the most important in a court’s analysis, the Proposed Rule will bring uniformity and certainty to worker-business relationships. And while such uniformity and certainty could result from other, more restrictive employee/independent contractor tests,⁷ the Proposed Rule best balances the need for guidance and consistency with the existing movement toward more external work and, therefore, provides a more reliable and stable ground for businesses and workers to engage economically.

⁶ The Gallup study is attached as Exhibit C.

⁷ SHRM points to the Division’s analysis regarding various alternative regulatory solutions including various test applied by different jurisdictions throughout the country. For instance, the Proposed Rule is correct that California’s so-called ABC test may be “more structured,” however it is out of step with existing work relationships and, if adopted widely, would have “disruptive economic effects.” (See Proposed Rule at 60636 and fns. 150-152 (collecting articles regarding the effects of an ABC test on flexible work arrangements).)

To this end, SHRM proposes additional clarifications in the Proposed Rule to ensure consistency in the application of the Proposed Rule and to ensure that the Proposed Rule best reflects the myriad external work relationships in today's workplaces.

1. The Final Rule should make clear that the Core Factors are determinative of whether a worker is an independent contractor or an employee, unless one of the Core Factors indicates a different status than the other.

It is essential to consistency and certainty that an emphasis on Core Factors is clear and widely understood. The Proposed Rule offers an approach where the Core Factors pointing in the same direction (i.e. both saying the worker is an independent contractor or both saying the worker is an employee) shows there is a "substantial likelihood" the worker is either an independent contractor or an employee. (Proposed § 795.105(c).) While this would be an improvement in "clarity and predictability on the economic realities test," SHRM believes this less-structured approach, where the Core Factors are not decisive regarding a worker's status, could result in less consistent rulings across jurisdictions and could grow to de-emphasize the importance of the Core Factors.

Indeed, the Proposed Rule itself makes clear that the various outgrowths of the economic realities test began from the same root—economic dependence—and "a lack of focus" from courts in balancing multiple factors. (See Proposed Rule at 60605-06.) Accordingly, SHRM recommends the Final Rule adopt a structured approach to the Core Factors by making them decisive in the determination of a worker's legal status and that other factors should only be consulted as tie-breakers in the event the two Core Factors point to opposite determinations.

2. With regard to parties' "actual practice," SHRM recommends the Final Rule state that the relevant inquiry is whether a worker's contractual right or remedy was available and that the worker had the opportunity to exercise that right.

The Proposed Rule states that "the actual practice of the parties involved . . . is more relevant than what may be contractually or theoretically possible." (Proposed Rule at 60622.) A focus on "practice" as opposed to the contractual "rights," of the parties, however, unnecessarily de-emphasizes voluntariness of the contract itself and places ambiguity over parties' negotiations. If a worker negotiates for an actual right within the contract and the business does not prevent the exercise of that right, the fact that the worker never exercised this bargained-for right should not be given more weight than the right itself.

The worker-business relationship thrives when it has clear expectations at the outset; it is essential for the worker to understand what results they have contracted to produce and it is essential for both parties to understand their rights and remedies. Because businesses engaged with independent workers necessarily build flexibility and independence into their contracts, businesses expect workers to differ in what rights they choose to exercise. It is essential to a worker's independence and flexibility to choose for themselves which rights they will enforce. For example, a contract may permit the worker to perform services for more than one business. Worker A exercises that right and does so. In contrast, Worker B, although she also has that right, chooses not to do so based on her own needs. That Worker A and B operate differently - which is all but guaranteed as independents - should not affect the nature of their relationship with the business. If a relationship's legal status can be unsettled by a worker declining to exercise an otherwise available right, independents will have no certainty or control over their own choices; businesses likewise will not be able to rely on their negotiated terms and will

instead be forced to anticipate numerous ad hoc differences in rights and remedies between workers that are otherwise the same.

B. The Nature and Degree of a Worker’s Control Over the Work is an Appropriate Core Factor, but the Proposed Rule Should Make Clear Businesses Can Provide Training, Auditing, and Benefits Without Becoming an Employer.

Central to independent work is flexibility, often found in the ability of the worker to determine their own schedule, the selection of projects, what kinds of work will be provided, and the method for achieving the business’s desired results. To this end, the Proposed Rule is correct in emphasizing the ability of the worker to reject opportunities without negative consequences as evidence of worker control. Likewise, the Proposed Rule is correct in rejecting the notion that the mere occasional presence of putative supervisors is evidence of control. (See cases cited in Proposed Rule at 60612, fn. 35).

Importantly, the Proposed Rule appropriately finds that a worker can still maintain independent status even if they are “not solely in control of the work.” (Proposed Rule at 60612-13 (quotations and citations omitted).) Accordingly, the Proposed Rule prioritizes the proper inquiry: the degree of self-determination present in the worker’s work, not simply whether all aspects of the work are within their discretion.

However, the Proposed Rule should adopt certain revisions in order to best reflect the interests of workers and others, and to provide the protections and benefits all workers should have in the modern workplace.

1. The Final Rule should make clear that the provision of workplace trainings, auditing, and benefits are not indicia of business control.

The analysis regarding control should be focused on only those aspects of control that are relevant to the actual work performed. The Final Rule, then, should explicitly state that the parties’ implementation of compliance and auditing measures are not evidence of a business’s control over a worker’s work. SHRM supports the Proposed § 795.105(d)(1)(i) recognition that contracting parties should be able to build compliance with, for example, specific legal obligations, satisfy health and safety standards, and the carrying of insurance into the contractual relationship. However, the Final Rule must emphasize that all workers, regardless of their formal employment status, should be able to benefit from the training, resources, and positive workplace practices as those who are directly employed in the same workplace. Prohibiting this type of workplace enhancement due to outdated concerns essentially freezes the Fair Labor Standards Act in 1938 when it was first passed.

The Final Rule should clarify that businesses may provide important workplace information, training, and other forms of protections designed to improve the work environment for all workers without becoming an employer of a worker. Ultimately, this is sound public policy because it incentivizes companies to set basic lawful standards, provide fundamental resources, trainings, and information, and ensure the existence of proper safety measures for all workers in the workplace regardless of whether the workers are employees. Companies that are concerned that all workers receive certain resources, trainings, and compliant pay and other practices should not be penalized for these proactive pro-worker, pro-workplace, and pro-employer affirmative acts that benefit all in the workplace, including especially all workers,

whether or not they are employed by the workplace in which they provide services or are provided these resources.

Similarly, the Final Rule should state that the provision of information or other supporting measures relating to various benefits and resources are not indicia of control. As the Proposed Rule reasons with regard to trainings and audits, the provision of benefits is not relevant to the control over the work performed by the worker, rather it is another workplace enhancement. Benefits can be used by businesses to attract talented workers in an ever increasingly competitive labor market. Regardless of whether a business believes it should provide benefit information and other supporting measures to independent workers, the Proposed Rule should not discourage that pro-worker opportunity.

In order to illustrate this point, SHRM offers four examples.

i. COVID-19 Safety Measures.

Perhaps nothing has proven this point better than the grave challenges businesses have faced with COVID-19. For instance, during the initial stages of the pandemic, essential businesses knew that they had to provide face coverings and protective personal equipment to their employees, but it was unclear whether they could do the same for non-employee workers without creating independent contractor compliance risks. Companies should not be discouraged from protecting the entire workplace from COVID-19 due to such concerns.⁸

Even OSHA guidelines make clear that COVID-19 is an issue for the workplace as a whole and not just for employers and employees. OSHA COVID-19 guidance even advised businesses to “[t]alk with companies that provide your business with contract or temporary employees about the importance of sick employees staying home and encourage them to develop non-punitive leave policies.” See OSHA Guidance on Preparing Workplaces for COVID-19 at 11, available at <https://www.osha.gov/Publications/OSHA3990.pdf>. Businesses should be assured there will not be additional liability when protecting all the workers they work with regardless of their employment status.

Likewise, states have issued guidance requiring businesses that use external workers to provide protective equipment to independent contractors.⁹ Absent clarity in the Final Rule, businesses are arguably left in the proverbial Catch-22 in other states that have not so explicitly regulated the workplace. Further, can providing personal protective equipment, cleaning, or other COVID-19 safety precautions to independent workers, allowed or required by a state order, provide evidence of employment under the Act? Do businesses open themselves up to liability claims by following these state orders or guidance?

⁸ See generally Allen Smith, COVID-19 Safety Plans Can Reduce Return-to-Workplace Fears, Society for Human Resource Management, <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-safety-plans.aspx> (June 22, 2020).

⁹ See New York State Empire State Development, Frequently Asked Questions (FAQ) on New York Forward and Business Reopening, at FAQ 18, <https://esd.ny.gov/nyforward-faq>. New York State has also recognized this concern in their reopening documents by mandating that employers have the same policies for their employees and contractors. See New York State Department of Health, INTERIM GUIDANCE FOR OFFICE-BASED WORK DURING THE COVID-19 PUBLIC HEALTH EMERGENCY, at 3, <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/offices-interim-guidance.pdf> (defining “employees” to generally include “the office-based businesses/tenants and their employees and/or contractors.”).

Especially now, amidst a pandemic, businesses should be incentivized (even if only to remove potential liability) to improve the safety and wellbeing of their employees and non-employees alike.

ii. Mandatory Workplace Sexual Harassment Trainings.

Providing anti-discrimination trainings and anti-harassment trainings are a positive development in the workplace and public policy should encourage these types of trainings. After all, no worker should be subjected to discrimination or sexual harassment in the workplace. To this end, some states have implemented measures requiring businesses to provide sexual harassment training to their external workforce. See e.g., NYC Commission on Human Rights, Stop Sexual Harassment in NYC Act Frequently Asked Questions, <https://www1.nyc.gov/site/cchr/law/sexual-harassment-training-faqs.page>.

Businesses should be permitted to institute preventive measures on an *organizational* level without concern that trainings provided to independent contractors will create an employment relationship. Indeed, studies have found with regard to gender harassment, for example, “when it occurs, it is virtually always in environments with high rates of uncivil conduct.” See National Academies of Sciences, Engineering, and Medicine 2018. *Sexual Harassment of Women: Climate Culture, and Consequences in Academic Sciences, Engineering and Medicine*, Washington, D.C. The National Academies Press. (<https://doi.org/10.17226/24994>) (“NAS Study”). In its 2016 comprehensive study on sexual harassment in the workplace, the Equal Employment Opportunity Commission (EEOC) observed that “organizational *culture* is one of the key drivers of harassment.” U.S. Equal Emp. Opportunity Comm’n, *Select Task Force on the Study of Harassment in the Workplace* (June 2016), at 54. (“EEOC 2016 Report”). Organizations should be permitted to create and maintain positive cultures for all workers, regardless of their status, without risk of upending their relationships with independent workers. In the same way, independent workers should be able to benefit from working with and in businesses that maintain positive workplace cultures. These workers are no less deserving of these benefits and no less at risk for the harms that befall those who work in toxic workplaces.

The Final Rule should encourage these efforts and other voluntary efforts to provide such training and other information, while removing the potential risk that these pro-worker policies and practices will result in a reclassification of the worker as an employee. Businesses must have the freedom to promulgate and enforce policies that further and maintain civil, respectful, inclusive, and diverse workplaces and specifically prohibit all forms of offensive, vulgar conduct and harassment that is based on a person’s protected status—including their race, sex, age, and religion.

iii. Auditing Service Provider Policies and Practices.

Companies have a strong interest in auditing service provider policies and practices around pay practices, documentation of employees’ immigration status, and safety measures in the workplace (amongst other legal compliance issues) to confirm compliance with applicable laws. The Final Rule should allow businesses to take reasonable steps to ensure that contractors are in compliance with all applicable laws, including federal and state wage and hour, immigration, and other laws, through audits and other practices, without opening themselves up to becoming an employer. Businesses should not be punished for these pro-workplace steps to ensure contractor compliance with the law.

iv. Offer of Benefits Like Healthcare or Savings

Workplaces aim to attract and retain key talent. In the current landscape, there is far too much risk associated with providing benefits to independent workers. Rather, businesses are often advised to avoid benefits altogether. 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>.

Ultimately, benefits are just another form of compensation. Just as paying an independent contractor at an hourly rate, in lump sums, or on a project-basis should not impact the employment status of the worker, offering additional benefits should not alter the relationship either. Nothing about the manner or means of work is dictated by how the worker will be paid. Similarly, nothing about the manner or means of work is dictated by also offering health insurance, bonuses, or retirement savings.

Given the prevalence of independent work, the modern workplace would suffer if businesses were effectively barred from providing workplace enhancements that all workers should enjoy like healthcare or retirement savings. While it is true that some businesses may choose not to provide benefits to independent workers out of fear it could hinder their ability to retain permanent employees, these are choices businesses should be free to make to best attract the talent that they need while also accommodating workplace models that allow for greater worker flexibility.

In addition, The Final Rule should make clear that a worker’s opportunity to perform similar services for multiple businesses weighs in favor of independence, regardless of whether the worker exercises that right. Employees, generally, are immobile; they usually work for one employer or business. See *Sec’y of Labor, U.S. Dep’t of Labor v. Lauritzen*, 835 F.2d 1529, 1542 (7th Cir. 1987) (“The usual argument that workers are ‘dependent on employers ... is that they are immobile.”) (Easterbrook, J., concurring); see also *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1442 (10th Cir. 1998) (stating that, generally speaking, “[e]mployees’ usually work for only one employer”) (quoting *Dole v. Snell*, 875 F.2d 802, 811 (10th Cir. 1989).)

