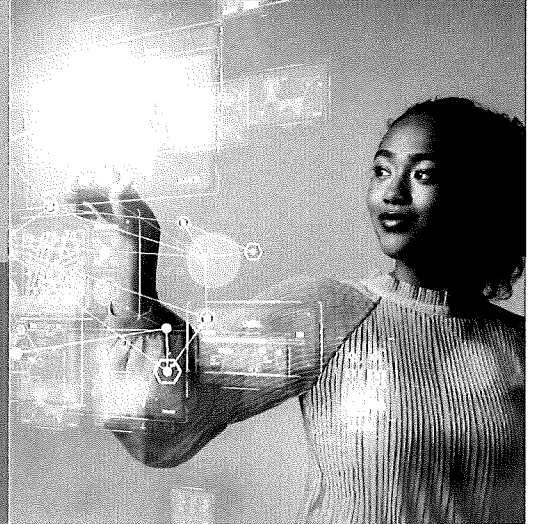
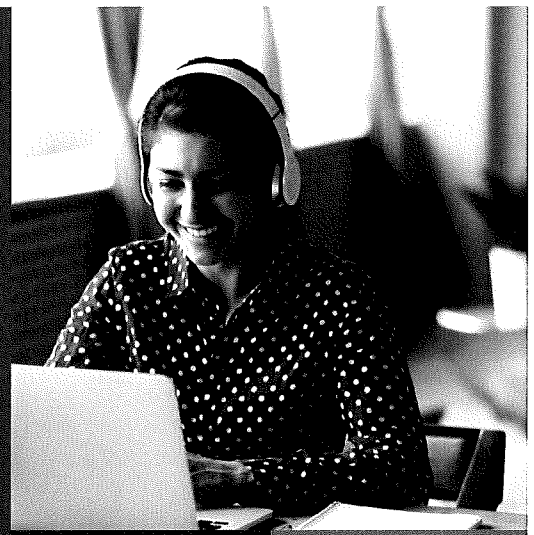


The Littler® Annual Employer Survey Report

May 2023



Littler®

Fueled by ingenuity.
Inspired by you.

Executive Summary

Widespread economic uncertainty. Evolving workforce expectations. Accelerating use of artificial intelligence (AI). A shifting patchwork of local, state and federal regulations.

Numerous headwinds are colliding in 2023 – and presenting employers with a litany of tough decisions.

Against this backdrop, Littler surveyed 515 in-house lawyers, C-suite executives and human resources (HR) professionals based across the United States and representing a range of industries and company sizes. This year's report offers insights for employers as they look to mitigate risk, seize new opportunities and lay the foundation for the future workplace.

The Lasting Effects of COVID-19: Hybrid Work, Disability Accommodations Are Here to Stay

Focus on the pandemic may be receding, but the hybrid work model appears to have staying power – at least in the U.S. Over 70% of the employers we surveyed have workforces operating on a hybrid work schedule. While some of these respondents may have workforces that include a mix of employees who work fully on-site and who are on hybrid schedules, it is telling that only 16% of respondents say their organizations require fully in-person work. Despite economic uncertainty and layoffs at major companies, only 20% of respondents believe that the easing of the labor market is helping them to push for more in-person work.

The pandemic also spurred a rise in employee requests for disability accommodations and leaves of absence. Sixty-five percent of respondents (and 78% of those from large organizations) report receiving an increase in such requests related to mental health conditions. Reflecting this trend, 50% of employers surveyed have expanded their policies for disability accommodations and/or leaves of absence since the start of the pandemic – with more changes likely to come as several additional states and localities implement paid family and medical leave requirements.

Employers Are Bracing for Heightened Regulatory Enforcement, Increasingly Active State Legislatures

As the patchwork of state and local requirements continues to grow, paid sick and family leave topped the list of employment law-related changes that respondents expect to impact their businesses in the year ahead (as selected by 71% of employers). Other top areas of employment law change that respondents are watching include pay equity, overtime pay and other income equality-related measures (67%), data privacy regulations (54%) and inclusion, equity and diversity (IE&D) considerations (53%).

Fortunately, employers have done considerable work to prepare for new laws coming into force around the country. With a growing share of workers living in regions with pay transparency laws, for example, our survey finds that the vast majority of respondents (91%) feel prepared to comply to some extent with these laws requiring the disclosure of salary ranges. The same percentage, 91%, feel prepared to comply to some degree with the California Privacy Rights Act (CPRA), which went into effect earlier this year and marked the first law in the U.S. to apply comprehensive data protection to HR data.

On the federal level, employers are also anticipating a substantial impact on their workplaces stemming from enforcement by regulatory agencies. This year's survey saw a particular rise in the expected impact of enforcement by

the National Labor Relations Board (NLRB) and compliance with its requirements. As NLRB General Counsel Jennifer Abruzzo continues to aggressively push to reverse existing precedent and expand enforcement actions, the number of respondents expecting a moderate or significant impact from NLRB-related factors rose 18 percentage points from our 2022 survey to 61%.

New leadership at other key federal agencies may deepen the Biden-era focus on workplace-related enforcement. Pending confirmations for leaders in the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC) and the DOL's Wage and Hour Division could usher in a new era of rulemaking and enforcement actions that affect employers.

AI and Other New Technologies Pose Opportunities, Challenges

With an increasingly remote and decentralized workforce, there has been greater attention to the use of software that can track and monitor the activity of white-collar workers. But our survey found that employers are split on the use of employee-monitoring technology, with 45% already using it and 41% not using or considering such applications. Employers identified a range of concerns in using monitoring technology, including the impact on employee morale and privacy law compliance, which were each noted by 65% of respondents.

AI tools are also increasingly being used by employers for a variety of essential HR functions. At a time when HR departments are increasingly stretched thin, respondents identified the greatest advantages as speeding up processes (63%) and reducing workloads and providing cost-efficiencies (59%).

AI solutions are not without risk, however, and as they become more embedded in organizations, respondents expressed concerns about the potential for systemic biases (59%) and employment-related discrimination (52%). Generative AI technology specifically also holds the potential to transform various aspects of the workplace, though half of respondents say their organizations are taking a wait-and-see approach when it comes to developing policies on their use – and a surprising number, 40%, say their organizations have no policies in place and do not intend to implement any.

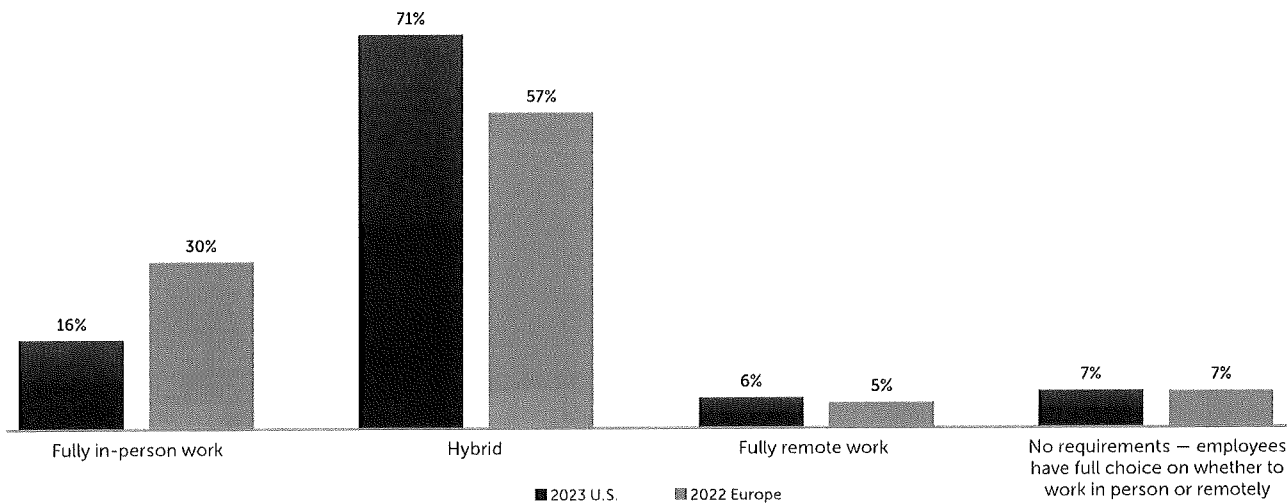
In what follows, we'll explore these and other timely issues impacting the workplace in more depth.

Responses to some questions do not add up to 100% due to rounding, and some exceed 100% because respondents were invited to select more than one answer. For the full survey methodology and a breakdown of respondent demographics, see page [31](#).

