

Proskauer»

Value Insights: Delivering Value In Labor and Employment Law

A survey of in-house decision makers
on labor and employment matters



FROM THE DESK OF ELISE M. BLOOM

The business world continues to change at a rapid and somewhat unpredictable pace. The pressures to not only reduce legal spend but to foresee and manage risk are particularly acute for those in-house lawyers responsible for labor and employment matters. With the focus on federal deregulation, we have seen increased activity at the state and local levels surrounding the scope of protections under the discrimination, leave and wage and hour laws. The continued threat of expensive, time consuming and publicity attracting class actions persists. The directive to “do more with less” while developing and implementing uniform and nationally compliant human resources policies has created additional challenges for in-house lawyers. With the establishment of the gig economy, the pressure to remain competitive and retain talent has further complicated the role of labor and employment lawyers in navigating the changing business environment and partnering with their business colleagues. We often are asked by our clients about how their colleagues at other companies are addressing these issues.

To help labor and employment in-house counsel position their legal departments as value-add business partners to their organizations, Proskauer launched our second *Value Insights: Delivering Value in Labor and Employment Law* survey. Serving as a benchmarking tool which highlights unique insight on how their peers address key challenges, this report will help in-house counsel to better maximize the performance of their own legal team; optimize partnerships with outside counsel; enhance collaboration with HR and other business units; and manage and mitigate labor and employment risk in an efficient, cost-effective manner.

We want to thank all participants for their significant contributions to the development of this survey and for the insights they shared, including our Advisory Committee, our Proskauer labor and employment alums and those who responded to the survey. Understanding the importance of seeking value, asking questions and sharing perspectives, collectively we can continue to strive for innovation as we navigate through the legal landscape and today’s workplace.

If you have any questions or comments, we would love to hear from you.

Elise M. Bloom

Partner, Proskauer Labor & Employment Law Department
Immediate Past Member, Executive Committee
Co-head, Class & Collective Actions Practice
Co-chair, Labor & Employment Law Department
+1.212.969.3410
ebloom@proskauer.com

Contents

Key Findings	1
Methodology	3
Respondent Profile	4
Key Challenges Affecting In-House Counsel Today	5
Maximizing the In-House Legal Department	6
Cost Management & Optimizing the Use of External Counsel	14
Working In Partnership with the HR Function and Business Units	28
Managing Risk to the Business	32
Working in Partnership with the Board	34
Closing Thoughts	38

Key Findings

- The [average in-house legal team](#) is comprised of 20 lawyers, 3 of whom handle labor and employment work. Only 1 in-house lawyer focuses solely on labor and employment.
- 11% of in-house legal teams were able to [increase headcount](#) in the past year.
- [Responsibilities of the in-house legal team](#): 79% of advice and counseling is handled by in-house counsel, and this consumes 45% of their time. 76% of litigation is handled by outside counsel, and this only consumes 20% of in-house counsel's time.
- In the past year, the average number of [labor and employment related claims](#) received were 12 threats of litigation or demands from potential plaintiffs, 9 administrative charges and 5 non-class action lawsuits.
- [1 in 5 businesses faced a class action lawsuit](#) in the past twelve months. Collectively, the respondents faced 125 class actions in the past year.
- While discrimination claims were the most common (and predicted to increase), respondents were [most concerned with wage and hour claims](#) as these often arise in class action disputes.
- On average, respondents spent [\\$4 million a year on outside legal counsel](#).
- [One-third of businesses did not set a budget for legal spend](#). Of the 69% who set a budget, only 36% met it.
- [Unpredictability in budgeting](#) and labor and employment legal spend emerged as a theme: 24% of respondents expect to increase legal spend, while the same percentage expect to decrease legal spend.
- The average business works with [4 firms for labor and employment matters](#) and nearly [one-quarter fired a law firm](#) in the past 12 months.
- [34% of respondents use AFAs](#) for at least some labor and employment work, with litigation being the most common type of work billed on a non-hourly basis.
- 76% of respondents [meet regularly with the Head of Human Resources and/or Business Units](#).
- 81% of respondents have taken [steps to mitigate and manage](#) labor and employment risk.
- Only 9% of respondents sit on the Board of their company. [No respondents in a labor and employment role sit on the Board](#), however, 20% of those respondents provide input to the Board.

Advisory Committee Members

We would like to thank the members of our Advisory Board Committee who shared their experience and insight to help structure and guide the development of this research.

Mylene Brooks

Executive Director, HR Compliance and Labor Relations,
Cedars-Sinai Medical Center

Bill Daley

Vice President and Chief Counsel - Labor, Employment & Compliance,
Conagra Brands, Inc.

Susan Haller

Vice President and Chief Litigation Counsel, Sprint Corporation

Neil Rosolinsky

Executive Vice President and Deputy General Counsel, Litigation &
Employment, Citizens Financial Group, Inc.

Niloofar Shepherd

Executive, Office of the General Counsel, Creative Artists Agency

Thomas Sparno

Senior Vice President, General Counsel and Secretary,
Schindler Elevator Corporation

Tracey Tiska

Associate General Counsel, McGraw-Hill Education

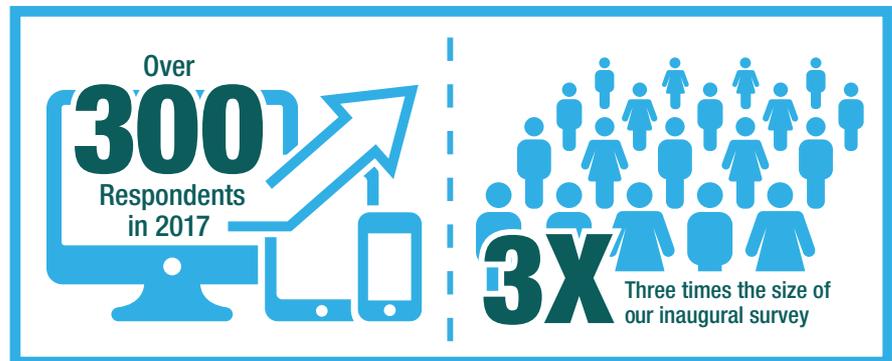
Methodology

We began the 2017 research by revisiting the findings from our inaugural survey, in which we explored trends in handling labor and employment matters.

In that survey we looked at:

- Data on the structure and size of in-house legal departments and how businesses utilize external counsel to provide a basis from which they could compare and benchmark their own approach.
- How businesses measure the value that in-house legal departments provide and how in-house teams manage and mitigate labor and employment law risk.

In developing our inaugural survey, in-house counsel told us they would value the opportunity to learn from their peers and compare and contrast their approach to handling labor and employment law matters against that of others. This discovery formed the cornerstone of our 2017 research which was developed in partnership with our Advisory Committee, comprised of leading in-house counsel, and Acritas, an esteemed professional services market research firm.

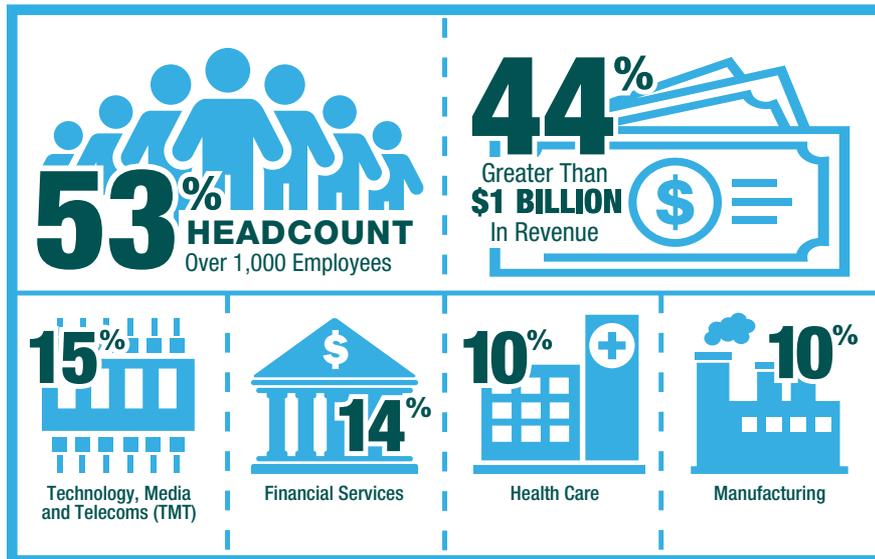


There were 303 respondents in 2017 – three times the size of our inaugural survey, with wider geographic coverage and a comparable spread across industry sectors.

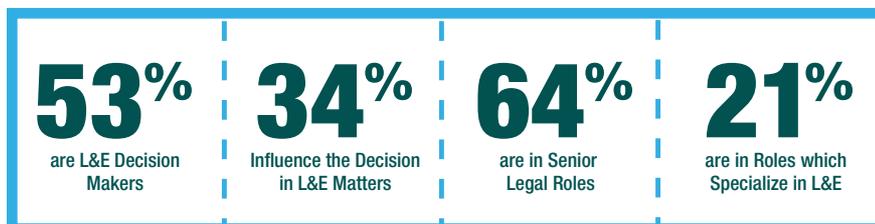
We used a combination of web survey and structured telephone interviews to capture the views of respondents. Respondents were predominantly senior legal counsel and labor and employment specialists. The research was completed in eight weeks, from January to March 2017.

Respondent Profile

To ensure that the research provided a robust and accurate view of the labor and employment market, it was critical that we captured the views of a representative sample of in-house legal decision makers and labor and employment specialists.



Almost half of the survey respondents work for businesses with annual revenues of \$1 billion or more, and half work for businesses with at least 1,000 employees. Respondents are decision makers and influencers in labor and employment matters, including 64% who are in Chief Legal or Associate/Deputy General Counsel roles. They are geographically diverse, spread across 38 states, and represent a broad cross section of industries, with the greatest representation in Technology, Media and Telecoms (“TMT”), Finance, Health Care and Manufacturing.