However, the opposite is true for independent workers; mobility is reflective of their control over their work. See *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 141-143 (2d Cir. 2017) (holding a worker’s opportunity or ability to simultaneously provide services to multiple entities, including competitors, demonstrates “considerable independence”) (quoting *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015) (“If a worker has multiple jobs for different companies, then that weighs in favor of finding that the worker is an independent contractor.”); *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998) (noting fact that “[t]he drivers can work for other courier delivery systems” supported independent contractor status); *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 171 (2d Cir. 1998) (affirming finding of independent contractor status when, inter alia, the worker “was allowed to sell merchandise on behalf of other companies”); *Freund v. Hi-Tech Satellite, Inc.*, 185 Fed.Appx. 782, 784 (11th Cir. 2006) (per curiam) (affirming district court’s finding that worker’s ability “to take jobs from” competitors, and to “take as many or as few jobs as he desired,” supported district court’s conclusion that there was not a “significant degree of permanence” in the relationship at issue).)

The ability to perform work for similar businesses, especially competitors, is evidence of independence, particularly the initiative of the worker to control their own work. Workers have

different reasons for how they structure their relationships with one or multiple businesses. Workers may provide themselves more freedom by working with multiple businesses whom they can source for work at their choosing, while other workers may find leverage in negotiating terms between multiple businesses. Many workers enter into relationships with multiple businesses to optimize their freedom and work opportunities. Ultimately, a worker's opportunity to work for other businesses is indicative of their freedom to be in business for themselves, regardless of whether they choose to do so.

Central to this factor is not whether the worker actually chooses to work for several businesses, but whether the nature of the relationship is such that the worker can provide services to others. Some workers may choose to work with only one business for myriad reasons, while other workers may choose to work for numerous businesses at the same time. The freedom to exercise a right is not undermined by choosing not to exercise the right; indeed, entailed in the freedom to choose is the freedom to make no choice at all. Accordingly, SHRM asks the Division to give equal weight to this consideration regardless of whether the worker actually exercises the right to work for others.

2. The Final Rule should include the following additional illustrations regarding worker control.

Worker control is ultimately about the manner and means through which the end-result is achieved. Accordingly, SHRM offers the following illustrations of worker independence to be included in the Final Rule:

- The worker's use of other contractors or service providers to either perform the entirety of the work, only subparts, or as support for the worker's performance (like administrative assistances, legal compliance, or financial services);
- The worker's ability to interface with customers or clients directly and without oversight for the duration of the service provided regardless of whether the business served to broker or initiate the relationship between the worker and customer;
- The worker's control over the manner of work performed including the sequencing of events or the equipment, supplies, or tools utilized; and
- The worker's control over when work will be performed where the bargained-for result does not specify a deadline for completion.

SHRM also recommends the Final Rule use the following as examples when business control is not present:

- The business's right to enforce provisions of the contract;
- The business utilizes employees to perform services that would otherwise be performed by the independent contractor in the event the independent contractor fails to perform;
- Control as to the timing of final results, such as deadlines;

- The business’s communication or provision of customer specifications regarding the results desired;
 - The business’s communication or provision of customer feedback and reviews regarding work performed; and
 - The business provides guidance regarding best practices that are not mandatory but that the business has found provides greater ease of performance or customer satisfaction.
- C. The Opportunity for Profit or Loss is an Appropriate Core Factor, but the Proposed Rule Should Eliminate the “Skill Required” Additional Factor and Incorporate It Into This Factor.**

The worker’s opportunity for profit or loss based on initiative or investment, the Proposed Rule’s second Core Factor, is an appropriate Core Factor. (See Proposed Rule at 60613). SHRM, however, asks that the Final Rule contain the following revisions to the Proposed Rule as well as the following additional illustrations.

“Skill Required” should not be an Additional Factor, but should instead be incorporated into the Opportunity for Profit or Loss Core Factor. To the Proposed Rule’s discussion of a worker’s business acumen as indicia of the worker’s ability to impact their profit or loss, see Proposed Rule at 60613-14, the Final Rule should state that business acumen may cover a broad range of subjects including sales, customer service, marketing, distribution, communications, and other professional, trade, technical, and other learned skills, as well as other unique business abilities and acumen, including acumen that impacts a worker’s ability to profitably run their own independent business.

For this reason, SHRM recommends that the Final Rule reject “skill required” as a stand-alone factor. Instead, “skill required” should be appropriately analyzed under the second Core Factor, the individual’s opportunity for profit or loss. Analyzing “skill” as a stand-alone factor risks de-prioritizing essential hallmarks of independent work -- flexibility and freedom to provide services -- that do not necessarily entail specialized training or education.

As an initial matter, the Division itself has found that specialized skills are irrelevant to determining whether a worker is in business for themselves. See *e.g.*, WHD Opinion Letter FLSA 2019-6 (April 29, 2019) (holding that ridesharing drivers were independent contractors under the Act, and their exercise of managerial discretion and lack of training weighs in favor of independent contractor status). Accordingly, the Final Rule should reject the inclusion of factors that the Division itself contends hold very little, if any, weight.

Additionally, an emphasis on “skill required” to perform the work does not match the real-world experience of independent workers. Indeed, most independent workers do not emphasize their skills as the main reasons they engage in independent work. Rather, when asked to select among the top three reasons for becoming an independent worker, only 17% of independent workers said they did so because the type of work they do is mostly done by independent workers. (Ex. A, p. 18.) These workers instead explained they became independent workers because of the freedom it afforded them in terms of scheduling, hours, and location of work. Accordingly, the fact that they maintained a special skillset was not determinative of the reason they sought out independent work, and there is

no reason the Final Rule should adopt rulemaking inconsistent with the voluntary decisions of independent workers.

As SHRM's research shows, independent work encompasses a broad range of work-types, each of which contains varying levels of skills and abilities depending on the results requested through each worker's arrangement. (Ex. A, p. 6.) Many types of workers, like consultants, designers, drivers, artists, actors, photographers, and technology specialists likely do not possess certifications or degrees that would be indicia of so-called skilled work. Rather, these workers may be self-taught or have learned "on the job." Likewise, an independent worker's skill may actually be their expertise in using a platform or the techniques they acquired from understanding their own profit and loss. For example, rideshare drivers are able to provide services to multiple clients by moving back and forth on different apps that are open at the same time. A factor prioritizing skill over these workers' acquired acumen in choosing when, whether, where, and how long to work undermines the initiative exercised by these workers in promoting themselves and seeking opportunities.

3. The Final Rule should include the following, additional illustrations regarding worker opportunity for profit or loss.

The Final Rule should provide more clarity to workers, businesses, and courts by way of additional examples of worker investment and initiative that impact profit and loss, as follows:

- The worker's decisions in choosing amongst opportunities offered that impact profit and loss;
- The worker's losses suffered from receipt of customer complaints where the worker's results were below customer or contractual expectations;
- The worker's decisions in avoiding liquidated damages charges or indemnification obligations in the parties' agreement;
- The worker's own decision-making on whether to use other workers or services as helpers or substitutes as well as the use of related labor or specialties to assist in either the services provided, the tools and equipment used, or the maintenance of the worker's business structure;
- The worker's acumen regarding the delivery of services/products that result in enhanced profits through tips and other incentives;
- The worker's decision-making regarding the details and means by which they obtain supplies, tools, and equipment for use in their business, including choices regarding from whom to purchase these goods, how much of the goods are obtained at any one time, the quality of the goods, and the negotiated prices regarding said goods; and
- The worker's decision-making regarding investment in skills they deem necessary to achieve the desired results from their work, including education, certificates, or classes;

Additionally, SHRM also proposes that the Final Rule include the following explicit statements regarding facts that do not support a finding of dependency:

- Workers may experience financial losses as a result of cancellations of their service or the provision of service that does not meet customer expectations when the worker has flexibility to choose between work opportunities; and
- Even if the business sets the price of goods provided by the worker, that does not negate the worker's initiative when the worker controls the amount of time, when, and where they provide the services as well as the amount of the same service they chose to provide.¹⁰

D. The Following Revisions Would Strengthen The Proposed Rule's Additional Tie-Breaking Factors.

1. The Permanence Factor Should Focus on Whether the Relationship is Intended to be Indefinite; Otherwise the Factor Should be Eliminated.

The Proposed Rule's interpretation of permanence of the relationship factor does not speak to the independence or voluntariness of the business-worker relationship in any meaningful way and will, instead, promote instability in contracting. Accordingly, SHRM asks the Division to either revise the permanence factor as set forth below or eliminate it entirely.

SHRM asks that the Proposed Rule be revised to find a lack of permanence when independent workers and businesses enter into one or more contracts of a specific duration regardless of whether said contracts or terms are repeated or sporadic and regardless of whether performance relevant to the contract is sporadic within a specified term. A term of a specific duration, regardless of whether it is continuous with other specific terms, is evidence of independence. A relationship of indefinite duration, however, does not exist simply because parties have continued to contract with each other over a series of defined terms. Indefiniteness is determined by the absence of any term whatsoever. To this end, the Proposed Rule improperly focuses on the length of the relationship in the discussion of the permanence factor. (See Proposed Rule at 60615 - 60616 (stating an employment relationship may be found if the relationship is "continuous.")).

It is simply good public policy to encourage businesses to continue contracting with independent workers who provide good service without running the risk of creating a relationship the parties never intended. Workers and businesses require the freedom to enter into longer-term contracts or repeatedly renewed contracts without a finding of employment status. Indeed, the freedom to independently contract would be severely undermined if continued and repeated service based on a history of expected or stellar performance could render an otherwise fruitful relationship into one of control and economic dependency.

As written and reasoned, the Proposed Rule is unclear on how courts resolve the "permanence" issue when a worker and business have a seemingly continuous relationship but the work within that relationship is sporadic. For example, how would the rule determine permanence when a contract term is longer but the work performed pursuant to that contract is sporadic? Would the work be "regular" or "continuous"? (See Proposed Rule at 60621.)

¹⁰ See, e.g. WHD Opinion Letter FLSA2019-6 at 9 - 10.

SHRM recommends the Final Rule make clear that work is not permanent, regular, or continuous when a worker stops or starts at will or takes on as many projects as the worker pleases within a long-term contract. Flexible work within a lengthy relationship is a sign of independence rather than dependence. Indeed, the fact that a worker does not appear to rely on a single relationship is the very antithesis of dependence.

Because a focus on permanence either confuses or undermines the nature of and public policy benefits of independent work, SHRM suggests that the relationships between workers and businesses that respect the contracting structure and contain elements of independent business relationships should be considered in a revised Additional Factor that looks at the relationship of the parties. In codifying this Additional Factor, the Division should consider the following: (1) the existence of a written agreement between the parties; (2) a specific term to that agreement, whether in terms of years or specific beginning and end dates; (3) an agreement that states the rights and obligations of both parties; (4) an agreement that is subject to negotiation and an agreement that is entered into voluntarily by both parties; and (5) an agreement that allows for the workers to choose as many or as few projects as desired.

2. The Integrated Unit Factor Should Be Eliminated or Revised To Reflect The Emergence and Existence of Platforms as Marketplaces

The Final Rule should explicitly state that multi-sided platform companies that connect customers with potential independent workers are distinct entities that are not engaged in the work the independent worker performs. Platforms must be recognized as operating outside of an “integrated unit” involving the worker and not as “hiring” the independent worker. While the Proposed Rule properly rejects an analysis focused on whether the worker’s services are “integral” to a business, specific guidance is needed to ensure that it does not unnecessarily disrupt independent relationships that may form subparts of a specific unit and reflect the impact of technological change on consumer preferences and worker demand for expanded, flexible economic opportunities.

First, platforms are not part of an integrated unit with the worker who provides the actual service. A ridesharing platform, for example, provides a market for drivers and riders to find each other, but if a rider accepts a ride request and transports the rider, that is not part of one continuous integrated process, and one does not employ the other. Instead, these are distinct functions: the platform provides the match and the driver performs the transportation service via a platform and is not part of an integrated unit or production line. This distinction has long been recognized by the courts, agencies, and in academia. See, e.g., *Ohio v. American Express Co.*, 138 S.Ct. 2274, 2280, 585 U.S. — (2018) (discussing two-sided transaction platform); see also David S. Evans, *Matchmakers: The New Economics of Multisided Platforms* (2016); Hagiu, Andrei and Julian Wright, “Multi-sided platforms” *International Journal of Industrial Organization* 43, no. 1 (2015): 162-174 (hereafter, Hagiu and Wright (2015)), pp. 162-163.

Second, regulators have consistently recognized the distinctions between platforms and integrated units. As an initial matter, the Division itself recognizes these distinctions. Recently, the Division reiterated the position it has held “[f]or more than 40 years” that matchmaking services can exist without creating an employment relationship, finding that nurse or caregiver registries are not employers when they “match” people who need caregiving services with caregivers who provide the services. See Field Assistance Bulletin No. 2018-4, “Determining whether nurse or caregiver registries are employers of the caregiver,” (July 13, 2018).

In April 2019, the Division issued an Opinion Letter finding that a company was not the employer of service providers in consideration of “an online and/or smartphone-based referral service that connects service providers to end-market consumers to provide a wide variety of services, such as transportation,” as well as other services “that uses objective criteria to match consumers to service providers.” See FLSA2019-6 (April 29, 2019) (the “Opinion Letter”). Specifically, the Division found a lack of employment status because the company “does not receive services from service providers, but empowers service providers to provide services to end-market consumers. The service providers are not working for [the company]’s virtual marketplace; they are working for consumers through the virtual marketplace. They do not work directly for [the company] to the consumer’s benefit; they work directly for the consumer to [the company]’s benefit.” *Id.* at 7.¹¹

The Final Rule should make clear that these platform companies are not “intermediary companies,” whose operations with the worker providing services terminate at the point of connecting the independent worker to consumers, and do not extend to the independent worker’s actual provision of services. (Proposed Rule at 60617.) To eliminate any confusion, an explicit expression that the platform is not analogous to a production line is recommended in the Final Rule.