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

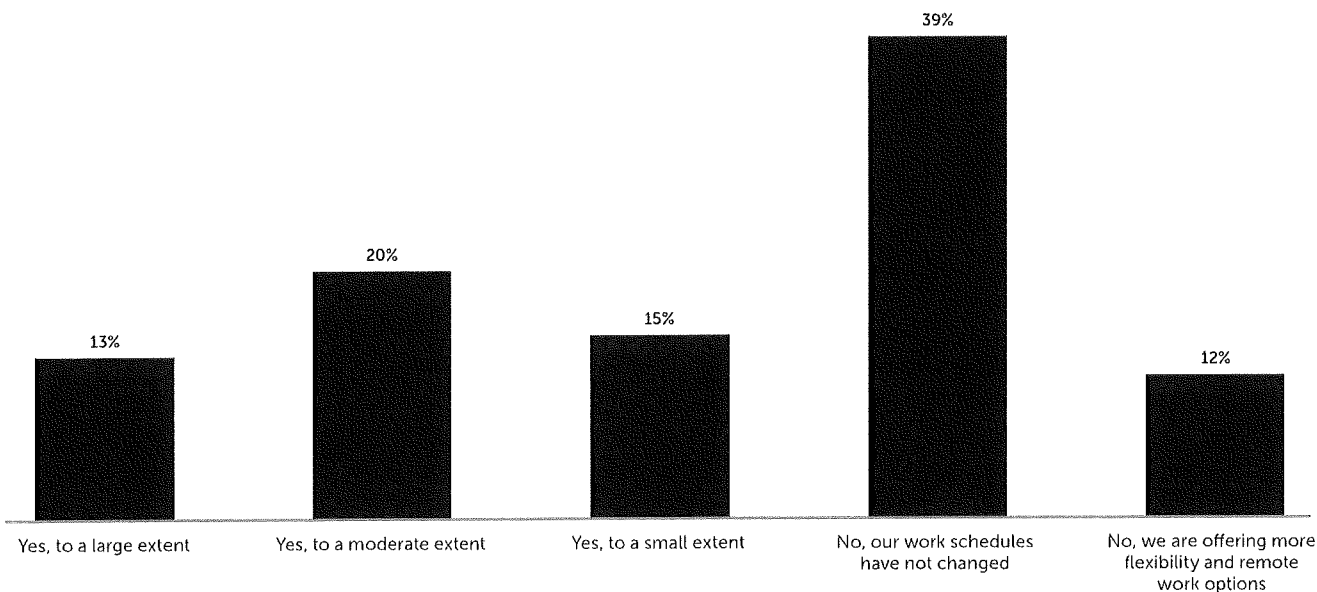
Workplace Management

Which of the following best describes your organization's current requirements for employee work schedules?

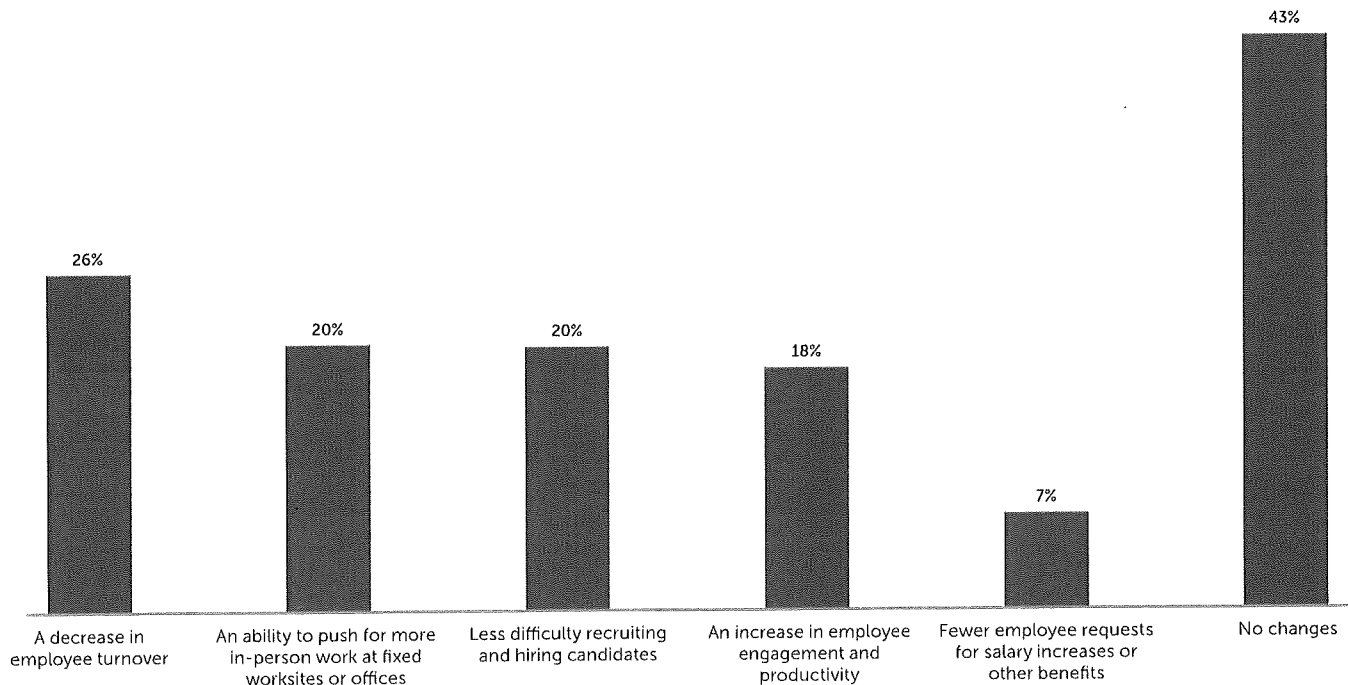


Is your organization reducing remote work schedules – and requiring that employees work more in person at a fixed worksite or office – this year in comparison to 2022?

This question was not asked to those whose organizations are fully remote or do not have any positions where employees can work remotely.



As the tight job market shows signs of leveling off, which of the following trends, if any, has your organization observed? (Select all that apply)



Three years after the start of the pandemic, and despite the Public Health Emergency ending on May 11, most U.S. employers we surveyed report that their workforces have still not fully returned to in-person work.

Over 70% of respondents say their employees are on a hybrid work schedule, while another 13% have workforces that either are fully remote (6%) or have total choice over where they work (7%). Only 16% say their organizations require fully in-person work. However, respondents are reflecting on the work schedules of their entire employee base, so it is possible that some – such as those in manufacturing or other industries involving frontline workers – may have selected a hybrid work option if they have both employees who are fully in-person and office workers with hybrid schedules.

In contrast to the U.S. results, nearly twice as many respondents (30%) in Littler’s [2022 European Employer Survey Report](#) said that their organizations required fully in-person work. This trend is supported by another recent [report](#), which found that office attendance in major U.S. cities still falls well below office occupancy in Europe and Asia.

Why are Americans lagging behind when it comes to resuming on-site work? The persistently low U.S. unemployment rate and staffing shortages across several industries may still be giving American workers more leverage to push for hybrid work arrangements. Despite economic uncertainty and layoffs at major companies, only 20% of employers we surveyed

believe that the easing of the labor market is helping them push for more in-person work. The largest percentage of respondents (43%) has not seen any changes as the job market cools.

Furthermore, data from our recent [2023 Economic Outlook Survey](#) found that fewer than one in four (24%) of employers are conducting workforce reductions, while 50% are either currently, actively planning on or considering *growing* their workforces. Meanwhile, 94% of respondents in that survey identified recruiting and retention as a high (69%) or medium (25%) priority.

Americans' relative reluctance to head back to the office may stem from a range of factors, from companies affirmatively offering greater flexibility to help attract and retain employees to unplanned changes in how parents manage childcare and other obligations. U.S. workers also tend to have longer commutes, larger homes and fewer public transit options [than their international counterparts](#).

That said, U.S. employers may shift further away from remote work as the pandemic continues to recede. Nearly half (48%) of respondents whose organizations permit employees to work remotely but are not already fully remote said they would be requiring more in-person work in 2023 than in 2022 – to a large (13%), moderate (20%) or small (15%) extent.

Of course, these trends tend to vary heavily by industry. For instance, nearly a fifth of respondents in the technology industry say their organizations are fully remote (compared with 6% overall). At the other end of the spectrum, manufacturing and healthcare industry respondents had the largest share of fully in-person workers compared with other sectors.

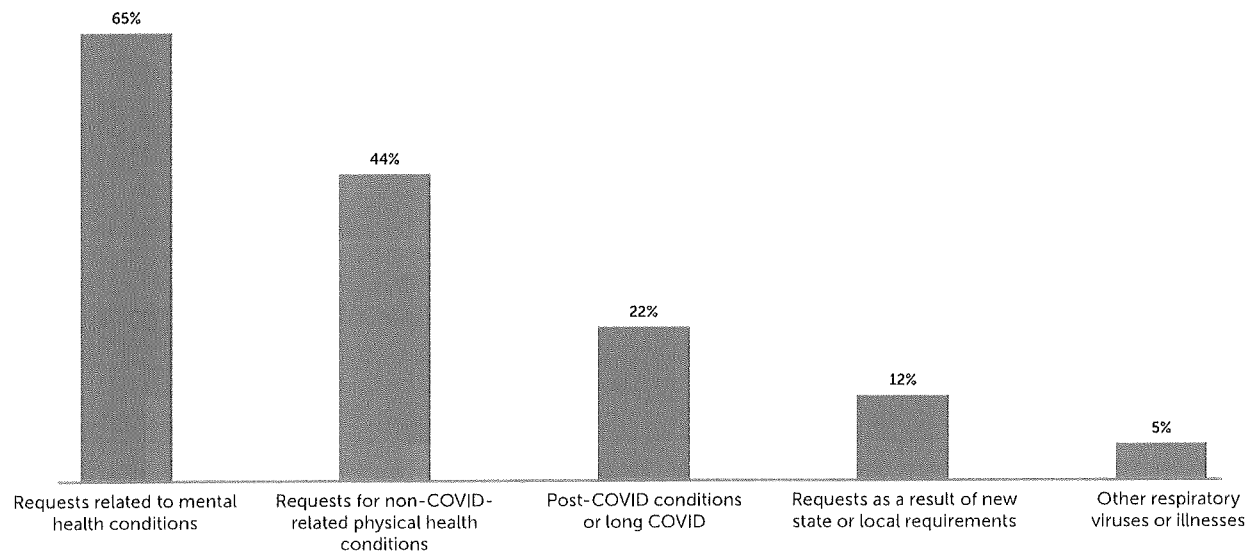
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In an environment where some hybrid work is likely to remain the norm, employers need to pivot away from crisis management and toward intentional remote work structures that can be broadly applied and consistently enforced. Given the current spotlight on equity, transparency and employee well-being, company leaders need to develop and communicate their remote work policies clearly and consistently to promote employee engagement and satisfaction.