Key Challenges Affecting In-House Counsel Today

One of the key objectives of the survey was to serve as a benchmarking tool for in-house counsel and to share best practices for managing the labor and employment challenges facing businesses today.¹ In order to understand those challenges in more depth, we asked respondents what they would ask their peers about how they manage labor and employment matters if they had the opportunity to pick the brain of their counterparts at similar businesses. The responses fell into five categories, which frame the results of our research:



¹ *Benchmarking Note: The average respondent in this data set has revenue of \$750 million and 1,500 employees. We recognize that averages often are useful only to organizations that fit the average profile. Accordingly, where possible, we have provided a breakdown of benchmarking figures by organization size, scale and industry.*

SECTION 1

Maximizing the In-House Legal Department



In-house legal departments are under constant pressure to be increasingly effective and efficient, to deliver more with less and to reduce risk to the business. These pressures are magnified in labor and employment law where the regulatory landscape is changing and resources are often more limited.

RESPONDENTS WANT TO KNOW

“How are they structured or organized to handle labor and employment?”

“Whether they have somebody internal who is dedicated only to labor and employment in legal.”

When we asked respondents what they sought to learn from their peers, 21% wanted to know how they could manage their legal department more effectively and efficiently. Their challenges encompassed two key themes:

TEAM

How best to recruit, structure and develop their team



COSTS

How to manage costs better – which may be achieved by improved management of claims and litigation



Benchmarking the Structure and Size of the In-house Team

Looking at the size and structure of in-house labor and employment teams, we found the average respondent's legal team is comprised of 20 lawyers, three of whom are involved in labor and employment work and one who is solely dedicated to labor and employment.



Perhaps not surprisingly, the average size of the respondent's legal team increases in direct relation to revenue and size of employee population. The largest businesses have the highest number of in-house lawyers.

Looking at in-house resources that are dedicated to labor and employment work, we found that not until businesses reach 2,000 employees is there one full-time equivalent (FTE) lawyer dedicated to labor and employment on average, and not until their size reaches 5,000 employees does the average number of FTEs dedicated to labor and employment increase to two.

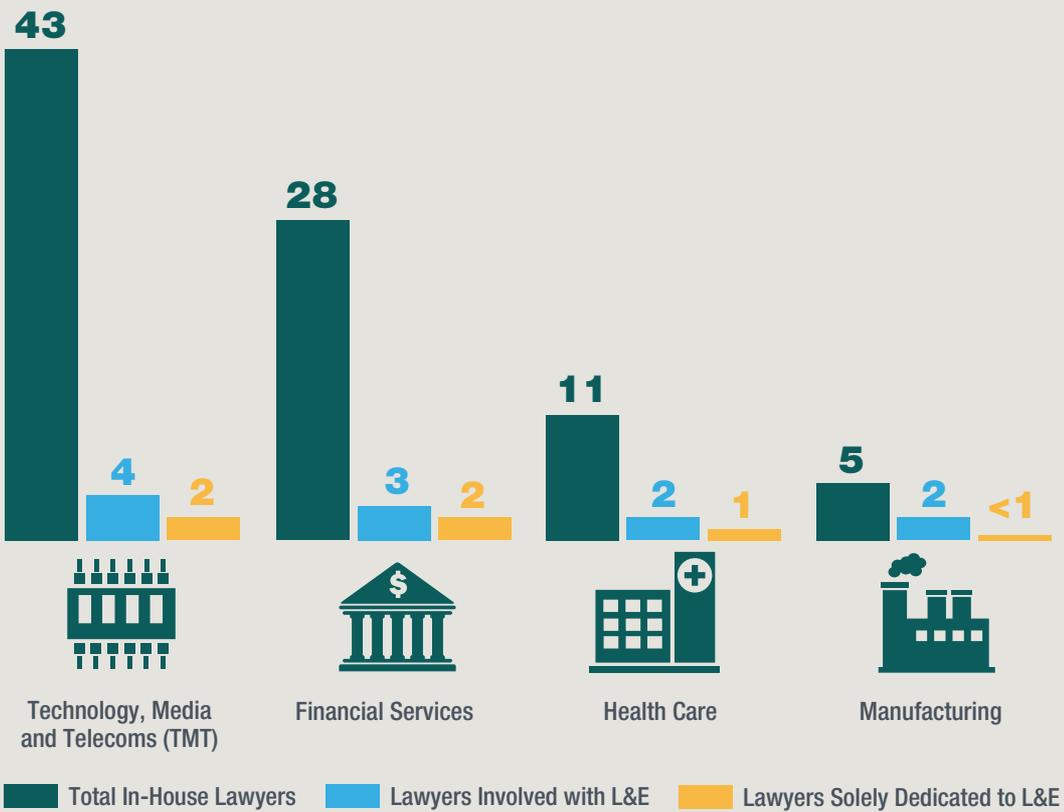


In the smallest businesses, with the smallest legal teams overall, the workload is spread across their legal team and more of the team is proportionally involved in labor and employment.

For businesses that have in-house lawyers focused solely on labor and employment, the top three areas of responsibility were (i) the general support of labor and employment-related work, (ii) managing outside counsel, and (iii) managing disputes – especially litigation.

Team Size Benchmarks

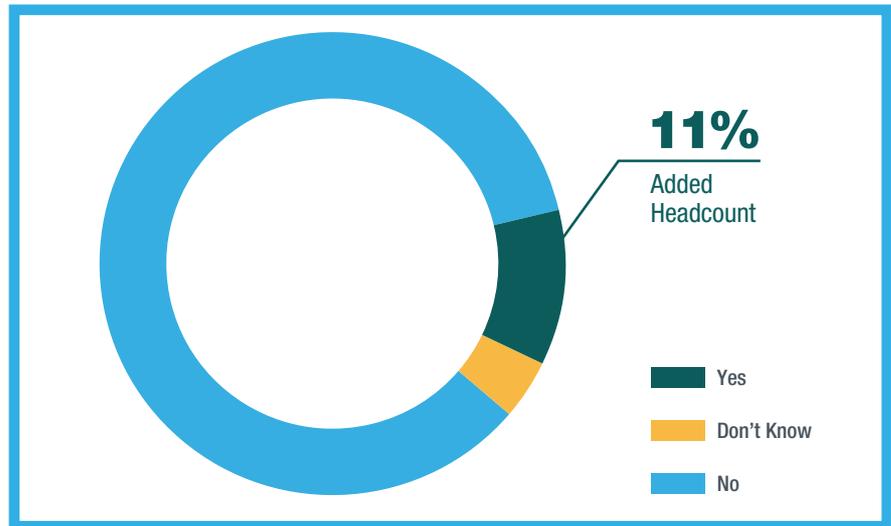
The TMT and Financial Services sectors have the largest in-house legal teams overall. Health Care has the highest proportion of the team solely dedicated to labor and employment.



Growing the In-House Legal Team

Given the pressures on budget and resource management, we asked respondents whether they had added headcount to the in-house legal team to handle labor and employment work in the last 12 months, and, if so, what business case they used to justify the extra resources. Only 11% of businesses had increased headcount in the labor and employment function in the last year.

Adding Headcount



The three most common business reasons to increase headcount were volume of work, growth of the company in terms of number of employees and, for some, an internal reorganization to provide more formal HR support. One-third of newly added positions were specialist roles, such as labor relations, employee benefits or compensation. Smaller businesses and businesses with no union workers were less likely to increase headcount.

POINTS TO CONSIDER

How does your in-house legal team structure compare to these benchmarks?

Do you need to – and can you – make a business case to add to your legal team?

PROSKAUER'S PERSPECTIVE

Building a business case to add headcount is critical. Here are some suggestions for why adding headcount in the legal team can positively impact overall business results. Additional headcount can enable the in-house legal team to handle more matters internally. New additions to the in-house team can also help reduce claims by dedicating resources to identifying potential issues and implementing preventative measures within the business. Members of our Advisory Committee noted that it would be nice to devote more time to proactive measures and to not only be "putting out fires" and being reactive. Our survey results suggest that this can have an overall positive impact on reducing legal spend.

Responsibilities of the In-house Team

RESPONDENTS WANT TO KNOW

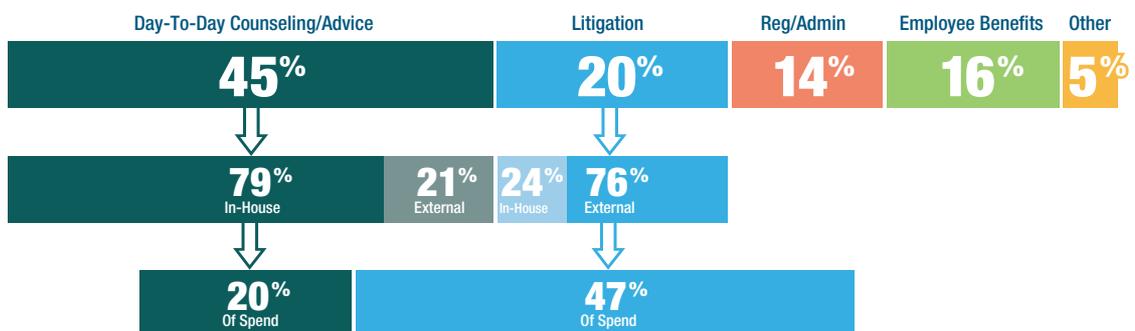
“I would want to know what types of issues they handle in-house versus having outside counsel handle.”

“To what extent they deal with labor and employment issues internally versus using outside counsel.”

When we looked at how in-house labor and employment counsel spend their time we found this to be very much in line with the prior survey results. In our inaugural survey we found that in-house legal departments spent on average 45% of their time providing day-to-day counseling and advice. This has not changed; in 2017, we see the same proportion of time spent on counseling and advice. Only 21% of counseling and advice is provided by outside counsel. While providing counseling and advice is the biggest draw on time and internal staffing resources, it represents just 20% of the external legal spend, a six percent decrease in spend since the prior survey.