SHRM agrees with the Proposed Rule that analysis concerning the “integrated unit” factor should not focus on the “importance of services” provided, see *id.*, however, the Proposed Rule’s newly framed inquiry centered on an “integrated production process” is not helpful to assessing a worker’s independence and will likely lead to litigation without the clarifications sought here.

Alternatively, the Division should consider a replacement factor that has been utilized in state laws to accommodate different forms of external work. Specifically, the Division should consider including the phrase, “or, alternatively, that the worker is performing work, the majority of which is performed off the physical premises of the business.” Such phrasing provides insight into whether the work is actually integrated into the business unit and de-emphasizes a vague notion of “importance” that the worker’s services may provide.

IV. CONCLUSION

SHRM urges the Department to adopt the Proposed Rule subject to the suggested changes provided above. The Proposed Rule is necessary to provide certainty and consistency to businesses and workers. Independent work is an integral part of the US economy. Therefore, it is imperative that neither the business community or workers be hindered by outdated and restrictive rules and regulations.

¹¹ Aside from the Division, the National Labor Relations Board (“NLRB”) Office of General Counsel (“OGC”) concluded that rideshare drivers were independent contractors when they “provid[ed] personal transportation services using [a company’s] app-based ride-share platform were employees... or independent contractors” and concluded that the drivers were independent contractors. See NLRB Office of General Counsel Advice Memorandum (April 16, 2019) (the “OGC Advice Memorandum”).

The Proposed Rule will promote efficiency, flexibility, and freedom for all participants in the economy. SHRM appreciates the opportunity to offer these comments on the Proposed Rule.

Sincerely,

A handwritten signature in cursive script that reads "Emily M. Dickens". The signature is written in black ink and is positioned above the printed name and title.

Emily M. Dickens
Chief of Staff, Head of Government Affairs & Corporate Secretary

EXHIBIT B



April 12, 2021

By electronic submission: <http://www.regulations.gov>

Ms. Amy DeBisschop
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Re: Department of Labor Wage and Hour Division Notice Titled, “Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal,” RIN 1235-AA34, 86 Fed. Reg. 14027 (March 12, 2021)

Dear Ms. DeBisschop:

The Society for Human Resource Management’s (“SHRM”) mission is to create better workplaces where businesses and workers thrive together. Our 300,000+ HR and business executive members impact the lives of more than 115 million workers and their families. 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 employment options that provide the 21st century worker the autonomy necessary to make the best decisions for them and their families. To that end, independent work is not only valuable, but necessary to compete in today’s global marketplace.

As such, SHRM supported the Department of Labor’s (“DOL or Department”) Final Rule on Independent Contractor Status under the Fair Labor Standards Act (“FLSA”) which was published on January 7, 2021 and effective on March 8, 2021. On March 12, 2021, the DOL issued the Notice of Withdrawal and request for comments, seeking to withdraw the Final Rule.

For all the reasons set forth below, SHRM opposes the DOL’s Notice of Withdrawal. DOL’s Final Rule entitled “Independent Contractor Status under the Fair Labor Standards Act,” 86 Fed. Reg. 1168 (January 7, 2021) (“Final Rule”) is sound public policy that creates a clearly defined standard benefitting all workers and workplaces.¹ SHRM urges the DOL to cease its efforts to stall, withdraw, and redo the Final Rule that was to take effect on March 8, 2021.²

¹ SHRM has attached as Exhibit 1 to these Comments the comments it filed with respect to the DOL’s Proposed Rule on “Independent Contractor Status Under the Fair Labor Standards Act” on October 26, 2020 (“SHRM Rule Comments”). Exhibit 1 contains further support for SHRM’s position that the Final Rule should not be withdrawn.

² A White House Chief of Staff memorandum issued on January 20, 2021, “Regulatory Freeze Pending Review,” (“Regulatory Freeze Memo”) sought to delay the effective date of the Final Rule to March 21, 2021. SHRM notes that on March 4, 2021 DOL issued a notice entitled, “Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date,” (“Delay Rule”), 86 Fed. Reg. 12,535 (March 4, 2021) stated its intent to postpone the effective date of the Final Rule to May 7, 2021. SHRM further notes that whether DOL lawfully

To that end, SHRM respectfully submits these comments in response to the United States Department of Labor, Wage and Hour Division's notice entitled, "Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal," published in the Federal Register on March 12, 2021 ("Notice of Withdrawal").

SHRM Comments Opposing the Notice of Withdrawal of the Final Rule

A. The Final Rule Provides Much-Needed Clarity for HR Professionals In Establishing and Maintaining Independent Worker Compliance Engagement and Management Practices, And Should Not be Withdrawn

SHRM generally supported the Department's initial proposal, which recognized that the regulatory framework around independent contractor status was unnecessarily unclear and too difficult to apply. In this regard, the Final Rule cited SHRM's Comments and noted that they were consistent with commenters in the business community and freelance workers generally. Specifically, the Final Rule quoted SHRM, as follows: "The Society for Human Resource Management (SHRM) echoed this sentiment writing 'the business community and worker are left applying numerous factors in a variety of ways that is mired in uncertainty and, therefore, unnecessary risk.'" Final Rule at 1172.

The Final Rule recognizes the importance of increased clarity, and relies specifically upon a study coauthored and cited by SHRM in its Comments entitled "Want Your Business to Thrive? Cultivate Your External Talent" (2019) <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/external-workers.aspx> (see Final Rule at 1233). The Final Rule, quoting SHRM, notes that "...human resources professionals' largest challenge concerning external workers that they would like to see resolved is the legal ambiguity regarding the use and management of external workers." Id. At 1233, footnote 200.

SHRM's Rule Comment, in support of the Final Rule, included SHRM's support of the Final Rule's interpretation of the economic realities test, including specifically the focus on a framework whereby a worker's status focuses initially on two core factors, followed by consideration of additional factors. SHRM further provided guidance on additional illustrative examples for businesses and workers. In support of independent workers, SHRM further proposed that the Final Rule make clear that businesses may provide trainings and protocols as well as benefits that enhance the workplace for all workers without the risk of becoming an independent worker's employer. See Exhibit 1 at page 2 and Final Rule at 1184 - 1185.

The Final Rule is a step forward in providing HR Professionals with a uniform, clear, and certain standard against which to enter into and guide a company's relationships with independent workers, for the benefit of workers, the workplace, and other employees.

SHRM remains confident that the Final Rule, if it remains in place, will reduce litigation and provide employers and workers with additional certainty in assessing their obligations and rights under the FLSA in the context of a wide variety of business relationships and relationships that are becoming exponentially more complicated as technological capacity expands. These complicated relationships, in-and-of themselves, were reason enough for SHRM to support the much simpler, comprehensive, and uniform Final Rule released earlier this year.

promulgated the Delay Rule is the subject of litigation in the U.S. District Court for the Eastern District of Texas in a lawsuit captioned *Coalition for Workforce Innovation et. al. v. Marty Walsh, et al*, Case No. 1:2021cv00130 (March 26, 2021 E.D. Tex).

B. Withdrawing a Rule Passed Through Formal Rulemaking Diminishes the Precedential Value of Rules Issued by Federal Agencies and Departments

As noted above, certainty is paramount for HR Professionals. Not only does the DOL's change of direction affect the ability of HR Professionals to effectively do their jobs, it also diminishes the precedential value of direction promulgated by the DOL and other agencies.

DOL published an extensive Proposed Rule on Independent Contractor Status under the FLSA, including a thorough analysis of existing precedent, studies, case law, prior DOL guidance, data, and research. Over the Proposed Rule's 30-day comment period, over 1800 commenters provided extensive additional analysis, data, economic reports, commentary, and reflection on the DOL's Proposed Rule. The DOL considered the comments filed, finalizing the Final Rule on January 7, 2021, and incorporating numerous references from the many commenters' analyses and recommendations. DOL accepted some recommendations and rejected others, with explanations in its Final Rule.

SHRM's Rule Comments, for example, provided specific recommendations and comments to enhance certain aspects of the Final Rule. SHRM's Rule Comments were cited 16 times in the Final Rule.³ There can be no question that tens of thousands of hours of stakeholders, individuals, and interested parties went into the filing of the 1800+ comments received by DOL in October, 2020. Hundreds of hours were likely then spent by DOL employees reading, analyzing, and incorporating those comments into the Final Rule (whether the comments filed were rejected or accepted). This thorough analysis of stakeholder input will be in vain if the Final Rule is withdrawn.

SHRM maintains that withdrawing a rule promulgated through the formal rule making process sets a dangerous precedent that diminishes the precedential value a court will afford, for direction coming from such agencies, and does long term damage to the interest of stakeholders in providing valuable input to DOL on important issues like the Final Rule. At best, withdrawal of the Final Rule will likely cause any court to look at future DOL direction on independent contractor status under the FLSA, and on other topics, with a skeptical eye, unknowingly diminishing the very power of the agency.

C. Apart From Procedural Reasons to Not Withdraw the Rule, The Rule is Also Grounded in Sound Public Policy and Case Law

Independent work is here to stay. While every generation is choosing independent work, nearly 50% of Generation Z and 44% of Millennials engage in some form of independent work.⁴ Workers of every generation recognize that independent work provides opportunities for enhanced autonomy, flexibility, and work/life integration. Certain workers in traditional freelance, consultant, contractor, direct sellers, and other decades-old industries have long flourished in independent relationships. As the Final Rule noted, SHRM research confirmed that 49 percent of external workers chose that work arrangement for the ability to set their own hours. Final Rule at 1237. As the modern economy provides new opportunities for these and other workers to engage and expand their economic opportunities with enhanced flexibility and freedom, the modern workplace must be allowed to meet this worker demand and provide

³ SHRM's Comments are cited in the Final Rule at the following pages: 1172, 1183, 1184, 1185, 1190 (twice), 1191, 1194, 1197, 1202,(twice), 1203 (twice), 1206, 1233, and 1237.

⁴ The 2020 Freelance Forward Study commissioned by Edelman Intelligence for Upwork found that 30% of Generation X and 26% 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>.

greater economic opportunities for all. The modern workplace also needs specificity and uniformity in the ability to determine whether a worker is or is not an employee under the FLSA.

Regulations that embrace these modern work relationships reflect today's workplace and economic opportunities available to workers who prefer the flexibility and freedom of providing work as non-employees to multiple businesses in a way that allows them meaningful self determination as to their work opportunities. 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 benefits work, workers, and the workplace.

The Notice of Withdrawal inaccurately and inconsistently states that the Final Rule is a "new" interpretation of the economic realities test. *See* Notice of Withdrawal at pages 14030 and 14034. To the contrary, the Final Rule embraces the economic realities test, and the elements that have been firmly established in law and regulation for over 70 years, ever since the United States Supreme Court adopted it in 1947 in *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947) and *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 - 326 (1992) (the scope of employment under the FLSA is determined by the economic reality of the relationship at issue). The Final Rule's guidance as to application of the factors relevant under an economic realities test helps workers and businesses to accurately structure and maintain their relationships, without guessing as to how to understand, address, and gauge the relevance and importance of the relevant economic realities factors.

Conclusion

The Independent Contractor Final Rule is sound public policy and should not be withdrawn. The Final Rule fundamentally embraces the complex nuances of the modern workforce. The Final Rule provides balanced, clear guidance to workers and businesses to ensure that workers have the opportunity to continue to operate as independent workers within clearly articulated rules that embrace both their status as non-employees and the flexibility and opportunities available to them as non-employees. In addition, the Final Rule, allows employers to engage these workers and provide them with certain guidance, tips, resources, and even non-employee benefits, without concern that these aspects of the relationship with independent workers will jeopardize their status. Lastly, the Final Rule, promotes efficiency, flexibility, and freedom for all participants in the economy.

Thank you for your consideration.

Sincerely,



Emily M. Dickens
Chief of Staff, Head of Government Affairs & Corporate Secretary

EXHIBIT C

Want Your Business To Thrive?

Cultivate Your External Talent



SAP SuccessFactors 



Contents

Executive Insights	3
Introduction	4
Who are external workers?.....	5
Types of External Workers	6
External Worker Motivations	7
Who We Asked–Other Stakeholders	9
About the Internal Employees	10
About the Managers	10
About the HR Professionals	11
Different Points of View	13
The External Worker Lifecycle	16
Planning	17
Sourcing	19
Onboarding	20
Working and Engaging	21
Paying	25
Exiting	27
Perceptions of Risk/Reward in the Use of External Workers.....	30
The Internal Employee View	31
The Manager View	33
The HR View	39
Are You Ready for Your External Workforce?..	40
Survey Research Methodology	43
About the Partners.....	46

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.