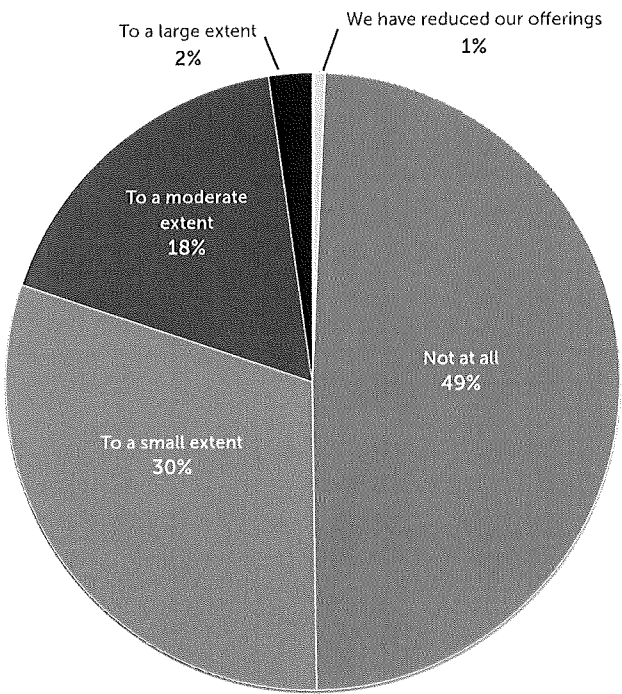
Devjani Mishra, Littler shareholder



In which of the following areas has your organization received increased requests for disability accommodations and/or leaves of absence since the start of 2022? (Select all that apply)



To what extent has your organization expanded its policies for disability accommodations and/or employee leaves of absence since the start of the pandemic?



The pandemic dramatically changed the ways in which employers handle disability accommodations and leaves of absence, as organizations adjusted to an increasingly remote (and sometimes burnt-out) workforce, as well as ever-evolving state and local requirements.

It follows, then, that half of all respondents told us their organizations have expanded policies for disability accommodations and/or employee leaves of absence since the start of the pandemic. More changes may be in store as employers adapt to shifts in state and local regulations. Paid family and medical leave will expand in 10 states and the District of Columbia this year. And while most state and local COVID-related paid leave mandates have expired or will soon, some permanent changes to unpaid family leave laws may be triggered in the event of future public health emergencies.

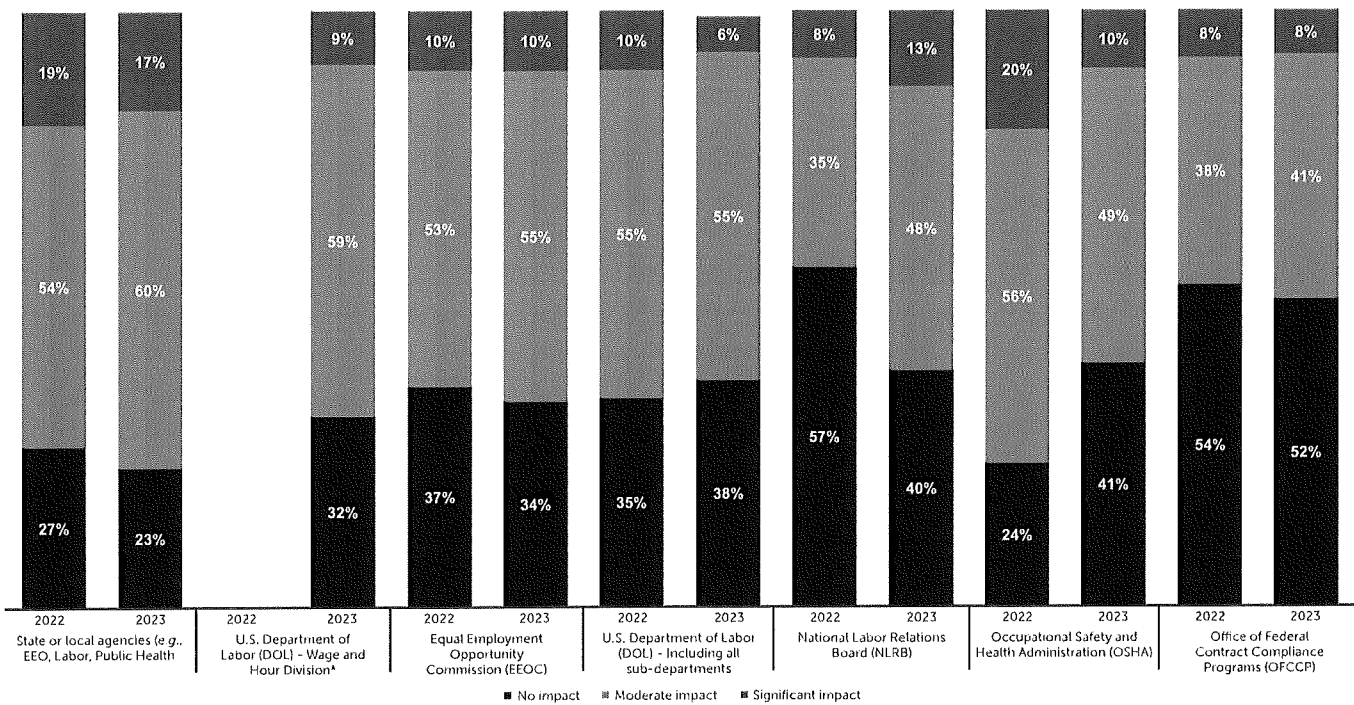
Since the start of 2022, 65% of employers have seen an increase in accommodation and leave requests related to mental health conditions, such as anxiety, depression and post-traumatic stress disorder. Nearly a quarter (22%) saw increased requests related to post-COVID conditions and 44% said the same about other physical health concerns. These numbers were higher across the board for organizations with more than 10,000 employees – for instance, 78% of these larger employers saw an increase in requests related to mental health conditions.

A combination of factors is likely contributing to the sharp uptick in mental health-related accommodation and leave requests. On the one hand, studies indicate people's mental health deteriorated during the pandemic and continues to suffer. At the same time, as the stigma around mental health issues decreases and employers communicate more openly about the available processes to accommodate for these conditions, workers facing mental health challenges may be increasingly comfortable making such requests.

Workplace Regulation and Litigation

How much impact do you expect enforcement by the following regulatory agencies, and compliance with their respective requirements, to have on your workplace over the next 12 months?

The below chart excludes data from respondents who said the NLRB is not applicable to their organizations (11% in 2023) and those who said the same of the OFCCP (24% in 2023).



* This answer choice was not provided in the 2022 survey

With focus on the pandemic receding and the Biden administration entering its third year, employers’ expectations around the impact of regulatory agencies on their workplaces have largely remained steady since our 2022 survey – with two notable exceptions.

One exception: enforcement by the NLRB and compliance with its requirements. As NLRB General Counsel Jennifer Abruzzo continues to aggressively push for expanded union rights and extraordinary settlement remedies – among other aspects of her agenda aimed at reversing established precedent – more employers expect to feel the effects. Compared to 2022, the number of respondents expecting a moderate or significant impact from NLRB-related factors increased by 18 percentage points to 61%. The issue appears to be particularly on the minds of larger employers, with 68% of respondents from organizations with more than 10,000 employees anticipating that level of impact.

In fact, the rise in activity has already been felt by employers as unfair labor practice charges filed across NLRB field offices from October 1, 2022, to March 31, 2023, rose 16% over the same period a year prior. While such charges are often dismissed, employers' concerns are warranted, as investigations alone – not to mention settlement or complaint processes – can impose significant financial and operational burdens. What's more, 2023 could be a pivotal year for the Board, which is expected to issue final rules broadening the definition of a joint employer under the National Labor Relations Act and revising representation election procedures. Reflecting the increased activity, President Biden, in March, proposed an NLRB budget of \$376 million for the next fiscal year, representing a 25% increase over its current budget.

The other notable change from the 2022 survey to the 2023 survey is that fewer employers are predicting impacts from Occupational Safety and Health Administration (OSHA) enforcement activities. In 2022, more than two-thirds (76%) of respondents anticipated a moderate to significant impact from OSHA enforcement; that number fell to 59% this year, with the share of those expecting to see significant impacts cut in half, from 20% to 10%. Similarly, as the next section shows, very few respondents (9%) expressed concerns about COVID-related lawsuits.

While perspectives on the EEOC remained stable from 2022, that may change if nominee Kalpana Kotagal, a Democrat, is confirmed as a commissioner. With the Commission deadlocked between Democrats and Republicans for the past three years, EEOC Chair Charlotte Burrows has been limited in moving forward her agenda, but this would change with a 3-2 Democratic majority.

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Given the era of divided government, many of the most significant changes impacting employers this year continue to come at the state and local levels. In the absence of comprehensive federal legislation governing such areas as paid leave, data privacy and minimum wage, state lawmakers are frequently taking the lead. As the patchwork of state and local workplace laws grows, employers are increasingly looking for state-by-state analyses to understand the various laws and obligations before making critical operational decisions, such as where to expand their businesses.