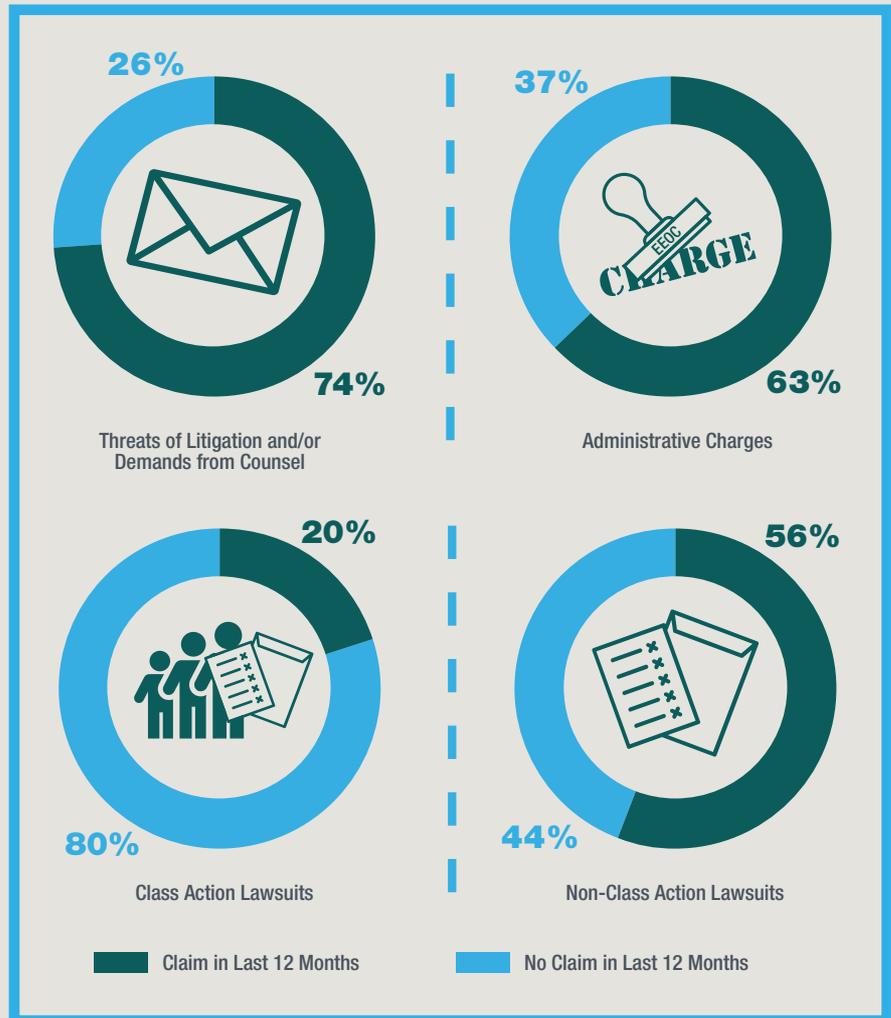
In contrast, 76% of litigation is handled by outside counsel – in-house lawyers only spend 20% of their time on litigation. Litigation is the most significant driver of legal spend, consuming 47% of the budget.

- Day-to-day counseling consumes the most time of the in-house legal team and 20% of the budget.
- Litigation consumes only 20% of the in-house team's time and relies heavily on outside counsel, consuming 47% of the budget.



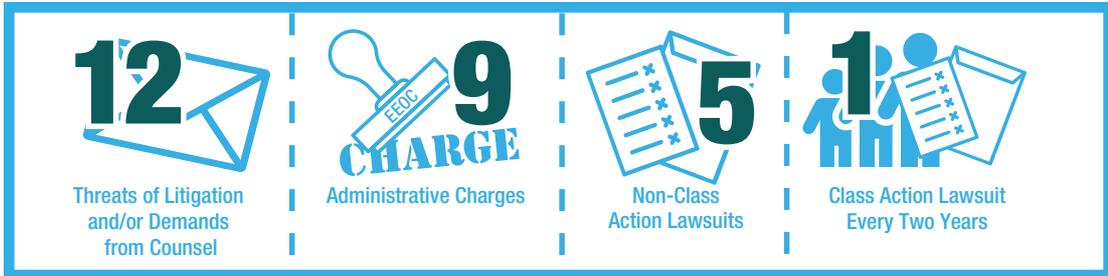
Volume of Labor and Employment Claims

Three-quarters of respondents received threats of litigation or demands from counsel, while two-thirds had to deal with administrative charges. One in five organizations dealt with a class action, while over 50% faced non-class action lawsuits in the past year.



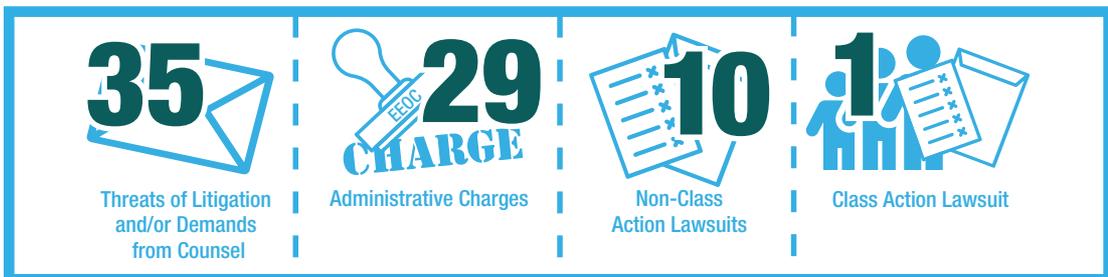
Overall, the average business received twelve threats of litigation and/or demands from opposing counsel, nine administrative charges and five non-class action lawsuits in the prior year. Survey respondents faced one class action every two years.

Average Respondent Faced



As one might expect, these figures vary by business size – the highest revenue businesses faced a larger volume of claims on average. We also found that businesses receiving a higher volume of claims in one category were likely to report a higher than average volume of claims in the other categories as well. For example, the top quartile of respondents in terms of number of demands received (35) also received 29 charges, one class action lawsuit and 10 non-class action lawsuits last year.

Top Quartile of Respondents Faced



PROSKAUER'S PERSPECTIVE ON CLASS ACTION LAWSUITS

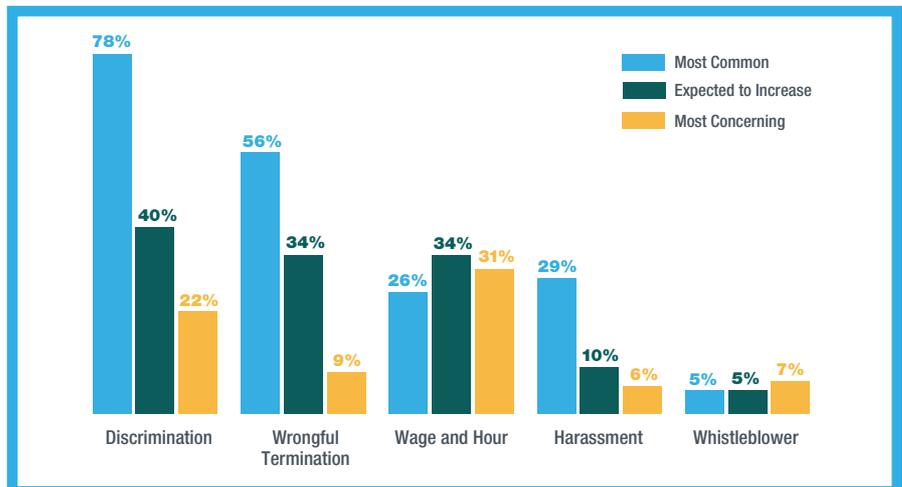
As the data showed, one in five businesses faced at least one class action lawsuit in the past 12 months. We also found that as businesses get larger, the chance of multiple class actions grows. The highest number of class action lawsuits received by any single business was 10, and, collectively, the respondent group received 125 class actions in the past year. The potential financial and reputational impact that class action claims can have on a business, and its workforce, are substantial. They are not only expensive but require significant time commitments by business and legal personnel. There are proactive steps companies can take. Devoting resources to understanding the business's potential areas of risk – like wage and hour exposure – can minimize expenses, reduce claims and, when litigation does occur, can help achieve a favorable outcome.

Sources of Claims

Discrimination was the most common source of claims, and 40% of respondents predicted an increase in future discrimination claims. Although numerous, discrimination claims are not seen as the greatest risk – respondents were most concerned about wage and hour claims.

One-third of respondents also expected wage and hour claims to increase. Our Advisory Committee explained that businesses have become familiar with the issues surrounding discrimination and perceive the risks to be lower – or at least more manageable – than wage and hour claims, which tend to be class action disputes. It appears that in-house lawyers face an uphill battle in getting their businesses to fully comprehend the risks and exposure associated with wage and hour disputes. Many businesses are reactive rather than proactive. For example, they are not preemptively auditing and assessing risks, which can be a complex and expensive process.

Wrongful termination is the second most common source of claims. One-third of respondents expect the number of wrongful termination claims to increase, but only one-tenth are most concerned about these disputes. The relative lack of concern regarding wrongful termination claims may also be a function of the relatively low exposure, as compared to wage and hour claims.



POINTS TO CONSIDER

How is your in-house legal team spending their time relative to these benchmarks?

Could you reduce the time spent on day-to-day counseling or reduce the number of claims through more education and training or improved policies and procedures?

SECTION 2

Cost Management & Optimizing the Use of External Counsel



The survey confirmed that businesses continue to face pressures to reduce costs and manage to a budget. With the drive to reduce spend, in-house counsel need to understand how their budgets and spend compare to their peers and how they can work efficiently to deliver more with less. A considerable portion of those costs are spent on litigation and outside counsel. As part of our research, we explored how in-house counsel predict costs and set and meet budgets.

RESPONDENTS WANT TO KNOW

“I’d want to know comparable spend.”

“How much, as a percentage of their legal budget, do they spend on labor and employment?”



Overall External Legal Spend

Looking at overall external legal budgets, we found that the average annual spend on outside legal counsel is over \$4 million. This equates to an average spend of over \$925 per employee. The figures vary by industry, the highest being in Manufacturing, with an average annual spend of \$5.1 million.

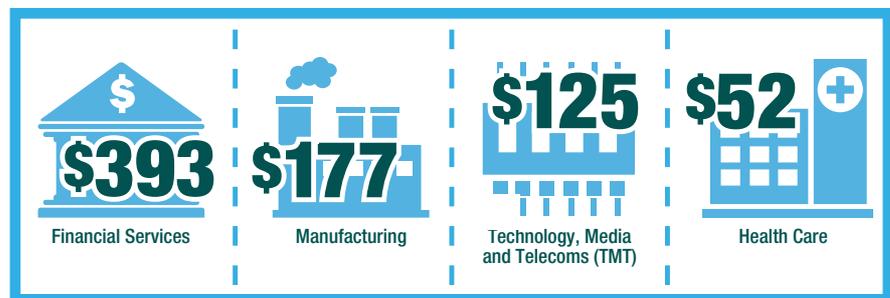
Total Labor and Employment Spend

Respondents typically spend one-eighth, about \$500,000 on average annually, of their total outside legal fees on labor and employment matters, and an equal number of respondents anticipate that their outside legal costs on labor and employment will increase or decrease in the next year.