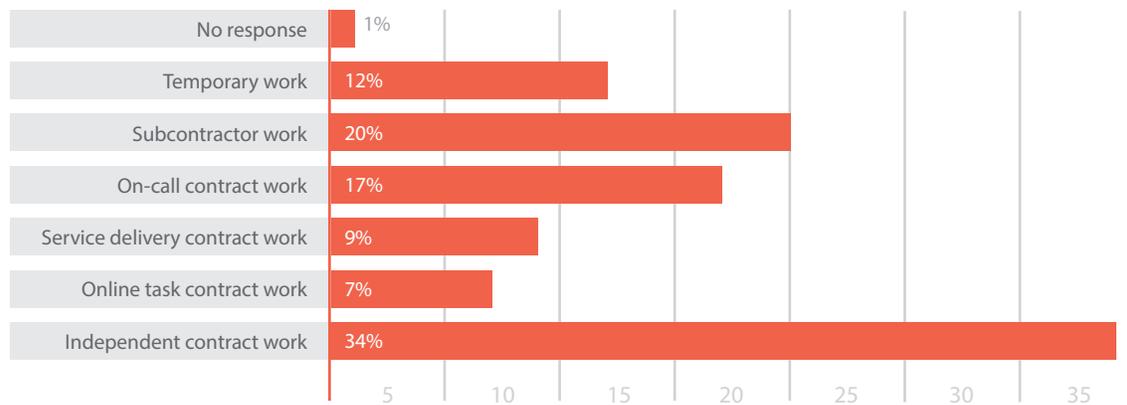
9. The Gig Economy and Alternative Work Arrangements, Gallup, 2018

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.

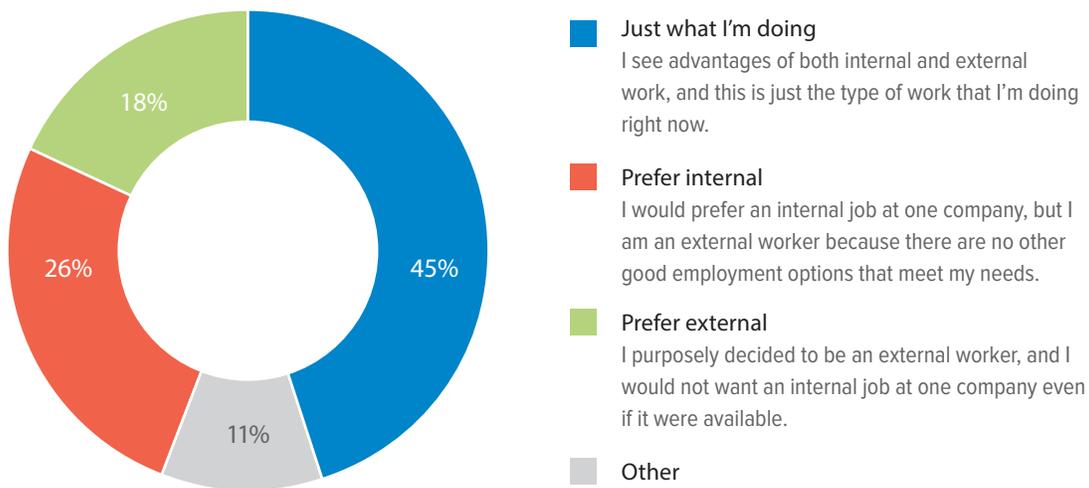
Smaller subgroups of internal employees who were former external workers (N=119), internal employees considering external work (N=74), and internal employees not considering external work (N=155) were asked about the reasons for those decisions. In all cases, their responses reflected a largely realistic 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

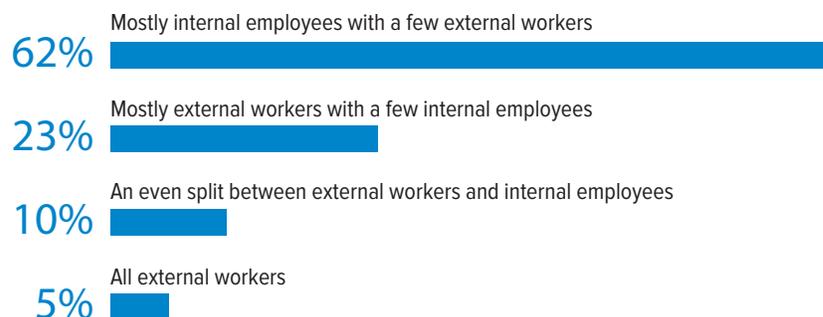
remainder nearly evenly split between those whose organizations don't use external workers and those who don't know if their organization utilizes external workers.

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?



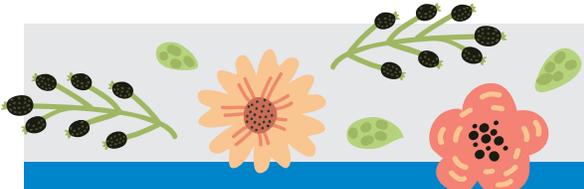
We also looked at the broad types of work that managers reported their organizations are using external workers for, as we suspected that there might be notable differences in organizations that allocate different kinds of work to external workers. Physical tasks were selected by nearly half (48%) of 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



HR's voice
Why We Use External Workers

“We struggle to find and keep workers to fill unskilled or low skilled jobs. If we could find them and keep them, we’d need external people less.”

“Finding qualified substitutes to cover employees on leave.”

“Larger or more available pool of specific skill sets.”

“To fill a role vacant to voluntary or involuntary termination until we can hire a new employee.”

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

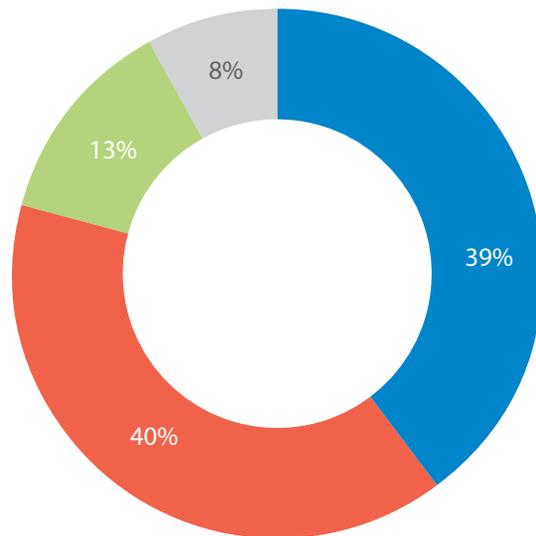


FIGURE 6

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

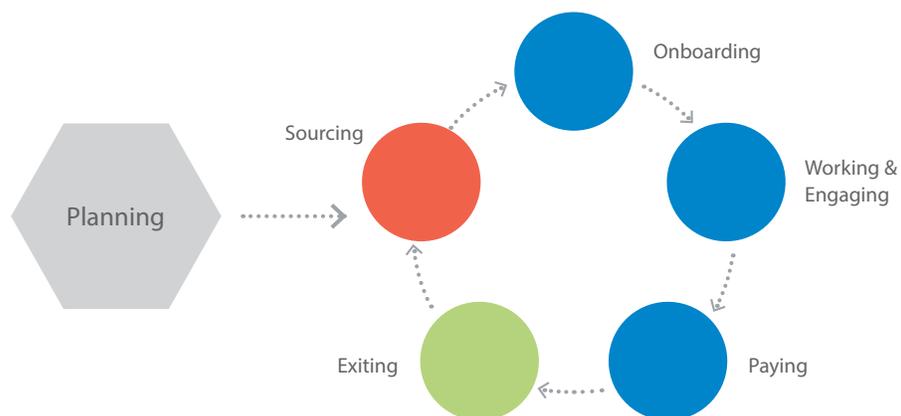


FIGURE 8

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

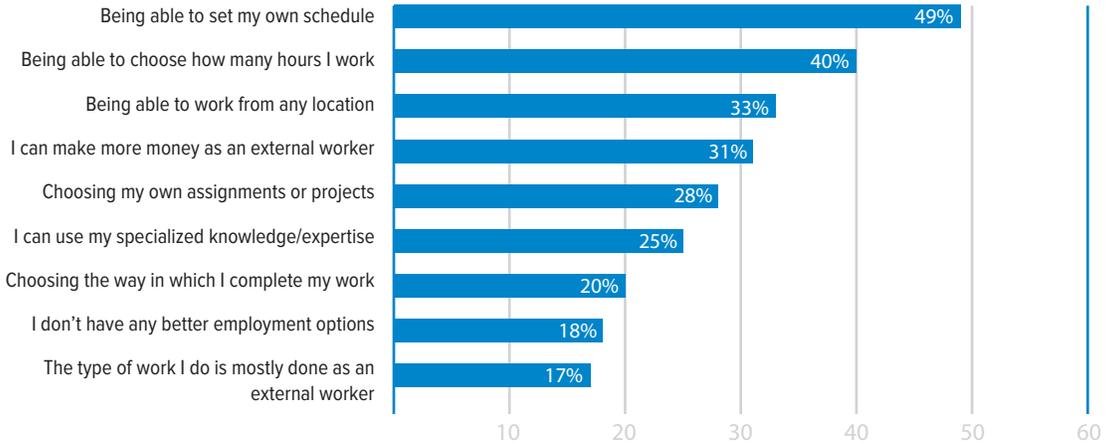


FIGURE 9

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

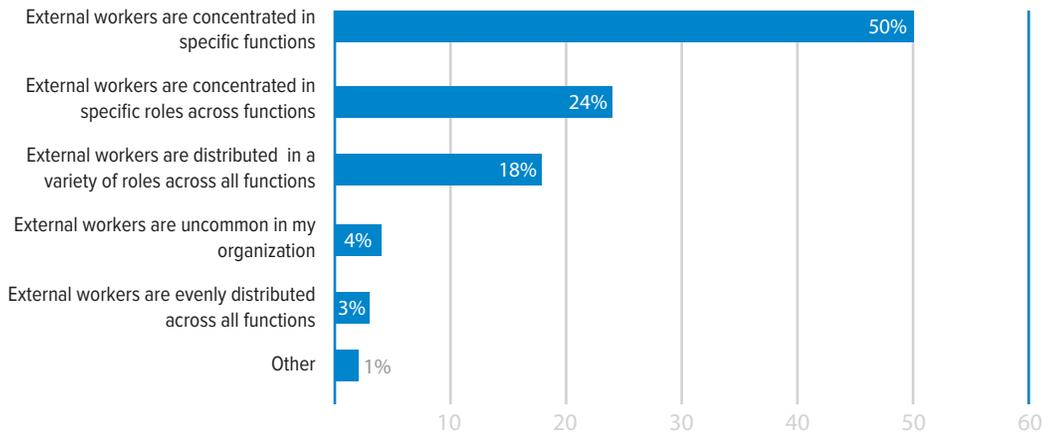
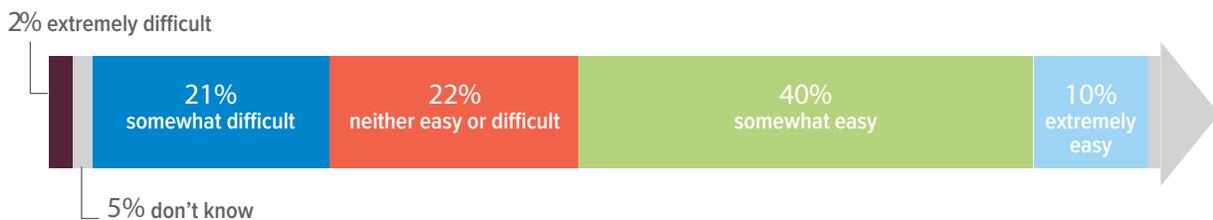


FIGURE 10

Difficulty hiring external workers



Sourcing

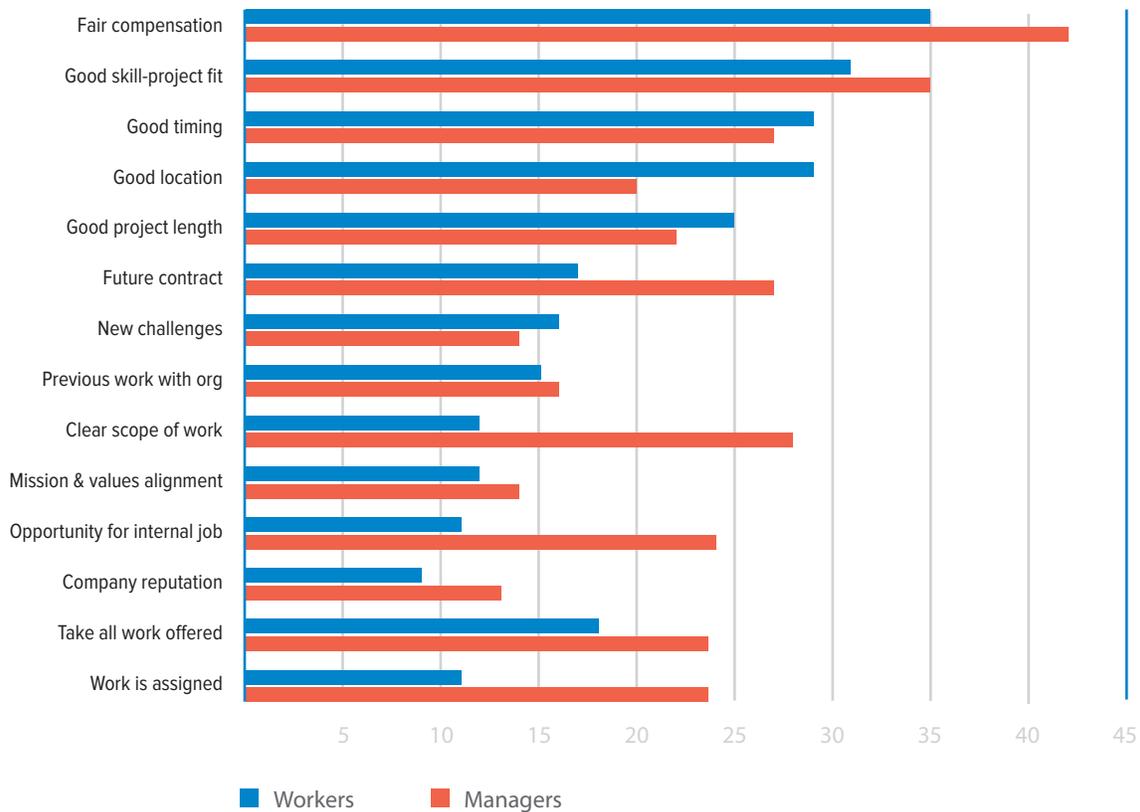
As external work is, by nature, temporary, the sourcing of external workers by organizations and sourcing of work by external workers are ongoing processes for both constituencies. HR professionals report that they use a wide variety of methods for sourcing external workers, in part reflecting the diversity 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