Michael Lotito, co-chair of Littler's Workplace Policy Institute (WPI), and Shannon Meade, Executive Director of WPI

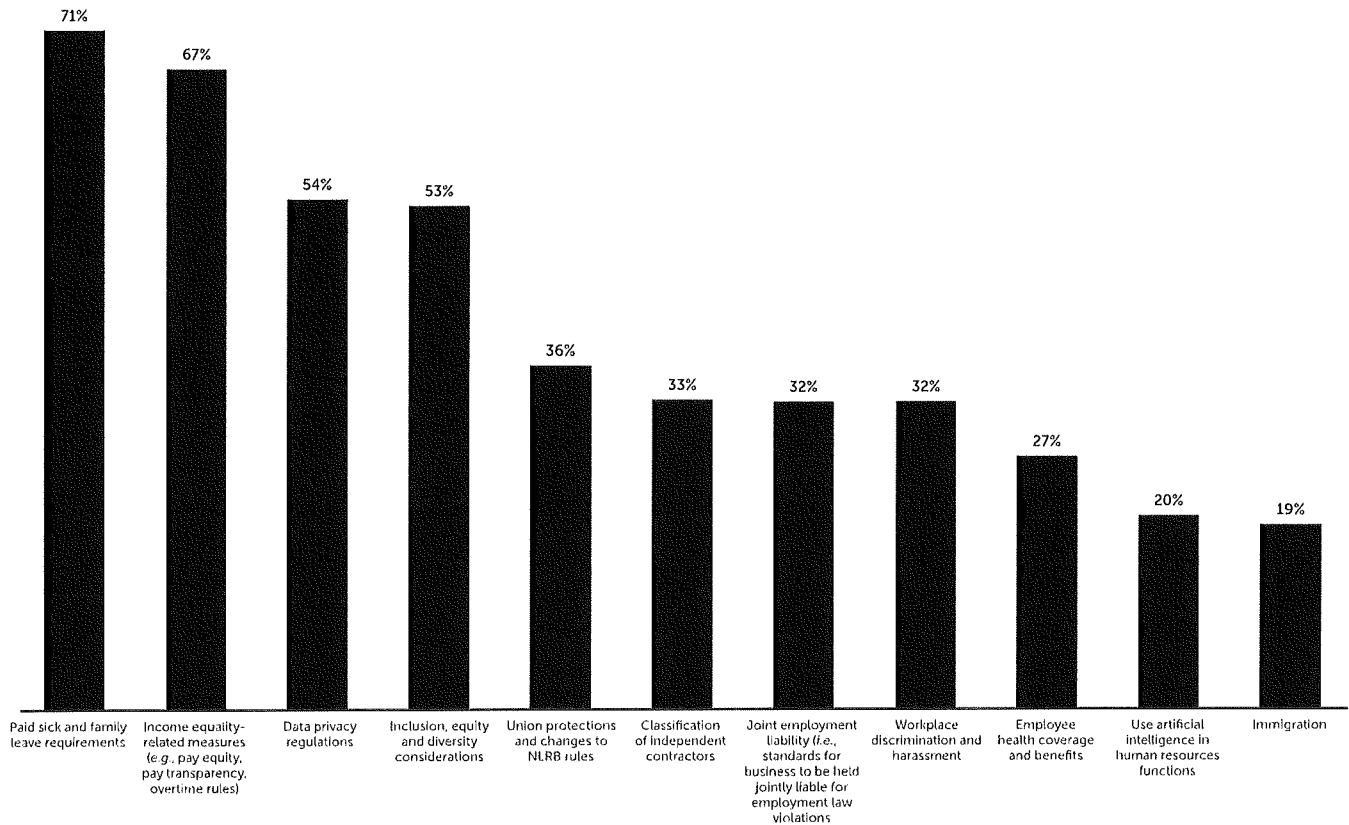


Changes may also be coming at the DOL's Wage and Hour Division, which has gone without leadership since the start of the Biden administration. President Biden has renominated Jessica Looman to serve as administrator of the Division after the Senate failed to confirm her earlier nomination in the last session. The DOL has also proposed a new rule that, if put into effect in 2023, would change the test for determining independent contractor status. Additionally, per the administration's Fall Regulatory Agenda, the DOL is expected to issue a proposed rule regulating overtime pay in May 2023. With significant implications for wage, overtime and recordkeeping requirements, the above potential changes have employers taking note: more than two-thirds (68%) expect to be impacted by the Division this year.

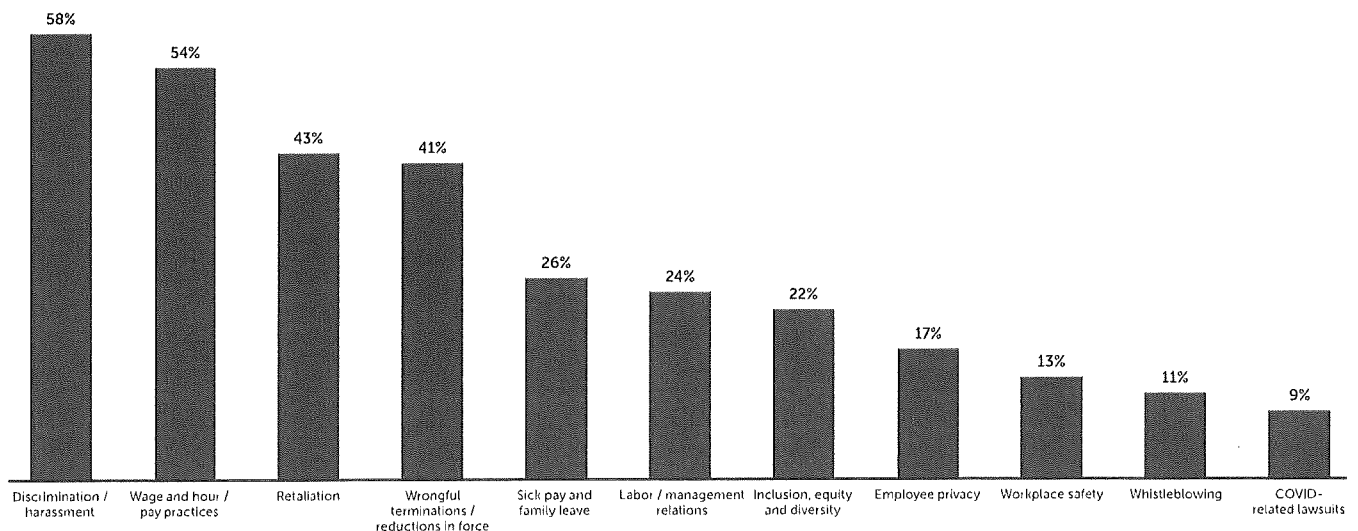
Similarly, while employers' expectations surrounding broader DOL enforcement impacts have remained the same, the departure of Secretary Marty Walsh may bring stronger enforcement actions. Acting Secretary Julie Su has been formally nominated to succeed Walsh. If confirmed, Su is likely to take a far more aggressive and radical approach to rule interpretation and enforcement actions.

Even amid these important leadership changes at key federal agencies, employers appear most focused on activity from state and local agencies. The largest percentage of respondents (77%) expect a moderate or large impact as it relates to enforcement from state and local agencies and compliance with their respective requirements.

In which of the following areas do you expect employment law-related changes that will impact your business over the next 12 months? (Select all that apply)



In which of the following areas is your organization concerned about employment-related litigation over the next 12 months? (Select all that apply)



Given the ever-evolving patchwork of paid sick and family leave requirements at the state and local levels, it's no surprise that this is the area where respondents most expect employment law-related changes to impact their businesses over the next 12 months. As employers adapt to these changes, more than a quarter of respondents (26%) are concerned about litigation around sick pay and family leave in the coming year.

Roughly two-thirds of respondents (67%) are expecting to see an impact from new income equality-related measures, such as around pay equity, pay transparency and overtime pay. And more than half of employers (54%) are concerned about litigation surrounding wage and hour or pay practices.

Data-privacy regulations are also a key concern of respondents, with 54% anticipating employment law-related changes in this area to impact their businesses. This marks an 11% increase in concern from a similar question asked in our 2022 survey (see page 18 [here](#)). While only 17% of respondents expressed concern about litigation related to employee privacy, that may change amid the recent proliferation of state data privacy laws, including the California Privacy Rights Act and the Illinois Biometric Information Privacy Act.

IE&D is another area that saw a rise in the anticipated impact of employment law-related changes (53% in 2023, compared with 43% in the 2022 survey). IE&D issues have been the subject of legislation among lawmakers on both sides of the aisle, from state and local [CROWN Acts](#), which prohibit discrimination based on hairstyle, to Florida's [prohibitions](#) on race-based diversity training, which is partially blocked pending a decision in the U.S. Court of Appeals for the 11th Circuit.

While less than a quarter (22%) of respondents expressed concern about litigation risks in this area, IE&D is embedded into nearly all of the other employment-related litigation risks that respondents identified. In fact, of the respondents who chose IE&D litigation as a concern, only four respondents did not select any other answer choice.

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Research consistently shows that inclusive, equitable and diverse workplaces bring numerous benefits to organizations. But with the increased visibility of IE&D programming, employers must also be mindful of complying with applicable laws and preparing for legal risks. Instituting effective, lasting and lawful IE&D programming requires thoughtful planning and proactively anticipating the legal risks and exposures these policies can create.