Financial Services firms spend the most on labor and employment issues, with an average annual spend of over \$700,000. Businesses with annual revenues greater than \$6 billion spend closer to \$1 million on labor and employment.

Overall, the average survey respondent is spending \$125 per employee on outside counsel costs associated with labor and employment. While this is a useful figure from which to estimate total spend, it varies significantly by size and sector. Spend per employee is highest in Financial Services, where the median spend per employee is \$393, and lowest in Health Care with \$52 per employee.

Legal Spend per Employee by Industry



As businesses grow and increase the number of employees, we see economies of scale: the labor and employment legal costs per employee reduce significantly, leveling off at around the 5,000-employee mark.

Legal Cost by Number of Employees



While, these figures provide benchmarks regarding spend on labor and employment matters, it is important to recognize that the structure and allocation of budgets vary across businesses. As our Advisory Committee noted, in some cases, the funding for labor and employment matters may be provided directly by the affected business unit and may therefore be counted as a business expense, rather than as a legal expense. In other cases, the cost is a budget item for the office of the General Counsel.

Predicting Costs and Setting and Managing to Budgets

RESPONDENTS' COMMENTS REGARDING BUDGETING

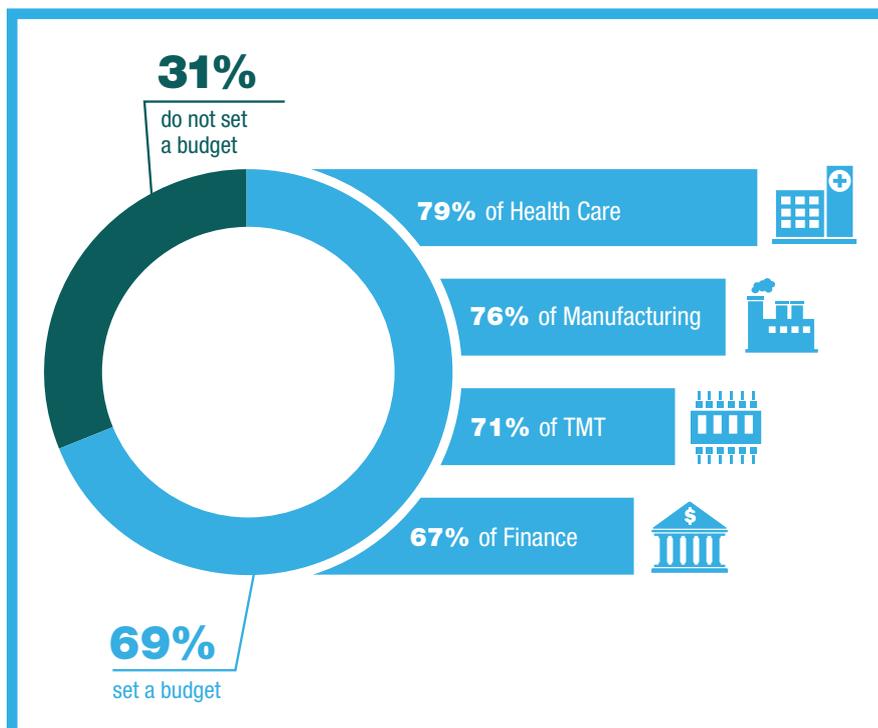
"We really don't have any basis for projecting, so what happens one year is as good a guess as anything."

"It is difficult to predict what might be the issues."

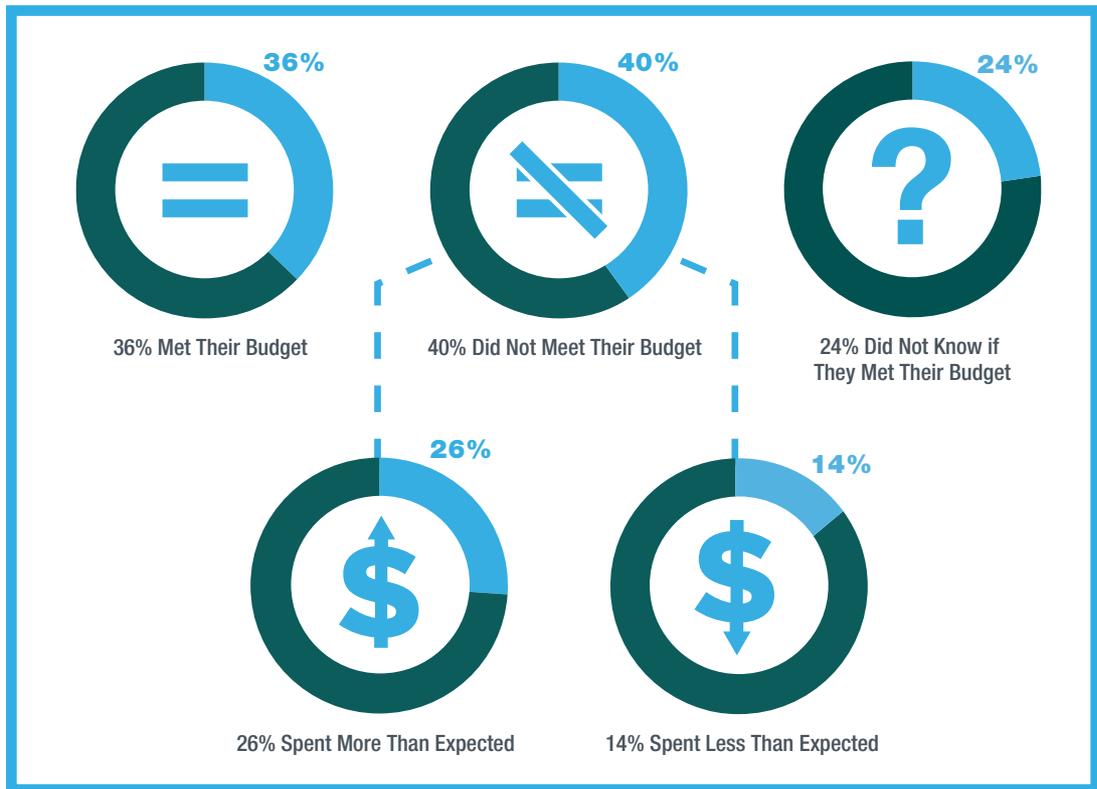
"Hopefully we don't face another lawsuit."

"I'm hoping for a decrease, but it all depends on what comes our way."

In addition to achieving lower costs, in-house legal teams also are under pressure to provide more predictability in legal costs including setting and meeting budgets. Despite this, nearly one-third of respondents did not set a budget for legal spend. Businesses with higher revenues and higher legal spend are more likely to set budgets. For example, 80% of respondents with revenues of \$6 billion or more set a budget. Budgets also are more likely to be set in Health Care and Manufacturing businesses.



Even when a formal budget is in place, survey respondents reported that adhering to their budget was often challenging. Labor and employment costs are hard to predict. Budgeting is by no means an exact science, and, even when estimates are made, the scope of work changes or the unpredictable happens. Looking at the level of spend allocated externally to labor and employment matters in the last year, only 36% actually spent what was expected. Forty percent did not meet their projected spend. Twenty-six percent said they spent more than expected, and only 14% spent less than they planned.



RESPONDENTS WHO SPENT MORE

“We had more claims than expected.”

“We had a number of significant employment actions which were either raised in the last year or became quite significant; particularly class actions.”

“We had a crazy judge in litigation....We ended up doing a lot more discovery than we budgeted for.”

Going over budget was usually attributed to unexpected and more complex claims – including class actions – although 12% said it simply cost more than they anticipated. Some also noted that unrealistic budgeting contributed to overspending; “[b]ecause the organization doesn’t want to spend anything on external so it’s always higher than what they want to spend.”

26% Spent More than Intended



RESPONDENTS WHO SPENT LESS

“Because I did a lot of the work.”

“We settled a couple of large matters that had been budgeted for.”

“We have been very aggressive in negotiation of AFAs to better efficiencies and value relative to our external spend.”

Forty percent of businesses who spent less than expected handled more issues in-house. When one considers that only 11% were able to increase headcount, this paints a stark picture for in-house counsel trying to juggle the multiple demands of their role. Others successfully settled or resolved cases and faced fewer claims than anticipated. Eight percent reported effective cost-management strategies, including the use of AFAs.

Some attributed their lower spend to “luck” or the fact that they were “pessimistic budgeters.” If legal departments want – and need – to meet their budget, they have to find a way to ensure that a realistic budget is set in the first instance, using relevant benchmarks and historic spend data to estimate as accurately as possible.

14% Spent Less than Intended



POINTS TO CONSIDER

Does your business set a budget for outside legal spend?

How do you account for the unknown and uncertainty in setting your budget?

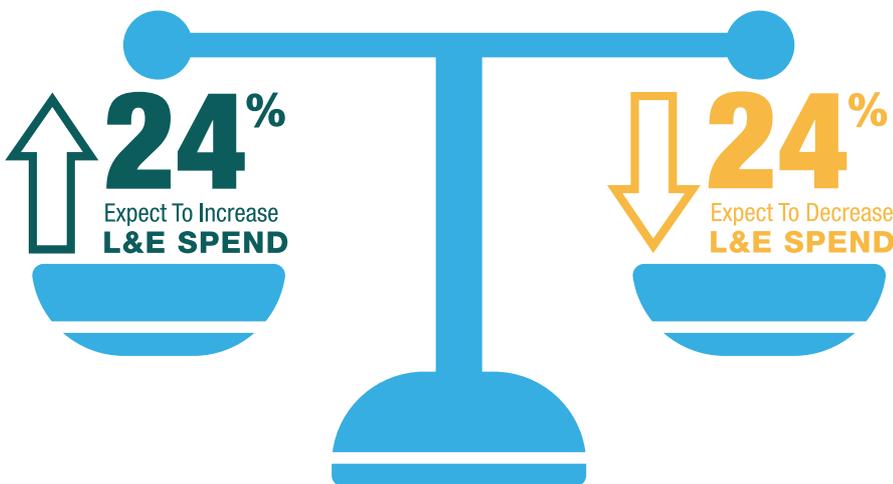
What is driving your business to overspend or underspend relative to budget?