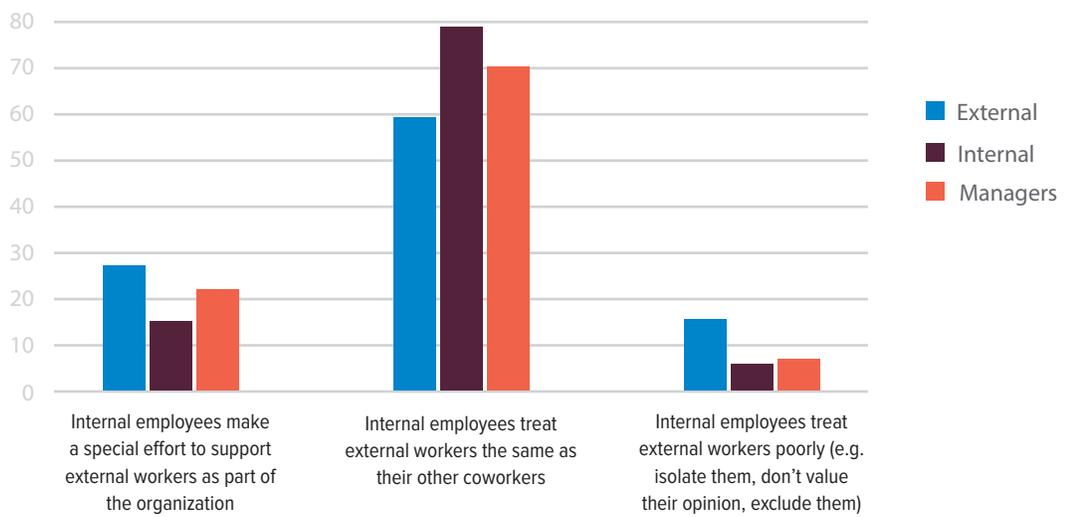
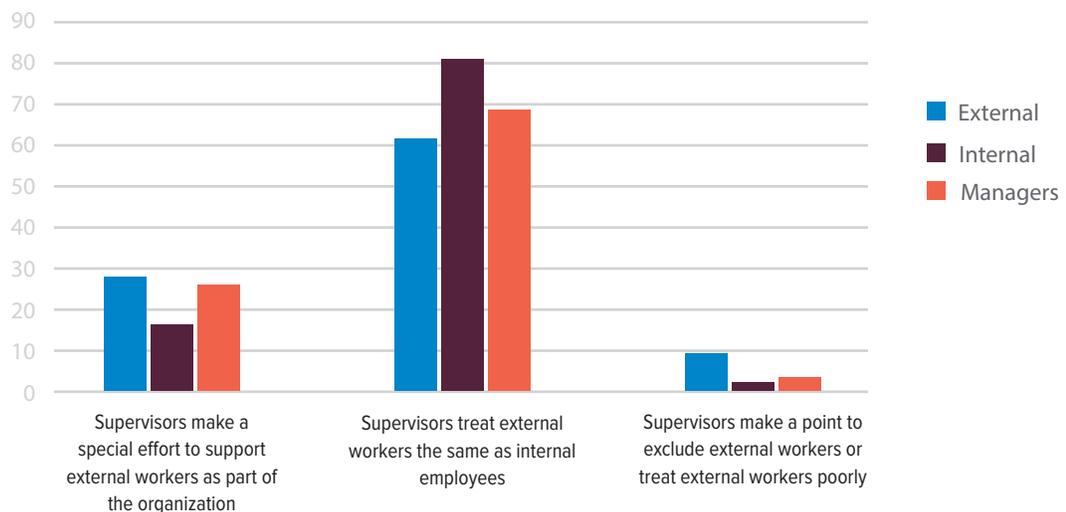


FIGURE 14 Supervisor treatment of external workers



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.

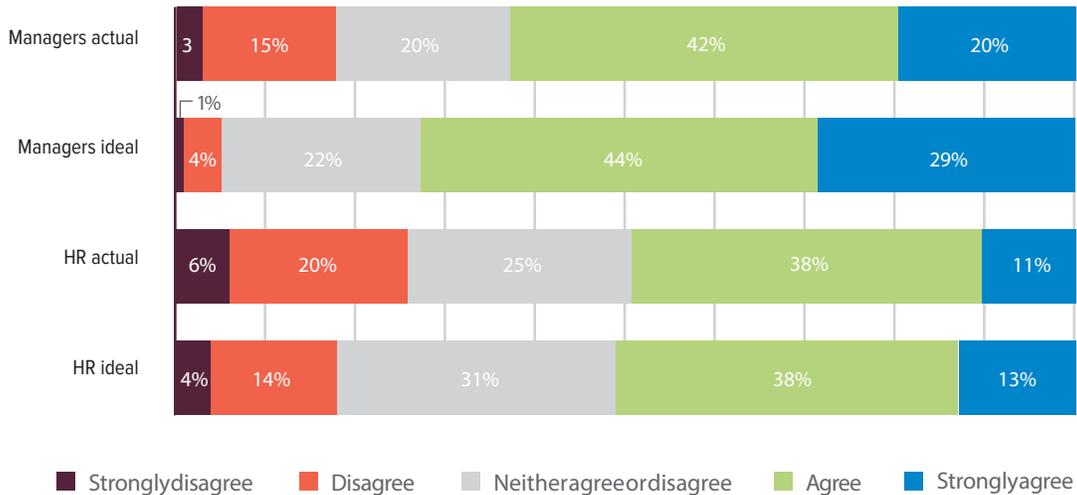
Even those external workers who work with others in a company setting have varied levels of interaction with the internal employees of the company they are working for. About a quarter of external workers

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

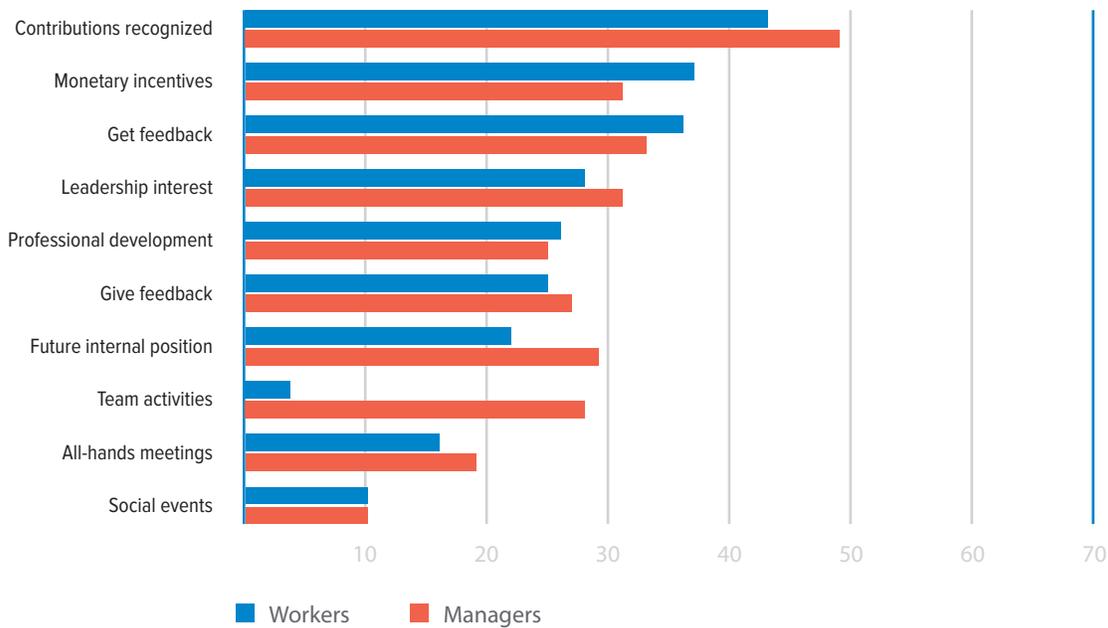
Ideal = Managers'/HR's belief that complete integration of external workers and internal employees on teams is ideal

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



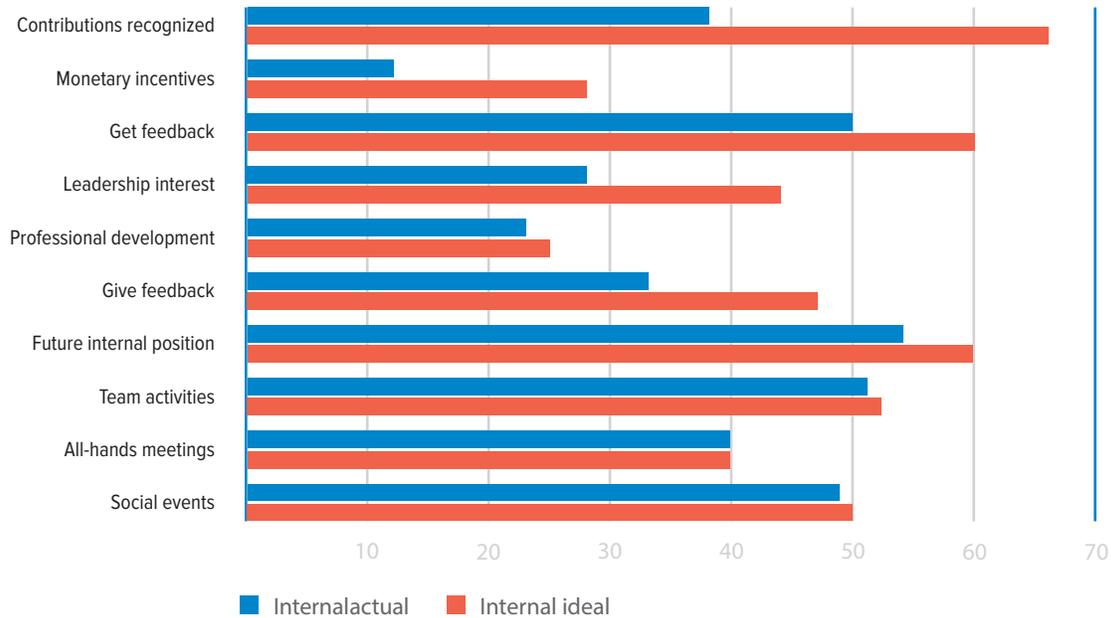
Internal employees’ views on what should be made available to external workers vs. what is made available

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.

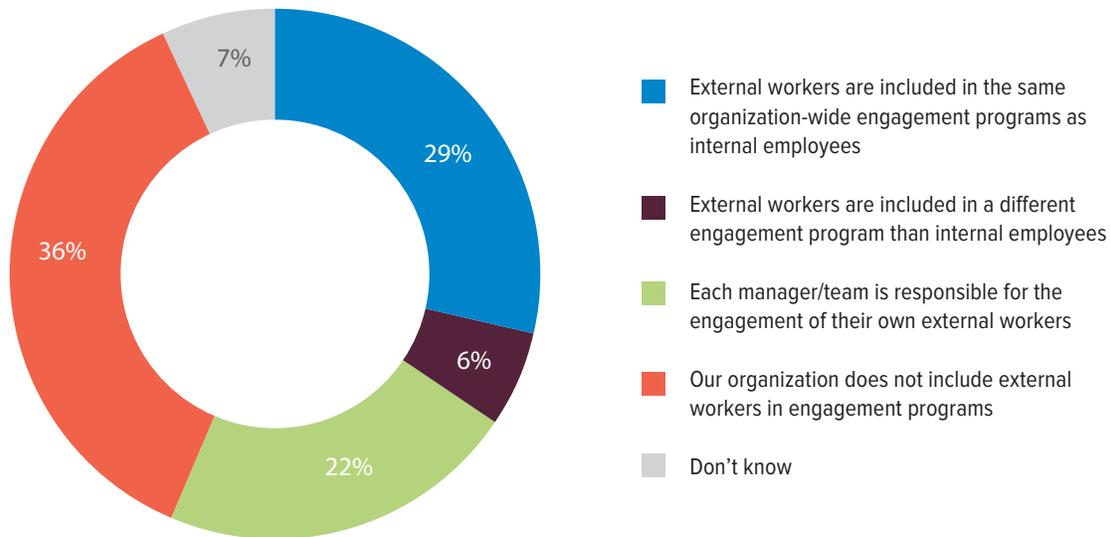
We also wondered what HR did for the engagement of external workers. This was an area in which there was little agreement across organizations. A similar number of organizations included external workers

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,

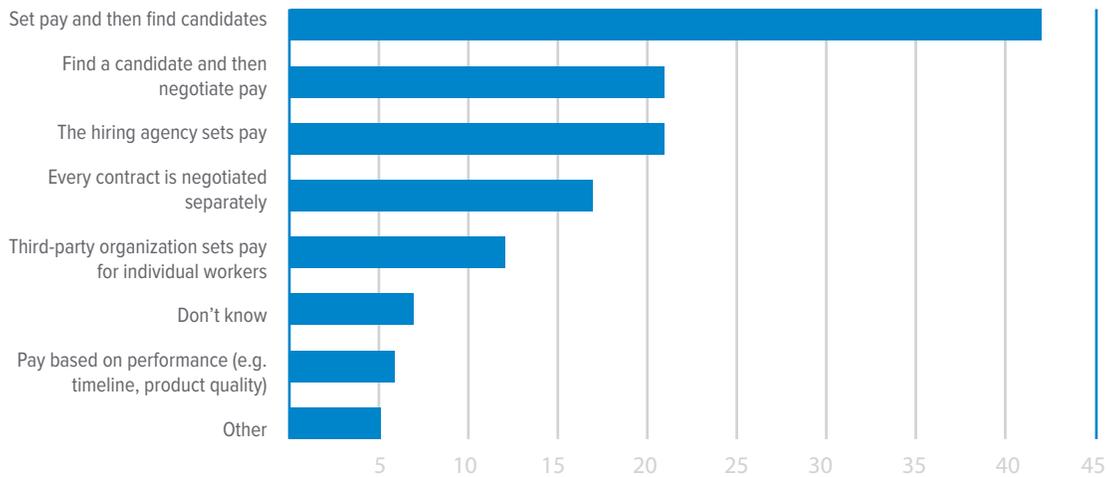
disagreement, and a neutral position across the three statements, conveying, once again, that external workers have very different perceptions about their experiences working in this capacity.