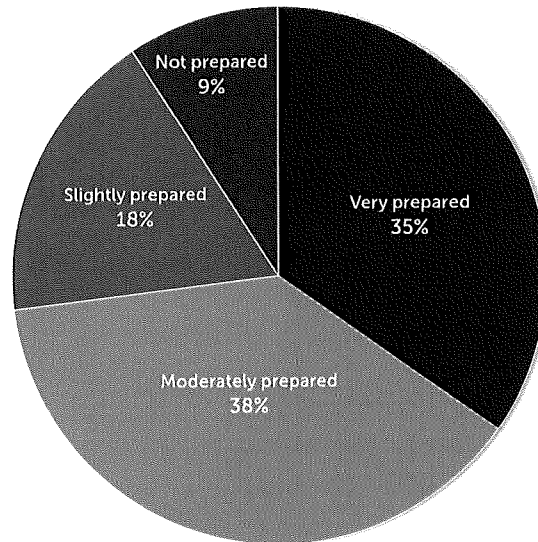
[AlYESha Asghar Dotson](#), co-chair of Littler's EEO & Diversity Practice Group who led development of Littler's [IE&D Playbook](#)



For example, discrimination and harassment litigation, which was cited as a concern by 58% of respondents, is closely connected to IE&D issues. One emerging flashpoint is the rise in claims of reverse employment discrimination, wherein members of majority or historically advantaged populations claim that they are being treated differently due to IE&D programs – a potential violation of Title VII. Similarly, IE&D can be tied into wrongful termination-related litigation, which 41% of respondents cited as a concern, if employees from majority or historically advantaged groups feel they were adversely impacted by such initiatives. Other areas that can pose risk from an IE&D perspective include family leave accommodation policies, employee privacy in the form of data collected through diversity surveys, and employee benefits.

While IE&D initiatives can significantly improve profitability, innovation and retention, a rise in these programs is leading to greater judicial scrutiny through single-plaintiff cases, class and collective actions, and shareholder derivative suits challenging these programs.

With cities and states increasingly enacting pay transparency laws that require employers to include salary ranges in job postings, to what extent do you feel your organization is prepared to comply with the laws of the various jurisdictions in which you operate?



Roughly one in four U.S. workers now [live](#) in a region where employers are required to share pay ranges by law and the number of cities and states enacting such rules continues to grow. This year, for instance, new requirements in [California](#), [Washington](#) and [Rhode Island](#) go into effect, while more pay transparency-related [legislation](#) has passed or is pending in [New York State](#), Massachusetts, Connecticut and South Carolina, among others.

This regulatory patchwork poses particular challenges for multistate employers, seeing as each law has its own nuance. Remote job postings, which could implicate various jurisdictional requirements at once, only exacerbate the compliance burden. National legislation requiring pay range disclosures like the [Salary Transparency Act](#) could address that issue, though whether such measures would find enough support to pass into law remains to be seen.

Fortunately, employers have done significant work to get ready for wage disclosure laws. Our survey finds that the vast majority (91%) feel prepared to some extent to comply with the requirements of the various jurisdictions in which they operate. Only 9% say their organizations are not prepared at all.

The next immediate obstacle that is top of mind with employers is pay data reporting requirements. For instance, California requires private employers with at least 100 employees in the U.S. (and at least one employee in California) to file an annual report that discloses certain pay data (e.g., pay band, occupational category, mean and median hourly rate, hours worked per each pay band) according to race, ethnicity and gender. Employers in the state with at least 100 contract workers in the U.S. (and at least one in California) also must file an annual report disclosing similar information for all their contract workers. This year's reports are due on May 10, 2023. In Illinois, employers of the same size must report pay-related information to the state Department of Labor to get certified as compliant with the Illinois Equal Pay Act.

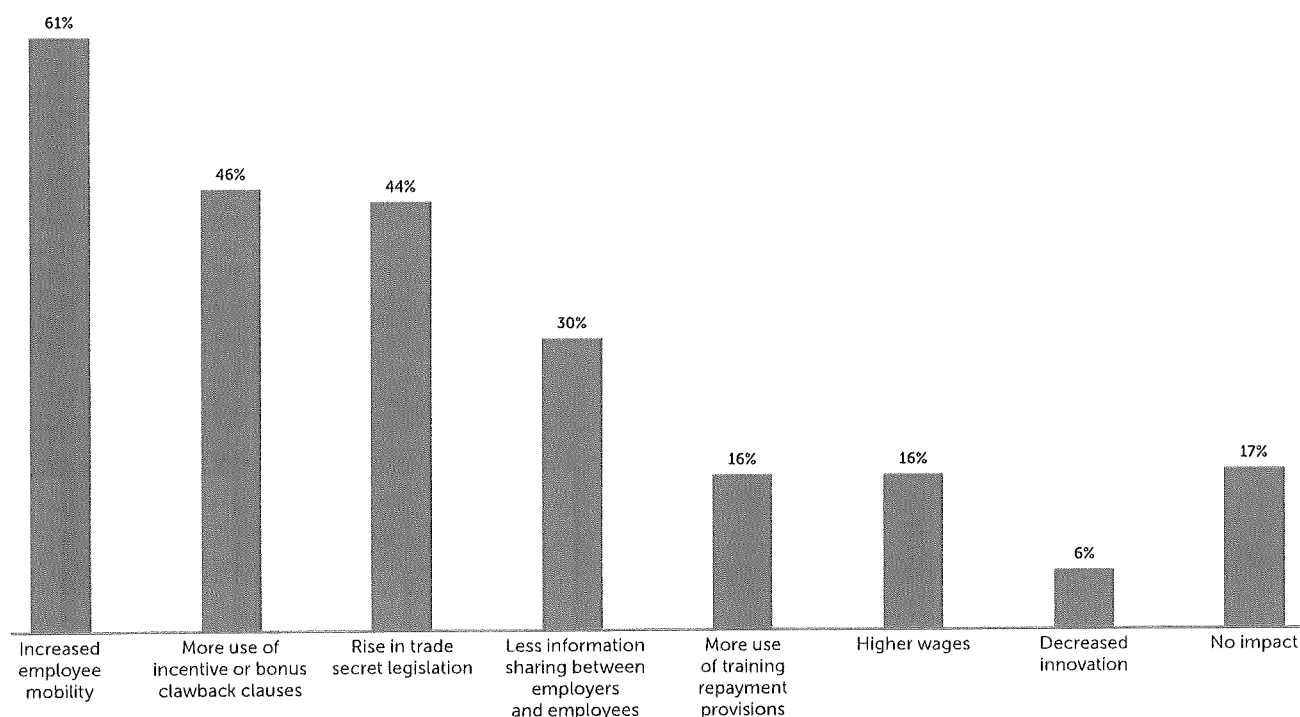
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Employers have been learning a lot about themselves as they conduct pay audits and comply with pay reporting and disclosure obligations. Tracking the varying requirements of each jurisdiction – and managing the employee-relations issues that come with pay-related disclosures – often creates a need to make internal structural changes to identify and set pay ranges, reshape roles and job descriptions, and put new processes in place. More broadly, with greater attention to pay equity – and coming off a highly competitive talent market that pushed many employers to boost salary offers – now is the time to look carefully at pay equity to mitigate legal and reputational risks.

Denise Visconti, Littler shareholder who helped develop the Littler Pay Equity Assessment™; Joy Rosenquist, Littler attorney and a California liaison for the firm's Workplace Policy Institute



The Federal Trade Commission (FTC) proposed a rule that, if made final, would ban all non-compete agreements with limited exceptions. In which of the following ways would you expect such a ban to impact the labor market and/or the employer-employee relationship? (Select all that apply)



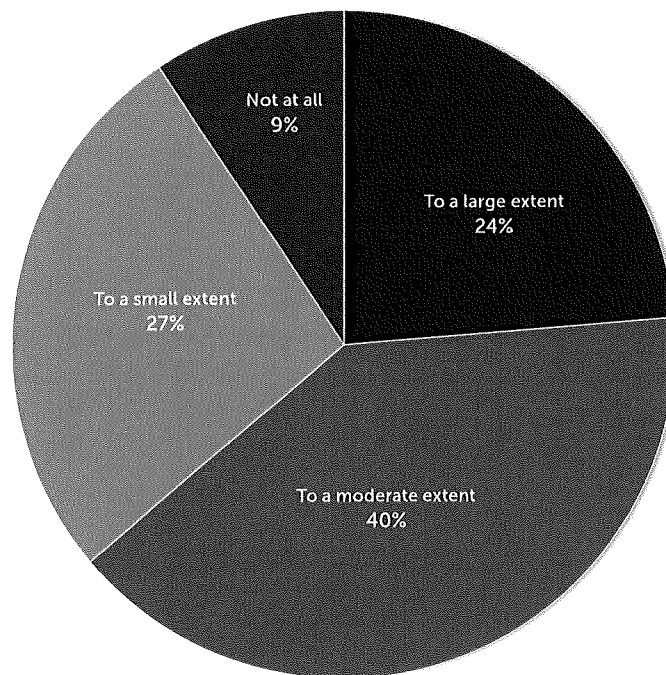
On January 5, 2023, the FTC proposed a rule that would essentially ban non-compete agreements, with limited exceptions. The proposed rule indicates "aggressive FTC interest in banning non-competes much more broadly," according to a recent Littler insight, and would extend beyond traditional non-competes to include any provision that the regulator determines functions as a non-compete. For instance, the FTC advises that while non-disclosure agreements and customer non-solicit agreements generally do not prevent a worker from seeking or accepting employment, such provisions would be covered within its definition of a non-compete clause if they are deemed so broad that they constitute a de facto non-compete. The proposed rule would also apply to non-compete agreements and supersede state laws that are less protective of employees.