Forecasting Change in Labor and Employment Legal Spend

RESPONDENTS WANT TO KNOW

“What are the costs year by year? Are they going down?”

When asked to look ahead to the next 12 months, 24% of respondents expect an increase in spend on labor and employment while the same percentage – 24% – expect a decrease in spend.



One of the interesting things we discovered in the data was that 13% of respondents did not attempt to predict future change in spend; they just did not know what costs they will face. This may offer some consolation to in-house counsel who are struggling to create and adhere to budgets in this shifting labor and employment legal environment.

PROSKAUER'S PERSPECTIVE

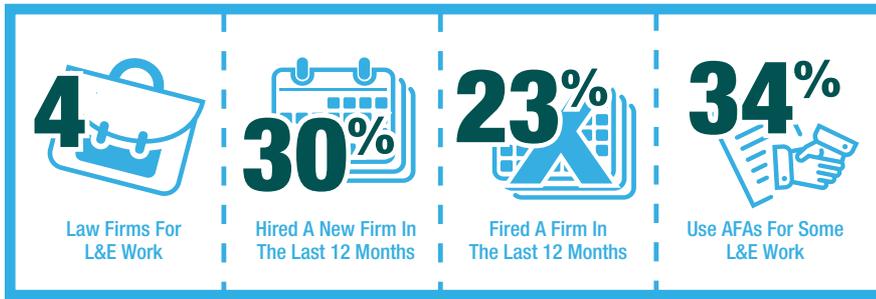
In addition to the volume of matters businesses expect to face, respondents cited several factors as potential drivers for both projected increases and decreases in outside legal spend. As you prepare your budget for the year ahead, it may be helpful to consider whether, and, if so, how, the following factors cited by respondents should be accounted for in building your budget and in anticipating and planning for contingencies.

What Is Driving Change in Spend?

	 Spend will increase:	 Spend will decrease:
A Change in U.S. Administration and Regulatory Environment	<i>"It's going to take a while to determine where the new administration is going and how that may affect some of the governmental division, EEOC, national labor relations board."</i>	<i>"I think the regulatory environment is going to ease up a bit."</i>
Organization Growing or Restructuring	<i>"Poor business leads to a reduction in headcount, which leads to an increase in employment cases."</i>	<i>"We are done with closures now, so that spike isn't there anymore."</i>
Change in the In-house Team	<i>"We went down a head in one office and lost an experienced lawyer whom we will backfill with a junior lawyer."</i>	<i>"I hired a full-time, in-house corporate attorney."</i>
Union Activity	<i>"Our largest union contract expires in two months, so we're going into a heavy negotiation that we'll use outside counsel for."</i>	<i>"It may actually go down because we're now going through some negotiations with our unions and that should be completed this year, and maybe next year we don't have as many expenses."</i>
Better Budgeting and Proactive Cost Management	<i>"We are doing budgets and I've got to raise it as we didn't make it last year."</i>	<i>"The labor relations staff: they are more proactive in respect of trying to resolve issues before they escalate into lawsuits."</i>

Optimizing Use of External Counsel

Average Respondent's Outside Legal Team



How Many Law Firms Should You Engage?

On average, respondent businesses use four law firms for their labor and employment work. For two-thirds of the respondents, the number of firms they used remained constant over the last 12 months. Eight percent reduced the number of firms they used, while 20% increased the number of firms they worked with.

One way businesses are managing legal costs is turning to fewer trusted firms to handle their matters. The goal of this approach is to obtain greater efficiencies and collaboration between the business and its outside counsel. Businesses hope to benefit from a closer relationship because the firms have the opportunity to develop a solid understanding of the business and culture and be a more effective partner to in-house counsel.

RESPONDENTS USING FEWER FIRMS NOTED

“We are trying to use fewer firms so there are stronger partnerships and those firms get to know our company better.”

“The firm wants to limit the number of law firms used to gain benefits of institutional expertise and volume cost reductions.”

External Counsel Changing Usage



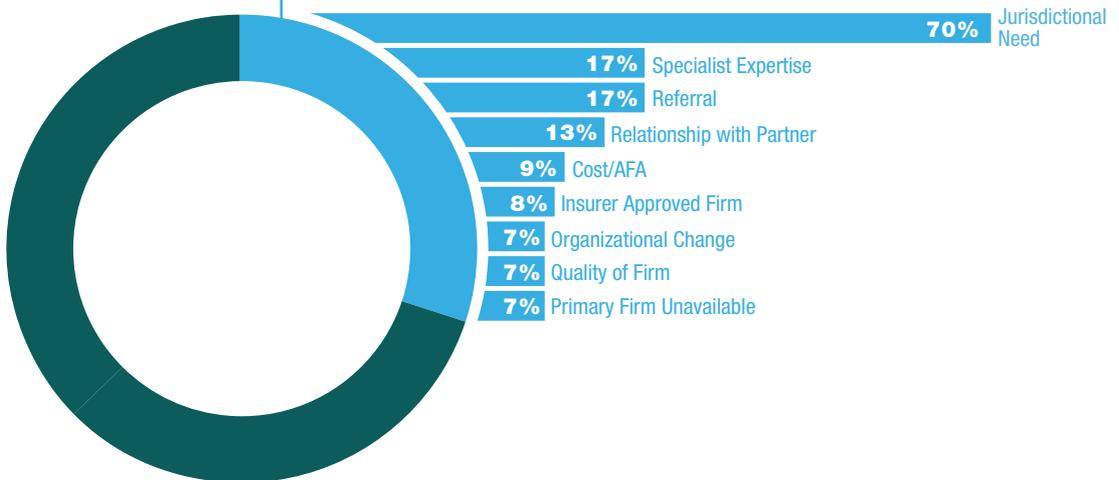
Changing Legal Providers: Hiring and Firing Firms

While the average number of firms used by respondents has increased slightly in the last 12 months (by 12%), the roster of firms used also changed. Thirty percent of respondents said that they had hired a new firm, and 23% fired a firm over that same period.

The biggest driver for hiring a new law firm was perceived need in a specific jurisdiction, followed by a need for specialist expertise. Hiring often was based on recommendations from peers, existing relationships with key partners and the promise of alternative and competitive pricing. We found it notable that only one respondent hired a new firm based on a desire to work with a more diverse team.

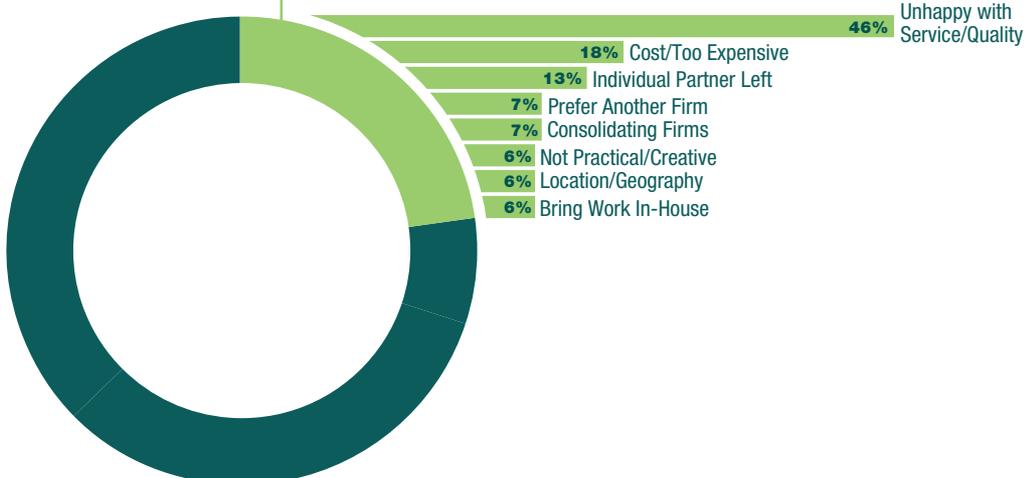
30%

Hired a new firm in the last 12 months



23%

Fired a firm in the last 12 months



Employment Practices Liability Insurance (EPLI) also played a role, requiring in-house counsel to work with a new firm designated by their insurer, often requiring the client to drop a firm from their outside counsel roster that was already familiar with their practices and operations.

Nearly one-quarter of in-house counsel also fired firms last year. In most cases — 46% — this resulted from poor service or quality. Other firms lost clients because of their costs or because key partners moved to other firms. When respondents talked about issues with service and quality, this centered around having been given poor and impractical advice, not achieving the desired results and the firm not meeting clients' expectations in terms of responsiveness. As one respondent noted:

“Not satisfied with the level of service; specifically, not offering business-friendly solutions and not responding to requests in a timely manner.”

Use of Alternative Fee Arrangements

Cost and pricing are considerations when hiring and firing firms and respondents are eager to understand how in-house legal teams can best structure pricing for their labor and employment work. They want to understand whether alternative fee arrangements are effective and how widely they are used.

RESPONDENTS WANT TO KNOW

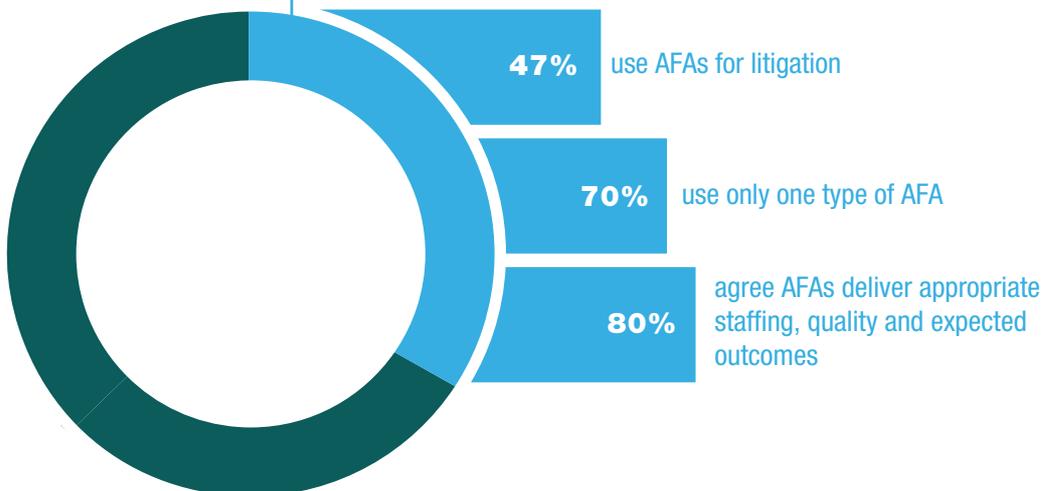
“I’d like to know how they’ve adopted alternative fee arrangements because I think that’s an area where we could do a lot more of that specifically for labor and employment.”