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.

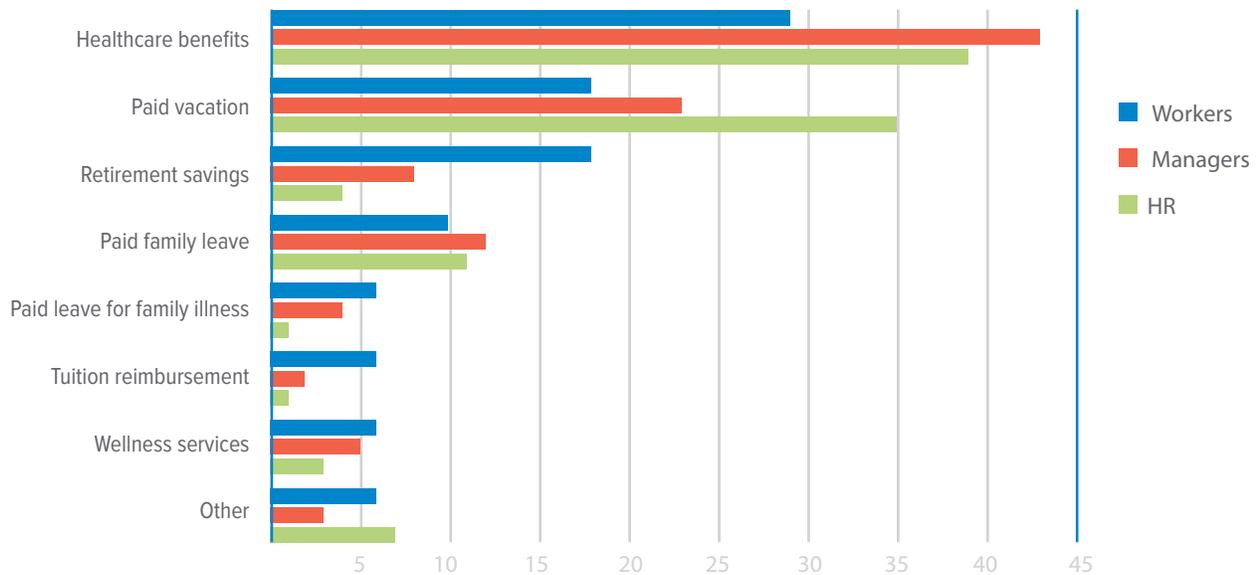
Organizations have opportunities to compensate workers in ways other than pay. For example, other studies suggest that independent workers may find it harder than internal employees to find opportunities to develop new skills and that opportunities for self-improvement are often cited as appealing by 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.

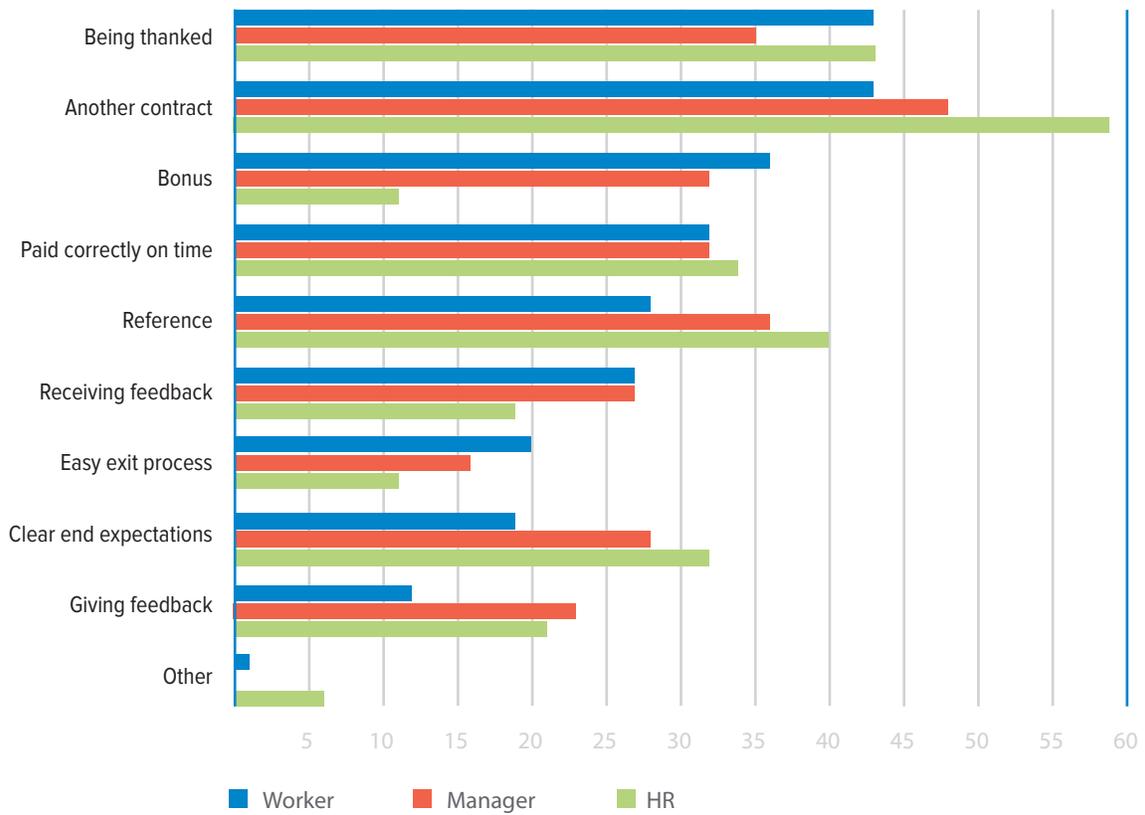
FIGURE 21

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



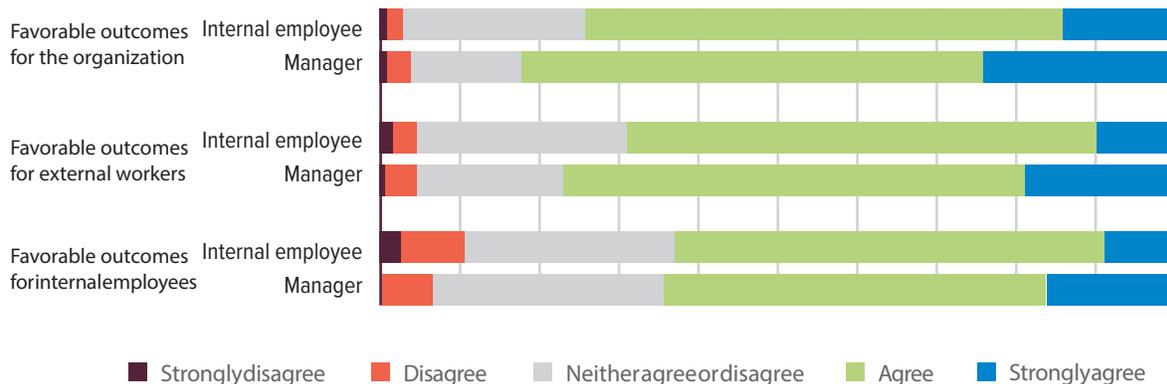
Perceptions of Risk/Reward in the Use of External Workers

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

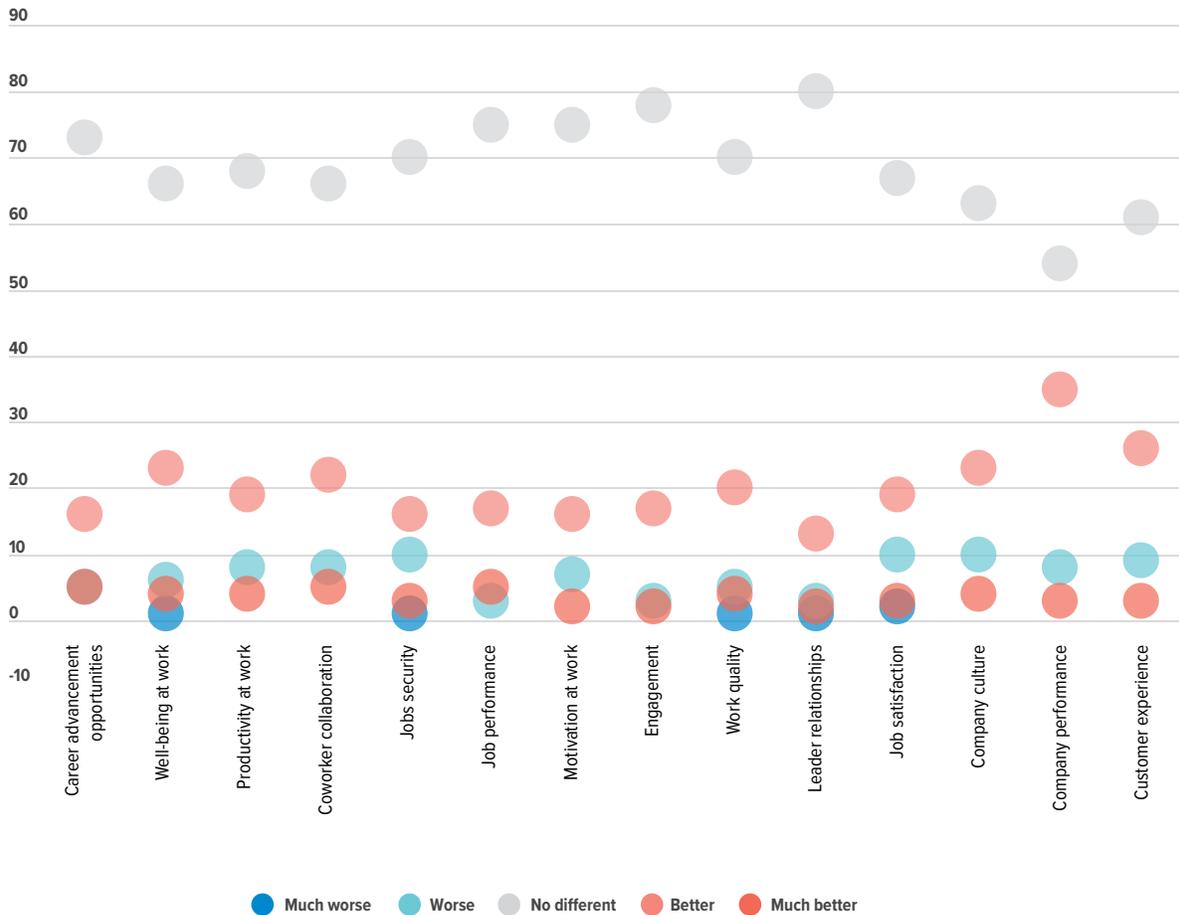
three areas in which internal employees expressed somewhat elevated concern that external workers are making their experience worse: job security, job satisfaction, and their company’s culture (figure 24).