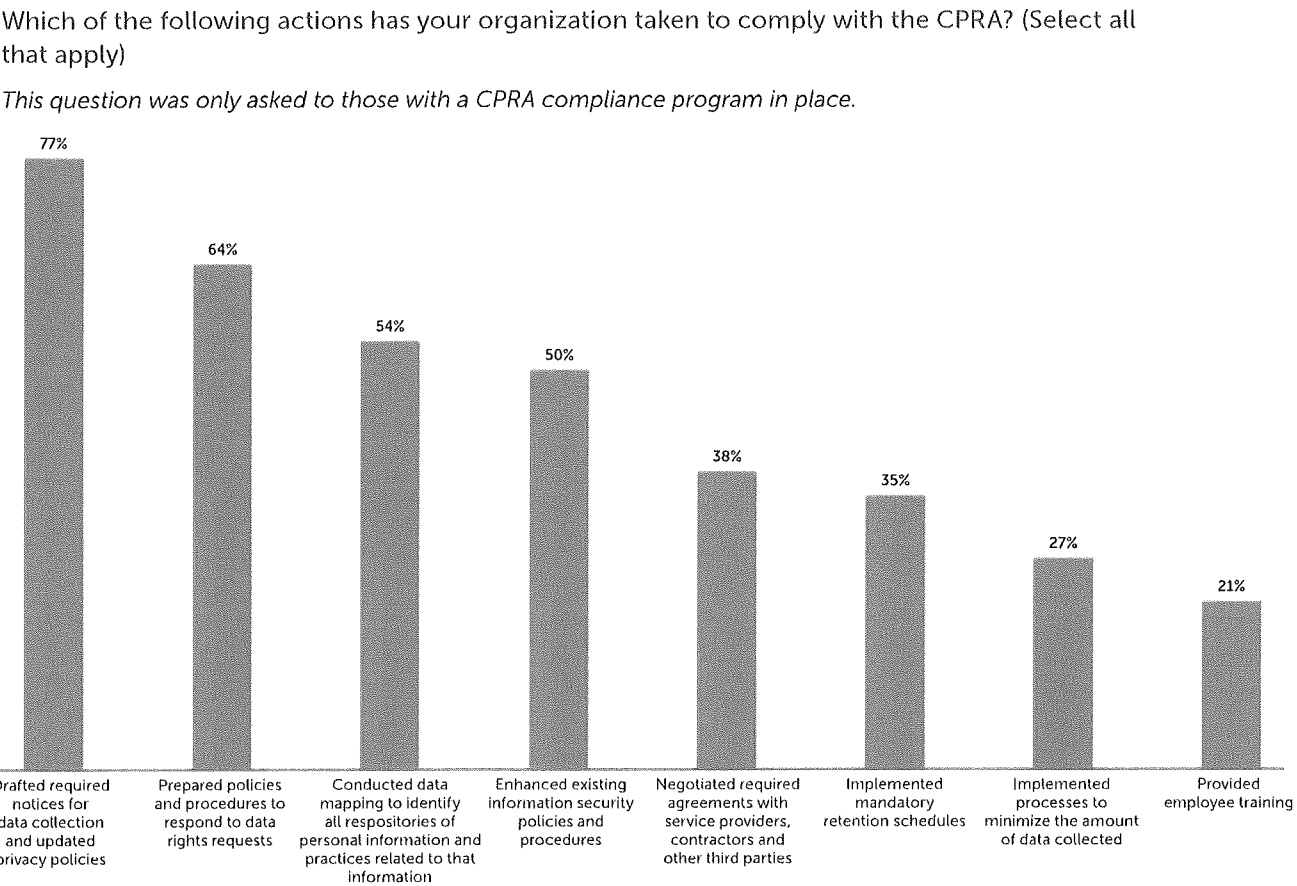
Our research reveals how employers think this rule, if finalized, could impact employer/employee relationships and the broader labor market. The most significant potential consequence, selected by 61% of respondents, would be an increase in employee mobility. Nearly 50% expect increased use of incentive or bonus clawback clauses, measures that can help encourage employees to stay with an organization. A similar percentage of respondents (44%) anticipate a rise in trade secret litigation, as employees can move more freely from employer to employer with sensitive information. And 30% believe there would be less information sharing between employers and employees – presumably due to efforts to minimize that risk. Only 17% of employers we surveyed expect no impact at all.

In the meantime, businesses should closely examine both existing non-compete clauses and other contractual provisions that may be deemed to be a non-compete provision under the proposed FTC rule. Those include non-disclosure, non-solicitation and provisions requiring employees to reimburse employers for certain training expenses.

The California Privacy Rights Act (CPRA) expanded the privacy and information security obligations of most for-profit employers doing business in California, effective January 1, 2023. Please indicate the extent to which you believe your organization has an effective compliance program in place to meet these new obligations for employees, job applicants, independent contractors and other covered individuals.

This question was only asked to those whose organizations are subject to the CPRA.





When the [CPRA](#) went into effect at the beginning of this year, many employers were forced to grapple – some for the first time – with developing and implementing a compliance program around data privacy and security. The first law in the U.S. to [apply comprehensive data protection to HR data](#), the CPRA covers data pertaining to, among others, employees, job applicants and independent contractors residing in California. Because companies may collect and store personal information on employees, including social security numbers, demographic information, financial records and even biometric or genetic data, these new regulations bring sweeping implications for HR, legal and information technology departments.

Yet, as the July 1 enforcement deadline approaches, just under one quarter (24%) of survey respondents believe their organization has a compliance program that meets the new data privacy obligations “to a large extent.” The greatest share (40%) is in the middle, with respondents describing their programs as moderately effective, while 27% feel prepared to comply only to a small extent and 9% say they do not have an effective compliance program in place at all.

Given the difficulties associated with developing policies, auditing and mapping data, training employees and implementing other administrative tasks necessary for a thorough compliance program, these figures are not surprising, and it is a positive sign that 91% of respondents feel prepared to comply to some extent. What’s more, while business-to-consumer companies may have more developed privacy procedures and systems, employers in non-consumer-facing

organizations may lack experience with complex data privacy and security requirements – or feel less prepared for the scope of the challenges involved with implementing a comprehensive data privacy and security program.

When it comes to the actions employers have taken to comply with the CPRA, most respondents are focused on two employee-facing elements of the requirements: drafting data collection notices (77%) and preparing policies and procedures in response to data rights requests (64%). As the most visible components of the new obligations, these actions are most likely to meet the level of compliance required to avoid regulatory scrutiny and employee complaints.

Other data privacy components have received less attention. Only 38% of respondents have negotiated required agreements with service providers and contractors, and just 35% have implemented mandatory data retention schedules. However, the importance of [these additional data privacy components](#) should not be underestimated. In the event of a data breach, for instance, retention schedules, employee training, data management and vendor agreements likely will all be part of the subsequent investigation, and their absence could increase liability, making the design and implementation of effective policies and procedures *in advance of* a security incident key to minimizing legal risks.

Data privacy regulations are likely to become even more common going forward. Many states are considering bills that would follow in California's footsteps, although the states that have passed these laws thus far have exempted human resources data. The European Union has already implemented the sweeping General Data Protection Regulation (GDPR) and numerous other countries are strengthening data privacy protections.

For now, the patchwork of U.S. privacy laws has created a difficult situation for multijurisdictional employers, who must decide whether to track and apply numerous different state laws or adapt all their policies to the most onerous regulations. This was evinced in our 2022 survey (see page 30 [here](#)), in which 63% of respondents told us they struggled to track the unique data protection laws in each jurisdiction where they operate. At least in the U.S., federal privacy legislation under consideration by Congress may ultimately prove to be the most efficient solution for employers, even if it poses administrative and practical burdens in the short term.

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The CPRA is certainly a significant step toward a stricter data privacy regime overall in the U.S. However, focusing only on comprehensive data protection laws obscures the growing number of 'micro laws' that target specific technologies or data – tailored to background checks or location tracking, for example – being passed in states around the country. Cumulatively, these micro laws also amount to a comprehensive data privacy framework, underscoring the importance for employers everywhere of developing thoughtful privacy policies and data management procedures.