“Whether or not they used fixed fee agreements.”

“How the alternative fee structure is working out for them.”

34%

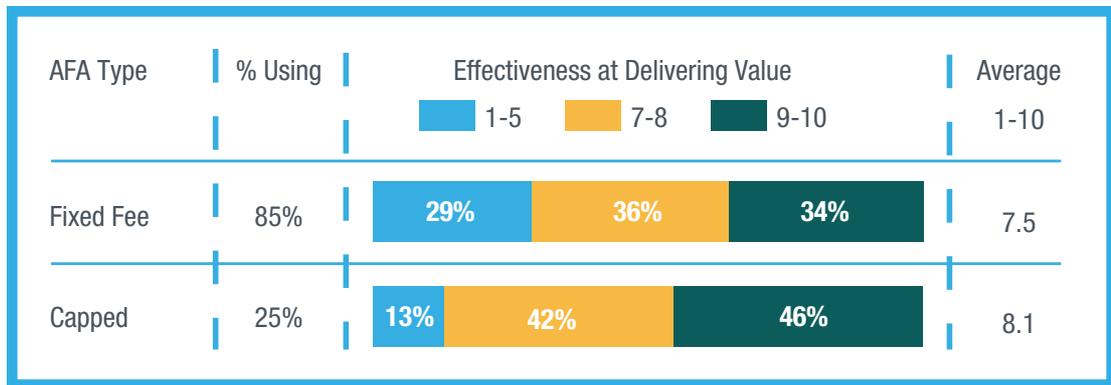
are using AFAs for at least some labor and employment work



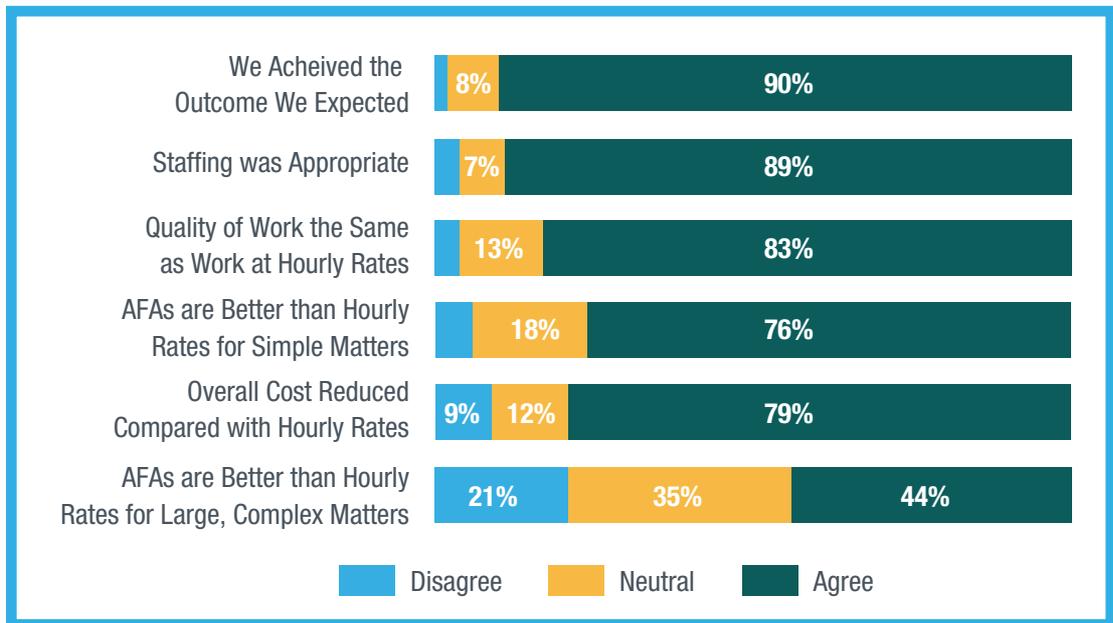
One-third of respondents use AFAs for at least some labor and employment work. Overall, across all businesses, approximately 12% of labor and employment work is billed under an AFA.

The largest businesses use AFAs more frequently, often due to greater volumes of work, leverage and negotiating power. Among respondents using AFAs, they are used for 34% of work on average, with litigation being the most common type of work billed this way. Most (70%) use only one type of AFA, and fixed fees are, by far, the most popular choice. The majority of those using AFAs believe that these pricing structures deliver value to their business – better quality, predictable outcomes and appropriate staffing on matters – when compared to the hourly rate pricing model. Seventy-six percent of respondents using AFAs felt that AFAs were superior to hourly rates when it comes to pricing simple, routine matters.

Alternative Fee Arrangements Overall



Effectiveness of AFAs Versus Hourly Rates



PROSKAUER'S PERSPECTIVE

Members of our Advisory Committee using AFAs noted that the most effective AFAs are those formed with the mutual understanding that there needs to be trust and a strong partnership with outside counsel. Both parties need to benefit from the arrangement and the lines of communication need to be open to address any issues or concerns, including those times when the scope of work is greater than anticipated or the litigation process results in unexpected costs or outcomes. We have found that frequent status and update meetings between in-house counsel and their outside counsel team are critical to maximizing satisfaction with AFA arrangements.

SECTION 3

Working In Partnership with the HR Function and Business Units



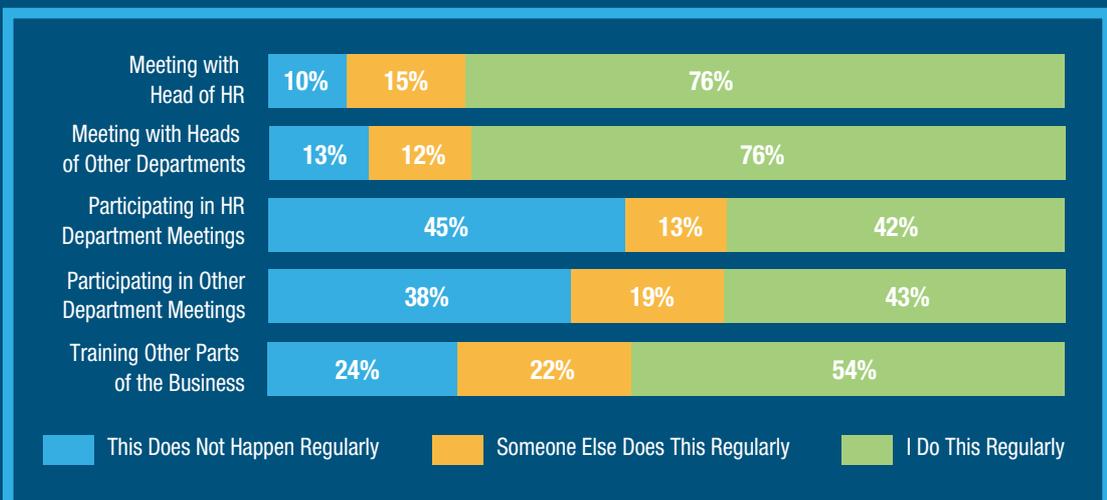
The survey findings reinforced the importance of a close working relationship among the in-house legal team and Human Resources and their Business Units. The benefits of such collaboration are many – and translate into real savings as discussed below – so it is not surprising that many respondents said they would like to ask their peers about how they work effectively with Human Resources. They wanted to know how involved legal should be in the HR function, when to step in and when not to. Respondents also wanted to know about working effectively with their Business Units.

RESPONDENTS WANT TO KNOW

“I would like to know about their relationships with the HR department.”

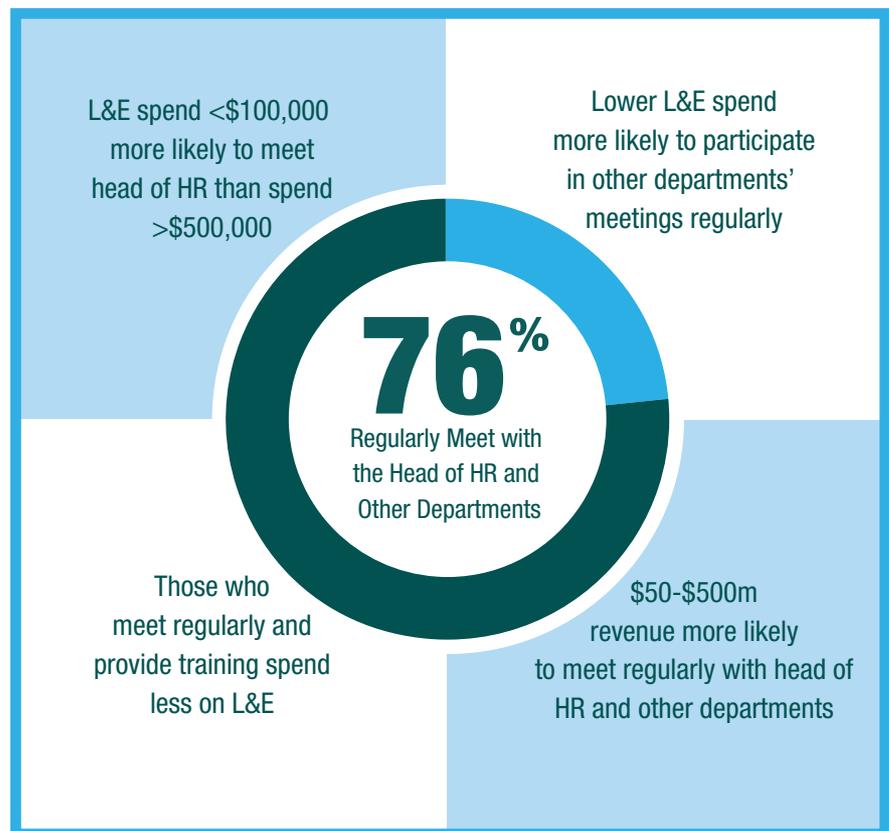
“How do they collaborate effectively with HR? What is the ‘right’ level of involvement by legal?”