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

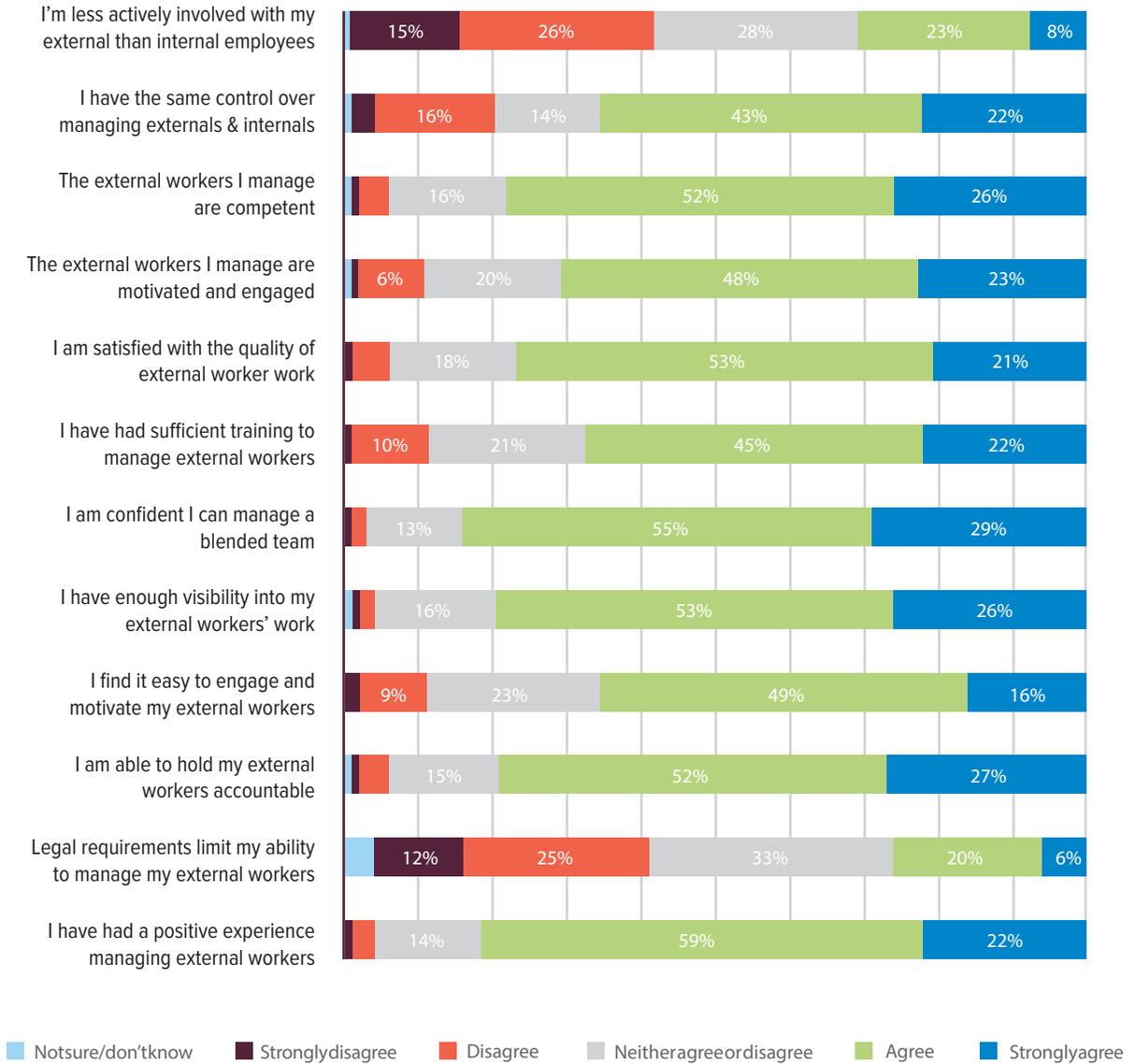


FIGURE 26

Please select the top three benefits of using external workers

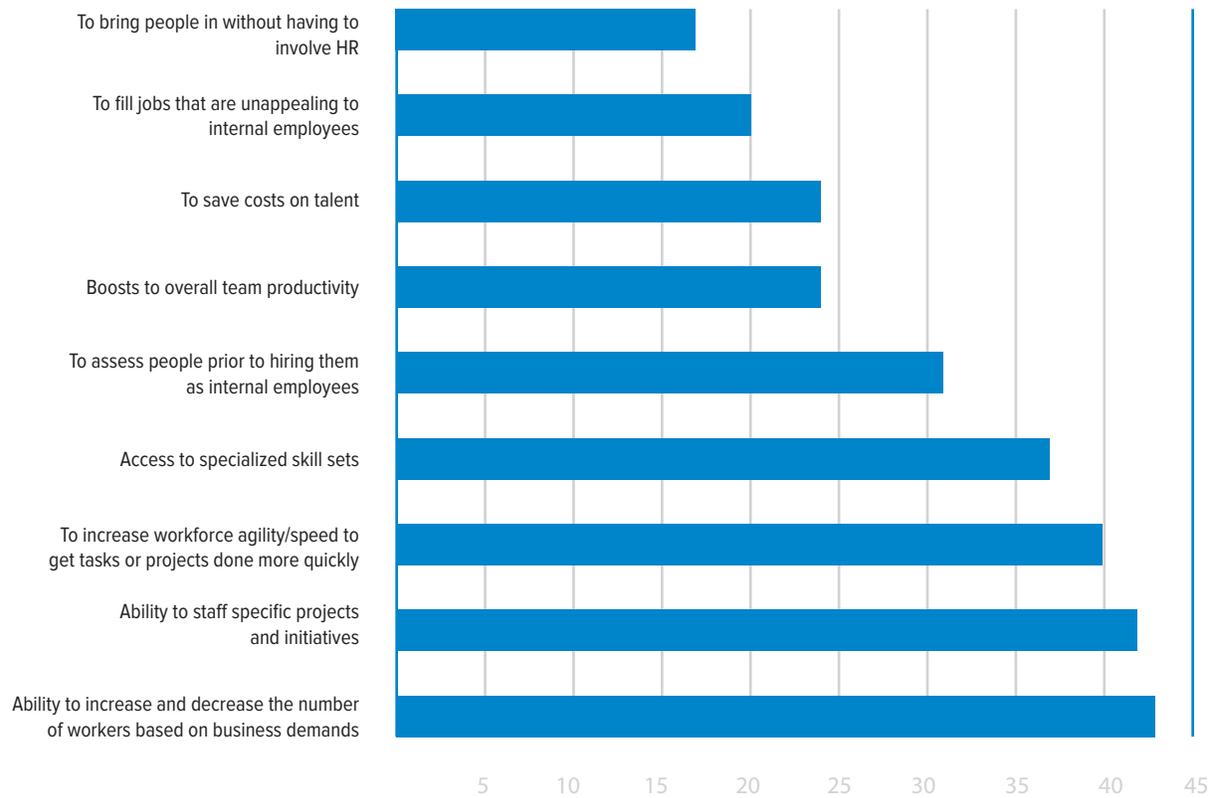


FIGURE 27

Please select the top three challenges of using external workers

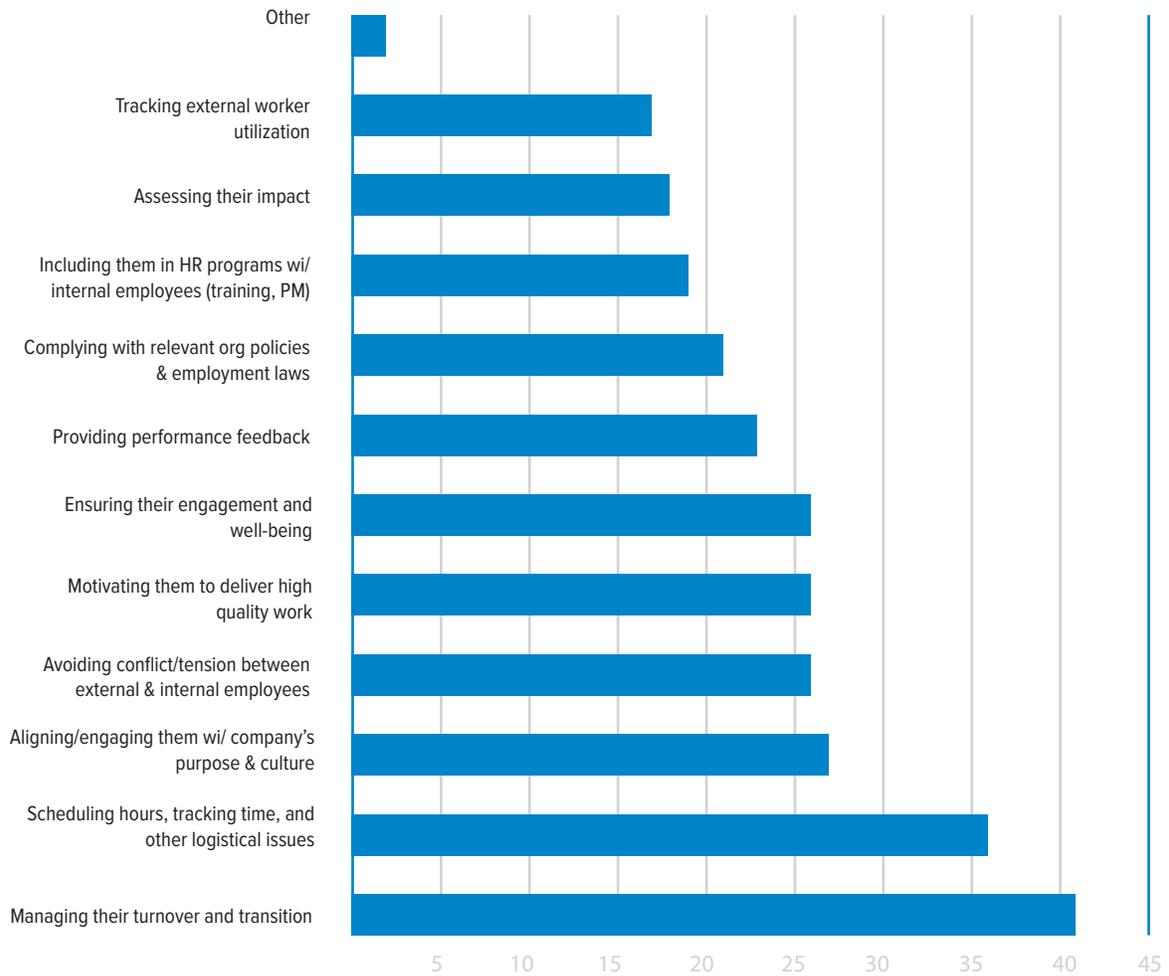


FIGURE 28

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

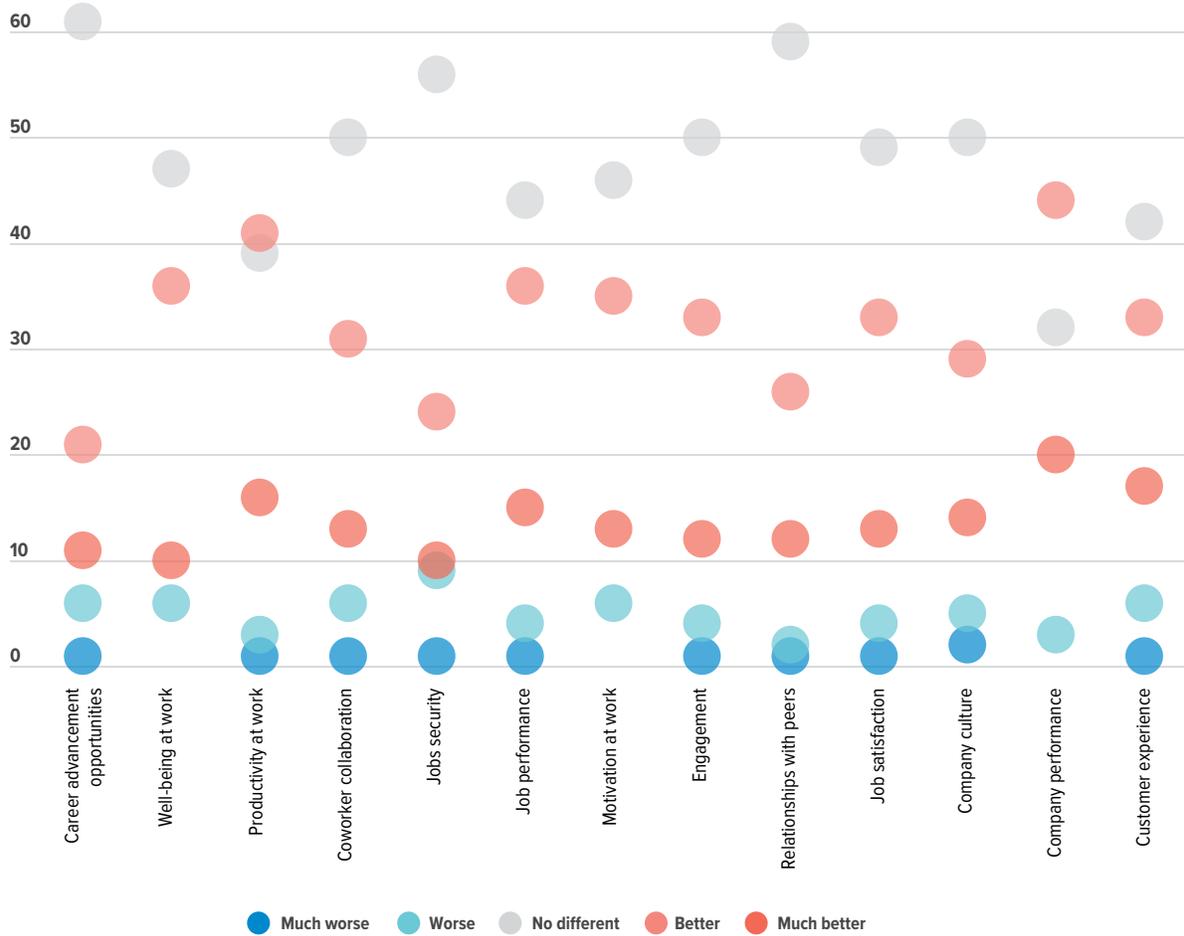


FIGURE 29

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

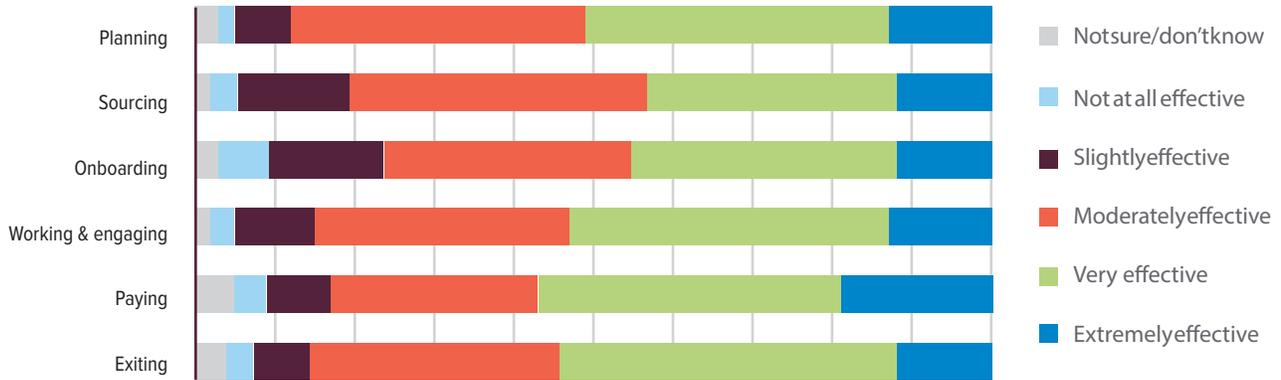
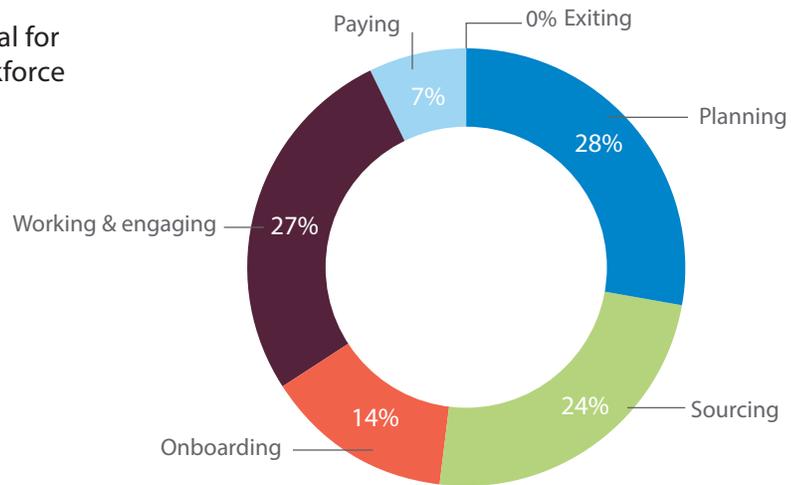


FIGURE 30

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



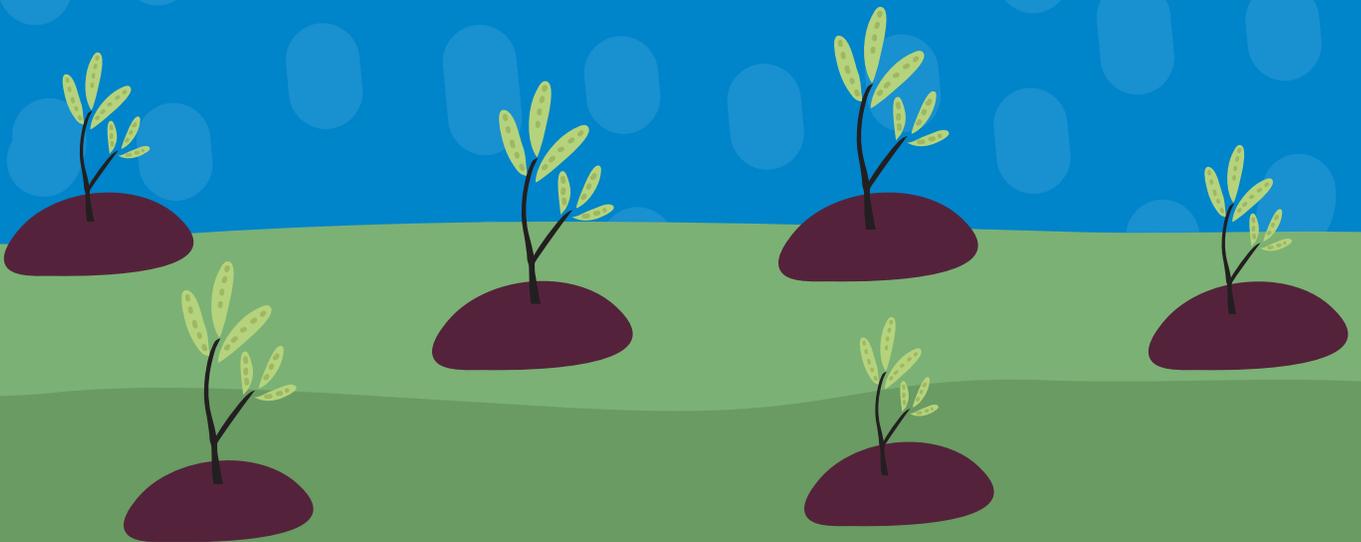
The HR View

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.



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.

EXHIBIT D



SHRM 2022 DOL Independent Contract Ruling Survey

HR Survey: The survey was fielded electronically to a random sample of HR professionals from the active SHRM membership from October 18, 2022, to November 1, 2022. In total, 956 members participated in the survey. Academics, students, consultants, and retired HR professionals were excluded. Respondents represented organizations of all sizes in a wide variety of industries across the United States.

For the purposes of this report, “small” organizations refer to those with fewer than 100 employees, “medium” organizations refer to those with 100-499 employees, and “large” organizations refer to those with 500+ employees.

Independent Workers Survey: A sample of 1,018 U.S. independent workers were surveyed online from October 18 to October 22, 2022. Respondents were sourced from a third-party online panel. All respondents currently worked as an independent worker, including but not limited to those who perform independent and online contract work, service delivery contract work,

About the HR Respondents

73% of respondents said their organizations utilize independent workers. Large organizations are more likely to utilize independent workers (84%) than medium organizations (73%) or small organizations (67%).

Nearly 4 in 5 HR professionals would describe their organization’s experience working with independent workers as positive (55%) or very positive (24%).

When determining whether a worker should be classified as an employee or an independent worker, the top two factors organizations are most likely to consider are:

- The nature and degree of control the worker has over the terms and conditions of their employment (61%)
- The degree of permanence of the work relationship (53%)

What types of independent workers do employers use most?

- Independent contractor workers (68%): 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. Examples include an independent consultant or a freelance worker.
- Temporary workers (51%): 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.

- Subcontractor workers (43%): 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.
- On-call contract workers (13%): 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. 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.
- Service delivery contract workers (8%): Workers who are paid for performing short in-person tasks or jobs for customers whom they meet through a website or mobile app. Examples include the worker using their own car to drive people from one place to another, delivering something, or doing someone’s household tasks or errands.
- Online task contract workers (7%): Workers who 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.

Why do organizations use independent workers?

The most common reasons why organizations use independent workers are:

- To staff specific projects or initiatives (65%)
- To address seasonal or short-term needs (54%)
- To access unique skill sets or experience that their employees don’t have (54%)
- To assess talent prior to hiring them as employees (25%)

Large organizations are more likely to use independent workers to address seasonal or short-term needs (66%) than medium (53%) and small (45%) organizations. Small organizations are more likely to use independent workers to access unique skill sets or experience that their employees don’t have (61%) than large organizations (49%).

Are organizations willing to offer their independent workers benefits?

42% of HR professionals say their organization provides training to their independent workers (47% do not, 11% were unsure).

Organizations in the manufacturing industry (63%) and healthcare and social assistance industry (57%) are more likely to provide training for their independent workers (63%) than organizations in other industries (39%).

Among organizations that provide training to their independent workers, the most common types of training offered are...

- Orientation/onboarding training (59%)