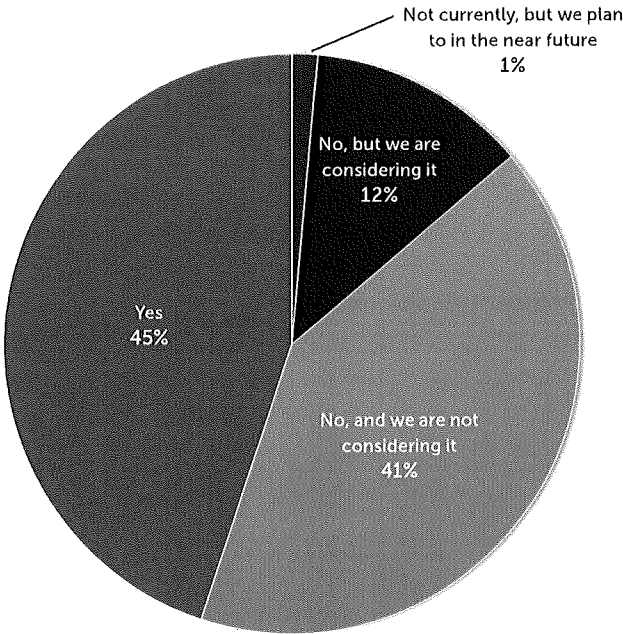
Zoe Argento, Littler shareholder and co-chair of Littler's Privacy and Data Security Practice Group



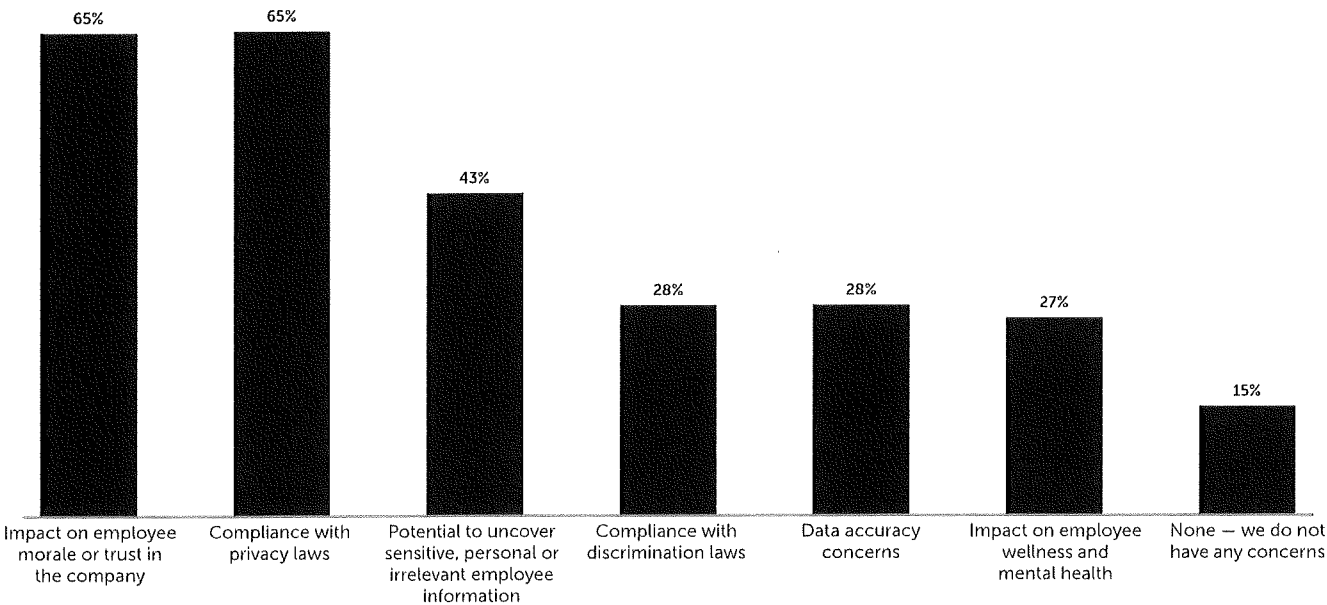
Technology in the Workplace

Employee-Monitoring Technology

Does your organization use software tools or surveillance technology to track and monitor employee activity?



Which of the following represent concerns of your organization in using employee-monitoring and surveillance technology? (Select all that apply)



Companies have used employee-monitoring technology for years to track productivity among frontline workers in industries like warehousing, logistics and manufacturing. However, as companies adjust to the persistence of remote work and an increasingly decentralized white-collar employee base, such applications are expanding – from programs that trace keystrokes or capture the user’s activity at regular intervals to AI tools that analyze muscle movements to determine concentration levels during meetings.

Employers are roughly split when it comes to using this type of surveillance technology to monitor employee activity: 45% are already using it, while 41% are not using or even considering using it. For large employers (those with more than 10,000 employees), the percentage of those using surveillance technology jumps to 61%. Interestingly, most employers appear to have made up their minds on this issue. On average, only 1% are not currently using the technology but plan to, and just 12% are considering it.

That said, the number of companies using these technologies may be underreported. Since such tools encompass everything that collects and stores data on an employee’s whereabouts or activity – ranging from cell phone GPS data to electronic badge swipes – it’s possible more employers are technically engaged in monitoring, but don’t recognize it as such.

For that reason, all employers – even the 41% who say their organizations are not using monitoring technology – should consider the potential risks or legal exposures that such tools can create. Data collection, especially without intentional policies in place, has the potential to gather employees’ sensitive or personal information, such as passwords or health conditions – a concern acknowledged by 43% of respondents. This, in turn, could run contrary to privacy laws, and even lead to allegations of discrimination based on this information, concerns noted by 65% and 28% of respondents, respectively.

Regulators are concerned, too. This past October, NLRB General Counsel Jennifer Abruzzo said that certain monitoring practices may impair employees’ ability to engage in protected activity under Section 7 of the National Labor Relations Act, which protects “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection” – all of which necessitate a degree of privacy. Abruzzo has urged the NLRB to adopt a new framework that would make certain uses and applications of electronic monitoring unlawful.

Beyond legal concerns, nearly two-thirds (65%) of survey respondents were worried about the impact monitoring software could have on employee trust and morale. Surveillance is unpopular with many employees and could adversely impact employee wellness and mental health, a concern noted by more than one quarter (27%) of respondents. In a competitive labor market, employers known to engage in electronic monitoring practices may have difficulty attracting and retaining top talent.

For organizations that opt to utilize these tools, notice and consent for employees – along with adequate transparency around how data will be evaluated – are important for both legal compliance and maintaining employee trust. Similarly, data collection and storage policies should ensure that sensitive information is kept secure. As state and federal regulations around privacy shift, employers need to stay aware of the legislative and regulatory impacts on their monitoring practices.

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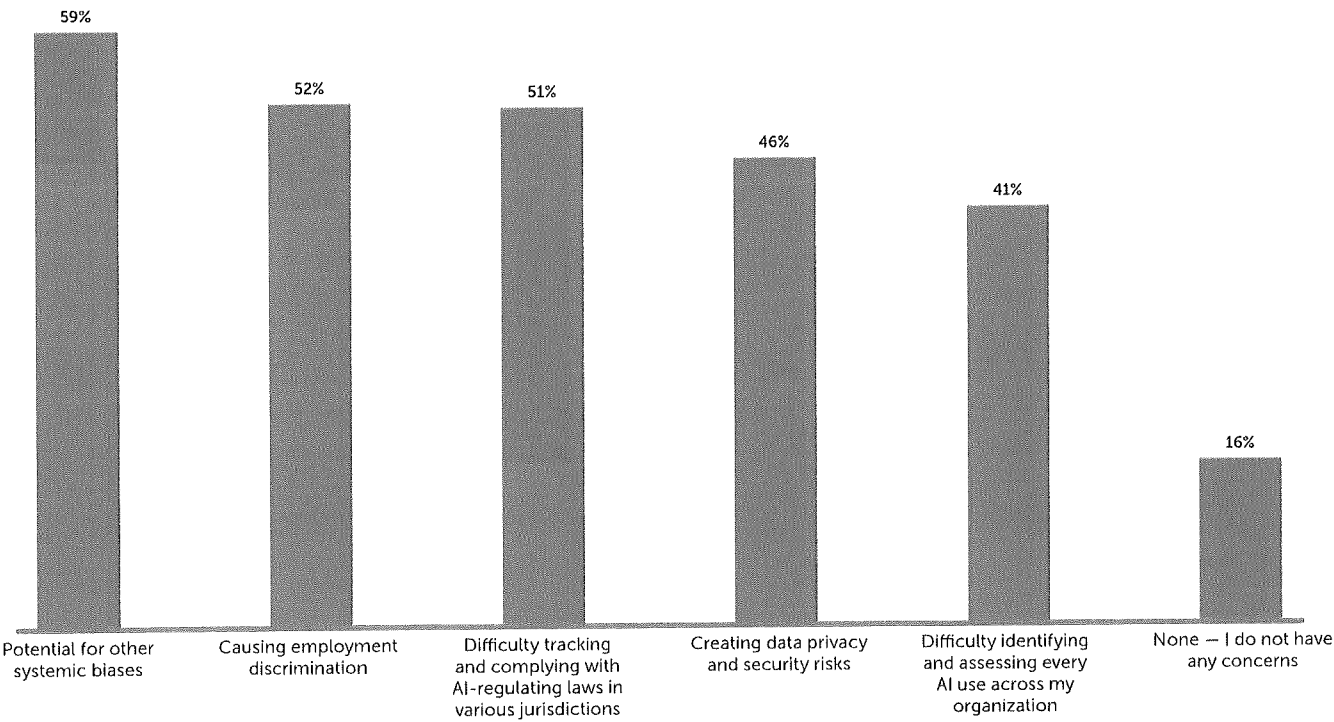
When considering the implementation of employee-monitoring tools, it's important for employers to carefully weigh the risk factors against the technology's benefits before determining whether to move forward. While some companies may see a significant productivity improvement, simply collecting data does not necessarily result in actionable insights and could unnecessarily increase the likelihood of compliance issues. A clear understanding and process for how the information will be used is key.