“How much does the legal department push back on the actions the business wants to take relating to employee matters?”



Working with HR

What emerged as a common best practice is for the in-house legal team to meet regularly with the heads of HR and the heads of Business Units. Over three-quarters of respondents (76%) met regularly with the head of HR and the same percentage met regularly with Business Unit heads. Over one-third (42%) regularly participated in HR department meetings and 43% in Business Unit meetings. A higher proportion of companies who regularly engaged with their HR teams and Business Units spent less on labor and employment work. Over half (54%) of respondents also regularly engage in training other parts of the business. These companies are similarly realizing lower labor and employment spend.



When in-house counsel work in partnership with HR and their Business Units, companies are able to be more proactive and get ahead of issues and ensure that the business has the right policies and procedures in place – and that they are communicated and implemented correctly and efficiently. These strong relationships can also assist in managing personnel and resolving issues and disputes when they arise.

Our Advisory Committee noted that legal issues are sometimes not perceived as the most pressing by their business partners. However, through day-to-day advice and counseling, the in-house legal team is able to invest in building the visibility and credibility of their legal department internally, thus becoming invaluable at times of crisis or when facing a significant risk. When speed is of the essence, having an established level of trust in the in-house legal team accelerates the decision-making process to safeguard the business.

As some respondents noted, they were able to reduce the frequency or magnitude of claims by enhancing collaboration among and between the in-house legal team, the HR function and Business Units:

“Having legal work closely with the HR organization to make sure that they are educated on how to handle things properly.”

“The employment attorneys basically providing more guidance upfront to our human resources personnel and since the human resources personnel are generally the first ones to hear about cases like discrimination or harassment, even some benefits problems, putting information in their hands allowed them to respond more quickly.”

“HR Compliance is working more closely with the HR business partners earlier in the process when a termination is looking likely.”

“Emphasis on the day-to-day advisory role of our HR people in connection with discipline decisions.”

“When our business leadership has a decision to make on layoffs or hires, we have instituted a more rigorous program where our HR department is involved in those decisions to ensure that we are not accidentally tripping over discrimination claims and the demographics of those people are being considered.”

PROSKAUER'S PERSPECTIVE

Though the dynamics among the in-house legal team, HR and the Business Units vary across organizations, particularly given differences in employee headcount, one thing is clear – working together can be effective at reducing labor and employment claims and decreasing legal spend. Nonetheless, despite the positive impact increased collaboration can have on a business, the data shows that less than half of survey respondents participate regularly in HR or Business Unit meetings. Moreover, nearly 25% of respondents reported that they did not train other parts of the business, even though respondents cited in-house training as an effective way to manage risk. These represent significant opportunities for the in-house legal team to become more effective partners to the business and to add value to their organization.

SECTION 4

Managing Risk to the Business



Many respondents felt that too often, the legal team is brought in to triage problems once they have already arisen, so that the focus is on damage control. Greater value can be added by getting ahead of the problem or concern, giving the business early warning on issues or, better yet, implementing policies and procedures to prevent the issues from occurring.

RESPONDENTS WANT TO KNOW

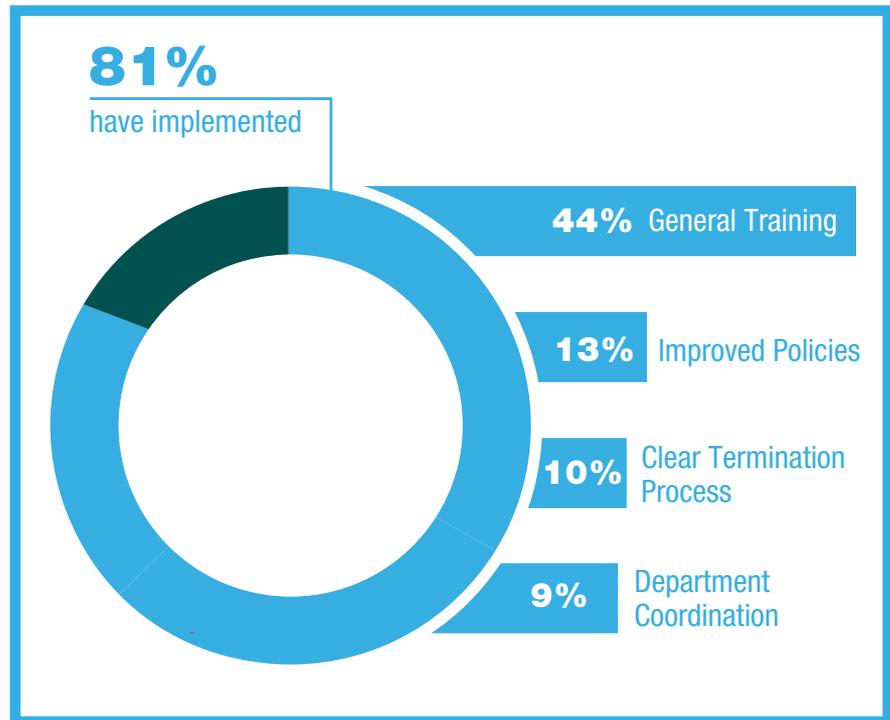
“What steps do they take to prevent problems in the first place?”

“What are your preventative practices?”

“What tools are they employing which are most successful in decreasing employee lawsuits?”

We asked respondents if they have taken measures to reduce the volume and size of claims in their business. Eighty-one percent of respondents responded that they had taken steps to mitigate and manage labor and employment risk. Over 40% of respondents introduced more training for the business, including compliance and employment law training, and educating the business on how to report concerns, investigate claims and reduce risk. Thirteen percent introduced or updated business policies, e.g., anti-harassment, anti-discrimination and whistleblower policies. Ten percent focused on the termination process, having greater involvement in terminations and training HR and the business on how to best manage that process.

Preventative Measures



Training was by far the most common measure used to reduce risk, but its success relies upon effectively engaging with audiences across the business. The Advisory Committee discussed the importance of adopting the right mode and tone of training, balancing the need to reach everyone against the cost, and ensuring that the message is not diluted – and is appropriate – as trainees evolve into the trainers. Factors such as size, geographic dispersion, remote workforces and high turnover of staff add to training challenges.

With risk management measures in place, businesses are in a more favorable position to set and meet their budget, while possibly reducing their average annual spend on outside counsel.

PROSKAUER'S PERSPECTIVE

Too often, training is either neglected or delivered in a perfunctory way that fails to engage employees in the subject matter and merely “checks the box.” More creative, thoughtful training can pay dividends in actually shaping employees’ behavior: reducing harassment claims, promoting compliance with company policies, and reducing risk.

SECTION 5

Working in Partnership with the Board



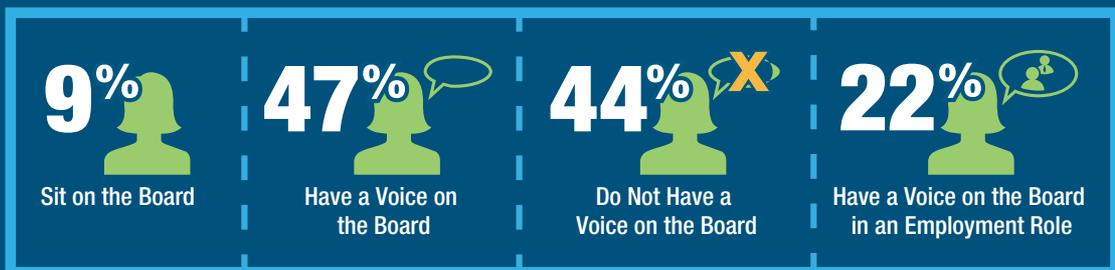
When it comes to dealing with labor and employment issues effectively and efficiently and investing in steps to prevent claims from occurring, it is essential that the legal team be well-positioned to be heard by and give impactful guidance to the Board.

RESPONDENTS WANT TO KNOW

“How do they get buy-in from management to conduct training sessions and educate the workforce?”

“How they are able to get the senior leadership to focus on labor matters. Short of there being a strike ... how to get the appropriate levels of attention and staffing at other times.”

We discovered that while only 9% of respondents actually sit on the Board, an additional 47% provide input to the Board. Those who sit on the Board are almost all in a General Counsel role. No respondents in a labor and employment role sit on the Board and only one-fifth of those respondents provide input to the Board, which is surprising given the importance of the workforce and workplace issues to most businesses.



In order to best support the business, in-house legal teams need to be on top of the issues - both those percolating inside the business and their industry and those evolving in the legal and regulatory environment. They need to know what issues are keeping the C-suite up at night, and as our Advisory Committee noted, what issues should be. This is an area where the partnership between in-house and outside counsel can add value.

Board Level Legal Issues

We asked those respondents who sit on the Board what they thought were the most critical labor and employee issues. Their responses fell into three main categories: wage and hour, state and local (and international) laws and employee relations.

Wage and Hour

"FLSA class actions. Class action, litigation, wage and hour."

"Wage and hour issues and particularly the pay equity and the administration of the pay system."

"Making sure there are no future issues."

"Probably concern about class action and concern about wage and hour."

State and Local (and International) Laws

"Changing labor laws in each state."

"D.C. just passed a paid employment leave act and no one quite knows how it's going to be implemented and how much it's going to cost. That's going to be a big issue for us."

"Class action lawsuits in California concern me."

"Increasing staff globally; hiring in other jurisdictions as we expand internationally."

Employee Relations

"Allegations of discrimination."

"Union contract negotiations. Employment litigation."

"Older workforce needs to move out."