- Skill-based training (58%)
- Compliance training (51%)

Independent Worker Survey Results

When asked how interested they would be in receiving access to benefits that employees receive from their organization in exchange *for a lower pay rate*, nearly two-thirds of independent workers said they would be at least slightly interested. 17% of independent workers said they would not be interested at all. 35% said they would be slightly interested in receiving access to benefits that employees receive from their organization in exchange for a lower pay rate, and 30% of independent workers said they would be very interested

Independent workers rated health care, paid vacations and holidays, and contributions to a retirement savings plans as the benefits they felt were most important.

Independent workers are most satisfied with areas related to the flexibility independent work offers, such as the location(s) they can work, their working schedules, having control in setting their work schedules and choosing the type of work they take on. Most independent workers said they were satisfied with their choice of work location(s) [92% somewhat/very satisfied], their schedule [92% somewhat/very satisfied], the control they have over their schedules [92% somewhat/very satisfied], and the types of work they take on [91% somewhat/ very satisfied].

Nearly half of the independent workers surveyed said they also work a full-time job while working as an independent worker (46%).

Nearly half of the independent workers surveyed (48%) said that the majority of the independent work they perform can be described as independent contract work.

18% of independent workers said that providing technology services best describes the type of work they do.

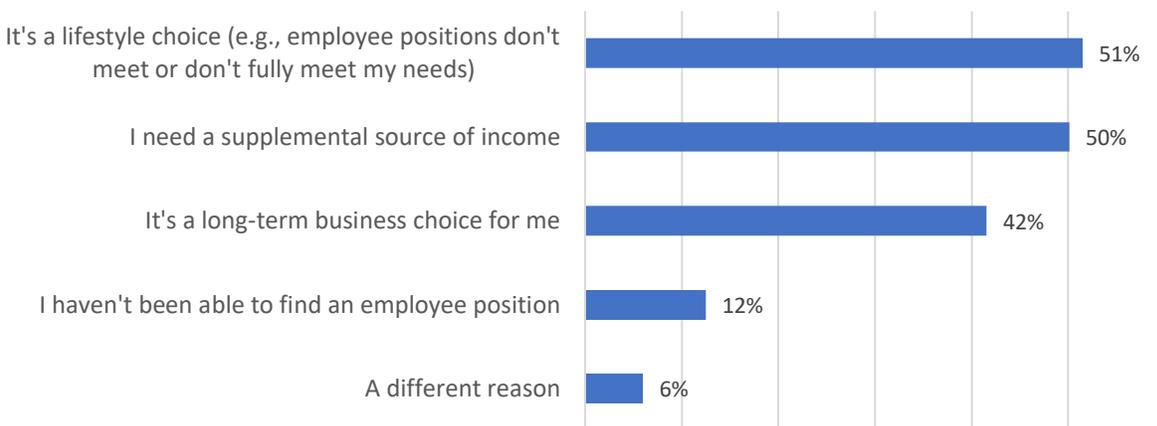
- 15% of respondents said that professional or knowledge-based services (e.g., consulting) best describes their work
- 13% said personal services (e.g., housekeeping) best describes their work.
 - Other responses include:
 - App-based delivery or rideshare services (10%)
 - Creative design work (10%)
 - Sales (8%)
 - Freelance writing (7%)
 - Administrative services (6%)
 - Non app-based deliveries (2%)
 -

24% of independent workers with caregiving responsibilities said providing technology services best describes the type of work they do, compared to just 9% of independent workers without caregiving responsibilities.

Nearly 3 in 5 independent workers (59%) said they work for multiple companies or customers. 41% said they just work for one company or customer.

When asked why they work as an independent worker, the top reasons respondents gave were that it is a lifestyle choice (51%) and that they need a supplemental source of income (50%).

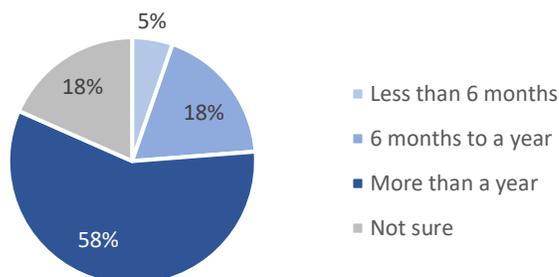
Reasons for working as an independent worker



Of those who work solely as an independent worker, 42% said they would not prefer to transfer to an employee position, while approximately a quarter (26%) said they would prefer to transfer to an employee position if given the choice.

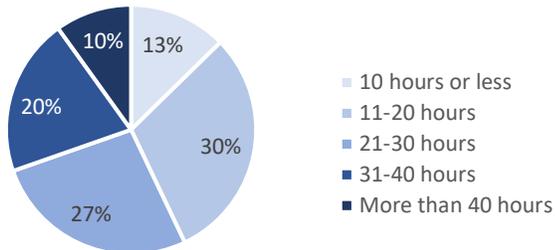
The majority of independent workers who also hold an employee position said they would prefer to keep this current working arrangement (81%), while only 19% said they would prefer only to work as an employee of a company if given the choice.

How long independent workers plan to continue their work



When asked how long they planned to continue working as an independent worker, 58% said they plan to continue for more than a year. Only 5% of respondents said they planned to continue for less than 6 months.

Average number of hours worked per week as an independent worker



The majority of independent workers said that, on average, they spend either 21-30 hours (30%) or 31-40 hours (27%) per week as an independent worker.

45% of independent workers said they would like to work more hours than they currently do. 44% said they would like to continue working the same number of hours that they currently do. Only 11% of independent workers said they like to work less hours than they currently do.

Independent workers were asked about which areas of being an independent worker they felt the most satisfied about. Most of those surveyed suggested they were somewhat or very satisfied with areas related to the flexibility independent work offers, including choice of location(s), their schedule and control over their schedules, and the types of work they take on.

When asked which areas of independent work they felt they had the most control over, respondents again were most optimistic around areas related to flexibility. Independent workers felt like they have the most control over their work schedules (64% saying they had a lot of control) and the number of hours they work (60% saying they had a lot of control).