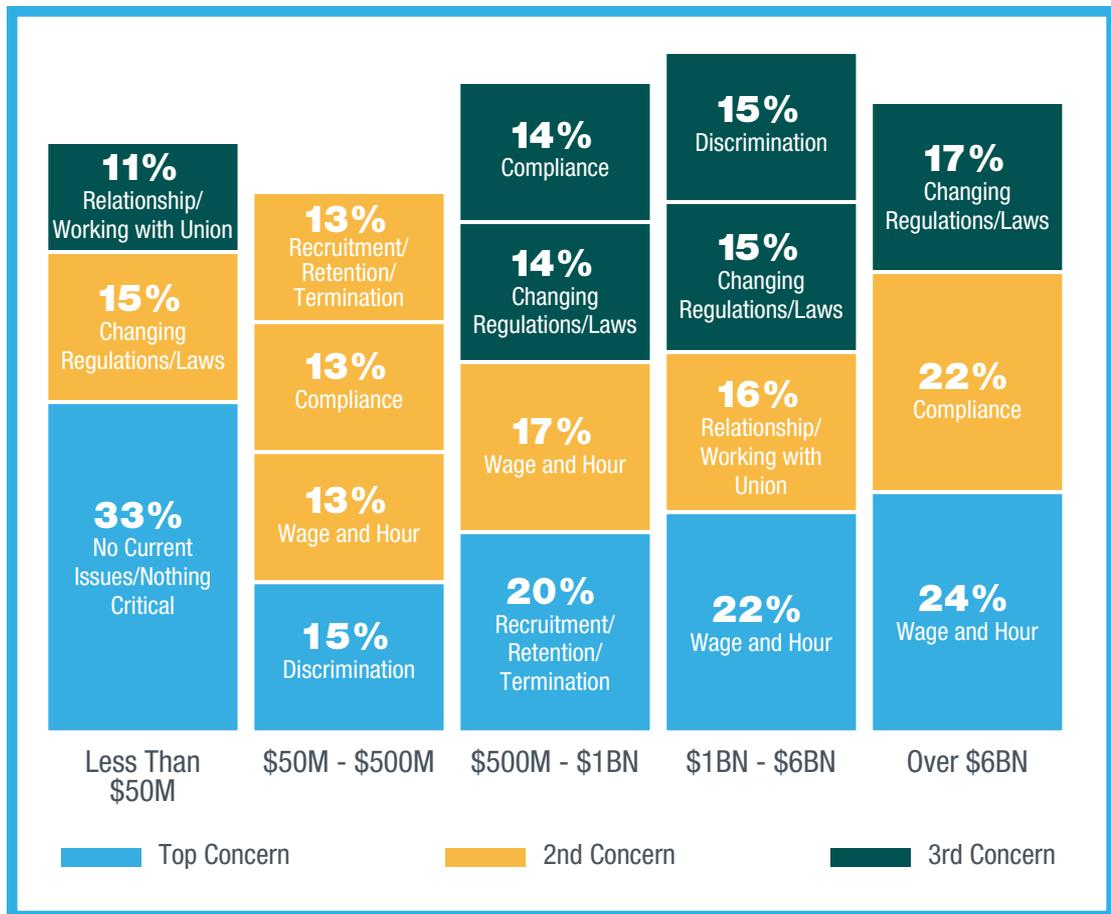
"Discrimination or wrongful termination concerns [...] making effective hires and then provide appropriate counseling and discipline when people are not performing."

"Obviously, everybody wants to grow, but you don't want to be in a high turnover [situation] [...] finding talent that is going to meet our needs is difficult, from a recruiting perspective."

We also looked at whether company size impacted the Board’s view of critical issues. Larger businesses with over \$1 billion in revenue are most concerned with wage and hour disputes, followed closely by compliance issues. Keeping on top of changing state and local (and international) laws and regulations was also of concern. Working with unions, dealing with discrimination cases and managing the workforce – hiring, firing and retaining talent – were also among the top concerns.

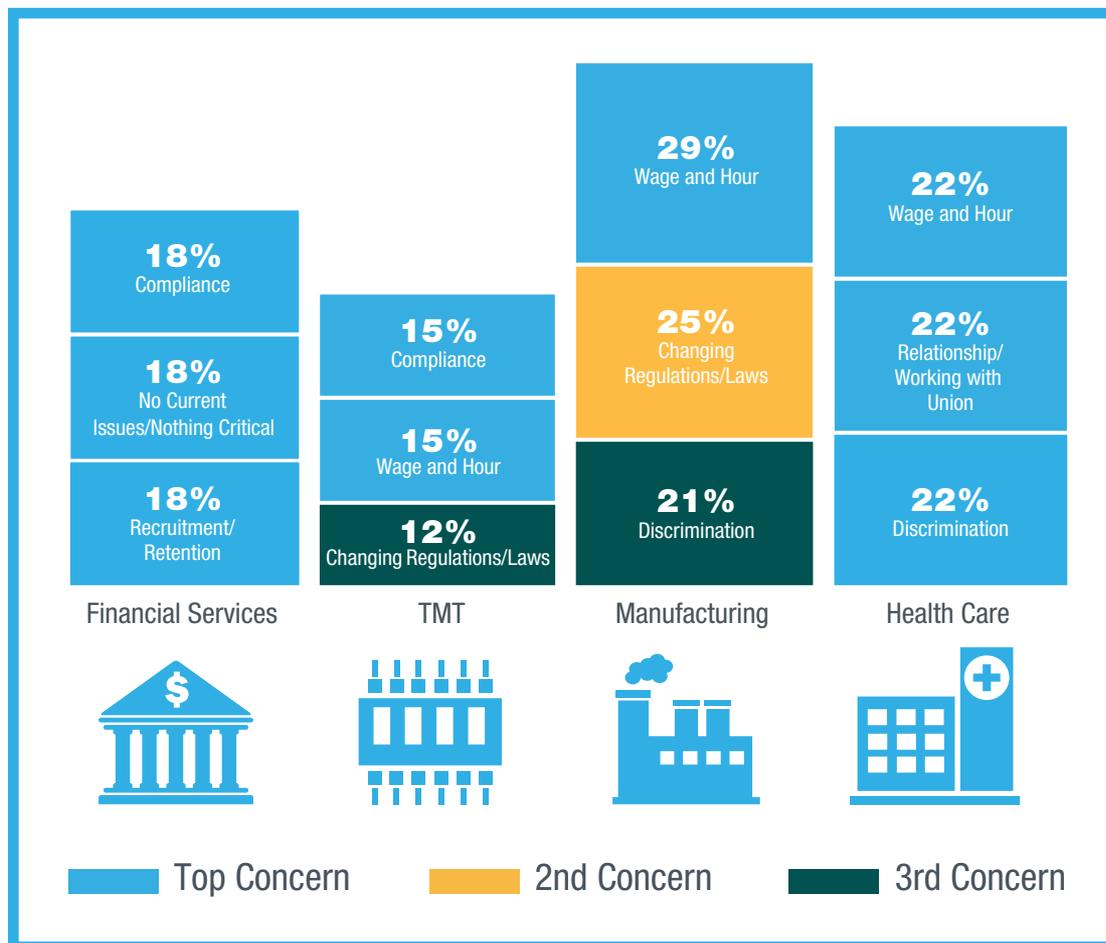
Smaller businesses focused on slightly different issues. Though they were concerned about wage and hour risks, they were more worried about recruitment/retention/termination and discrimination claims.

Most Critical Legal Issues by Revenue



The more heavily regulated industries, such as Financial Services, were most concerned about compliance issues. Manufacturing respondents were most concerned about wage and hour disputes, and Health Care respondents expressed equal levels of concern for their top three issues: wage and hour disputes, discrimination and working with unions.

Most Critical Legal Issues by Industry



PROSKAUER'S PERSPECTIVE

As our Advisory Committee noted, in-house counsel have the delicate task of flagging issues for the Board but also need to convey “We have it under control.” They know the Board expects them to be on top of hot issues like pay equity and how to comply with the myriad of state and local regulations emerging in this environment of federal deregulation of the workplace. But in-house teams often lack the resources and expertise to cover all these bases. This is an area where partnerships with outside counsel can help in-house counsel add value to the Board. Outside counsel can share with their in-house counterparts the types of issues generating concern among other companies, hot issues in their industry and emerging trends, including best practices from outside counsel’s experience working across industries. They can provide in-house counsel with concrete and practical information that will enable them to generate and maintain productive dialogue with the Board.

Contacts:

Please direct any comments and questions about the study to:



Neil H. Abramson
Partner
New York
Labor & Employment Law
+1.212.969.3001
nabramson@proskauer.com



Stacey C. S. Cerrone
Senior Counsel
New Orleans
Labor & Employment Law
+1.504.310.4086
scerrone@proskauer.com



Mark W. Batten
Partner
Boston
Labor & Employment Law
+1.617.526.9850
mbatten@proskauer.com



Catherine A. Duke
Legal Director
New York
Labor & Employment Law
+1.212.969.3959
cduke@proskauer.com



Elise M. Bloom
Partner
New York
Labor & Employment Law
+1.212.969.3410
ebloom@proskauer.com



Sarah Burdette
Associate Director
of Business Development
New York
+1.212.969.5611
sburdette@proskauer.com



Scott A. Faust
Partner
Boston
Labor & Employment Law
+1.617.526.9650
sfaust@proskauer.com



Mary Grace Leal
Business Development
Coordinator
New York
+1.212.969.3571
mleal@proskauer.com



Anthony J. Oncidi
Partner
Los Angeles
Labor & Employment Law
+1.310.284.5690
aoncidi@proskauer.com

We hope you enjoyed the findings and Proskauer Perspectives from our second *Value Insights: Delivering Value in Labor and Employment Law* survey. For additional information about this survey, our methodology, or to suggest additional questions or areas of interest for our next survey, please feel free to contact any of the team members listed above or email proskauervalueinsights@proskauer.com.

In order to continue the dialogue around this important topic, we are planning a select number of “Peer Perspective” roundtable events around the country to bring together in-house counsel and others responsible for labor and employment to provide a forum for discussion. If you are interested in participating in our “Peer Perspectives” roundtables, please let us know.

*“Strive not to be a success,
but rather to be of value.”*

– Albert Einstein

Proskauer.com

Beijing | Boca Raton | Boston | Chicago | Hong Kong | London | Los Angeles
New Orleans | New York | Newark | Paris | São Paulo | Washington, D.C.