Britney Torres and Mickey Chichester, Littler shareholders and members of the firm's Global Workplace Transformation Initiative

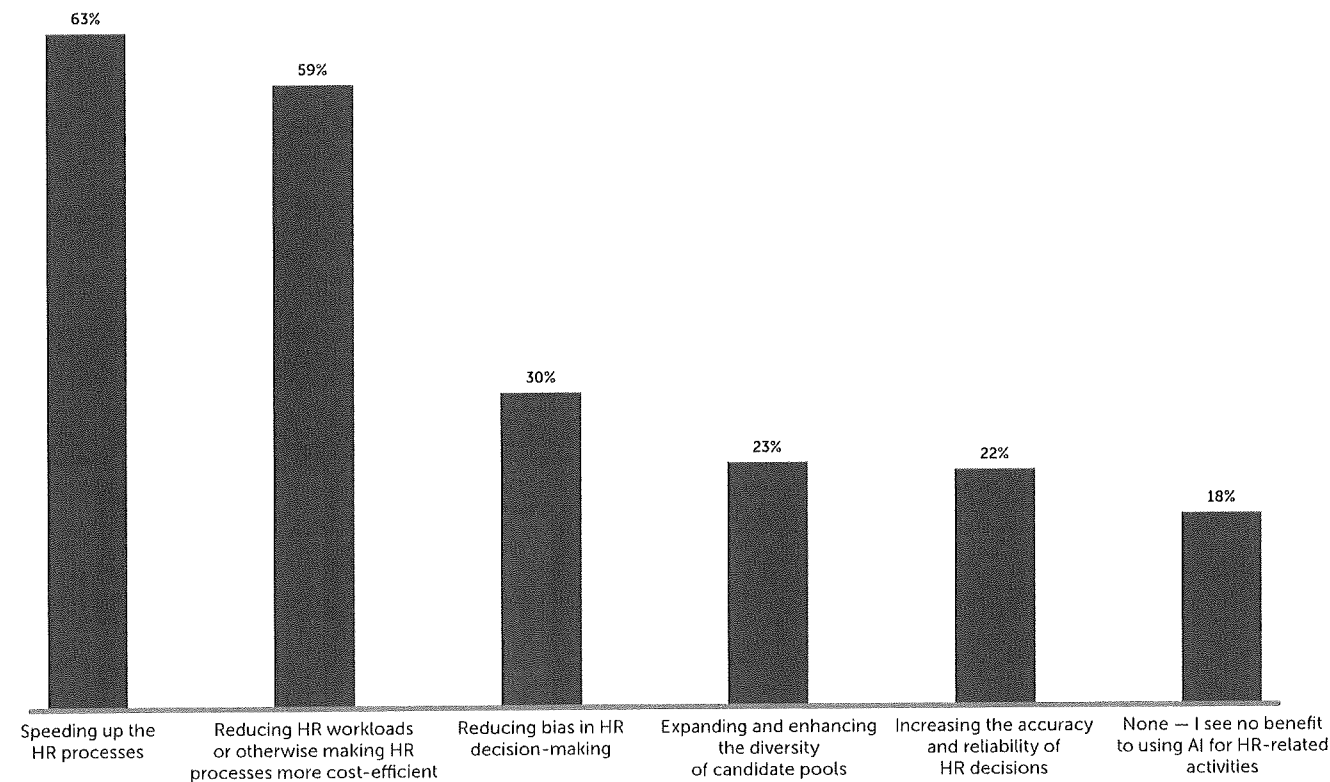


AI in HR

Which of the following do you view as concerns when using AI solutions for recruiting, hiring and other HR-related activities? (Select all that apply)



Which of the following do you view as benefits of using AI solutions for recruiting, hiring and other HR-related activities? (Select all that apply)



Employers are increasingly using sophisticated AI tools in recruiting, hiring, employee management and other HR-related activities. Our 2022 survey, for instance, illuminated use cases ranging from screening applications and identifying candidates to determining compensation, assessing employee performance and guiding retention efforts.

Adoption is advancing quickly. Eighty-two percent of this year’s respondents see at least some benefit to using AI in HR activities, and only 18% see no benefit to these tools – a significant shift from last year’s survey when 48% of respondents told us that their organizations were not even using AI tools in workforce management (see page 27 here).

At a time when HR departments are increasingly stretched thin, respondents identified the greatest advantages as speeding up HR processes (63%) and reducing HR workloads (59%). Nearly one-third (30%) recognize the potential for AI to reduce human bias in employment decision-making and 22% see value in increasing the accuracy and reliability of decisions. However, as AI becomes increasingly integrated into essential HR functions, the potential risks are also becoming more apparent.

Respondents are most concerned about AI’s potential to cause employment discrimination (52%), and to create other systemic biases (59%). These are important considerations, as AI’s ability to make some aspects of decision-making more objective may be offset by the potential for unintentional biases to be coded into algorithms.

For example, if employees in a particular role have historically been men, an AI recruiting tool may prioritize male applicants – thereby violating Title VII, which prohibits employment discrimination based on protected categories such as gender. Alternatively, using an AI platform to evaluate candidates over video may inadvertently discriminate against neurodivergent applicants who do not replicate the facial expressions or eye contact the AI tool is trained to prioritize, posing compliance risks under the Americans with Disabilities Act.

Stricter privacy regulations around employee information, such as the CPRA, could also pose issues for employers using AI to evaluate employee data. Forty-six percent of respondents cited data security and privacy risks as a concern, reflecting the potential perils of entering employee data into a third-party tool with limitations on oversight and transparency.

Another hurdle for employers: keeping abreast of evolving AI-related legislation. Roughly half of the respondents are concerned about tracking and complying with such laws in various jurisdictions. [California](#), [Illinois](#), [Maryland](#), [New York City](#), [Texas](#) and [Washington, D.C.](#), for example, have all proposed or passed legislation specifically governing the use of AI tools with employees and job applicants. The OFCCP's new proposed Item 19 in its [scheduling letter](#) would require contractors to provide "[d]ocumentation of policies and practices regarding all employment recruiting, screening, and hiring mechanisms," including the use of AI and other technology-based selection procedures. And while the EEOC's [Artificial Intelligence and Algorithmic Fairness Initiative](#) offers compliance guidance for AI use, the rapid advancement and growing application of AI tools require up-to-the-minute analysis.

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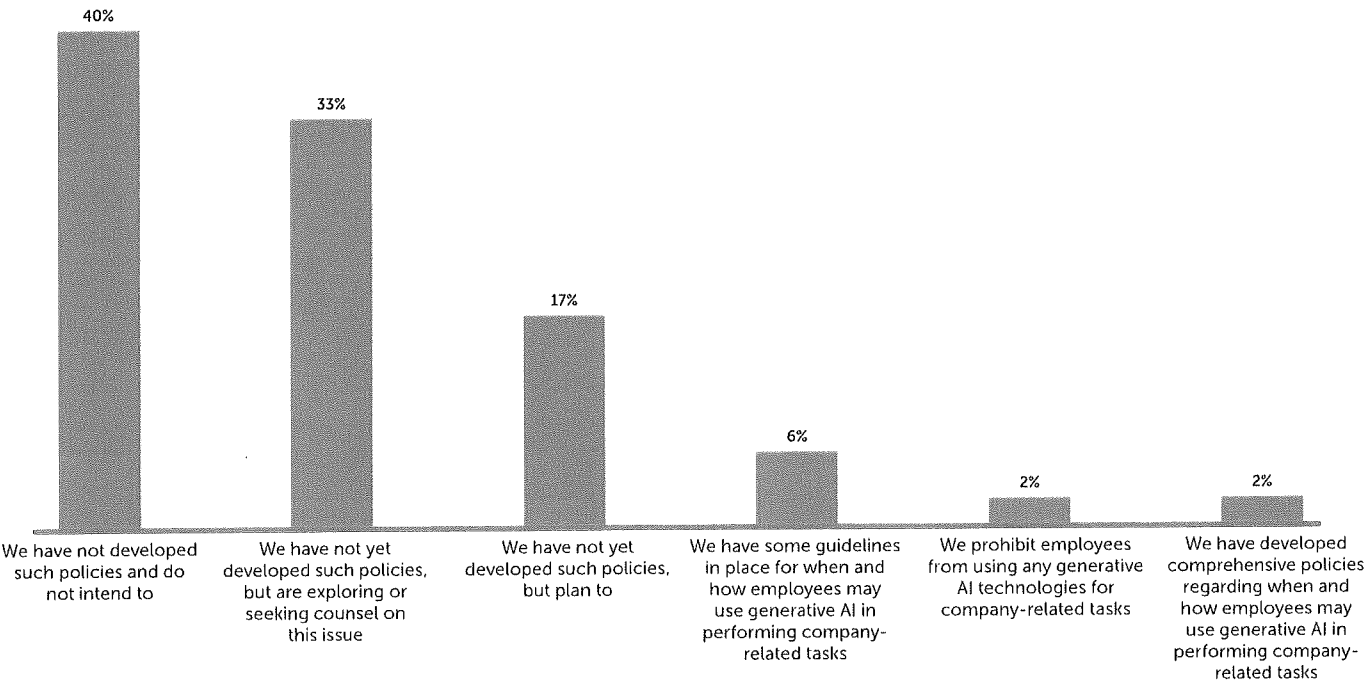
AI tools will be an integral component of the future workplace, and organizations that do not take advantage of the benefits of these tools risk losing a competitive edge. However, the lack of regulatory certainty and the potential risks make it critical for employers to adopt these tools with purpose and compliance top-of-mind. This includes implementing AI usage and development policies, conducting due diligence on AI products, undertaking bias and efficacy audits, and carefully tracking the AI tools in use across the organization.

[Niloy Ray](#), Littler shareholder who helps lead the firm's efforts to counsel on [AI in Human Resource Decisions](#)



Generative AI Technology

Which of the following best describes the policies your organization has developed regarding the use of generative AI technologies (such as ChatGPT, DALL-E and others that can be used to create human-like content) in your workplace?



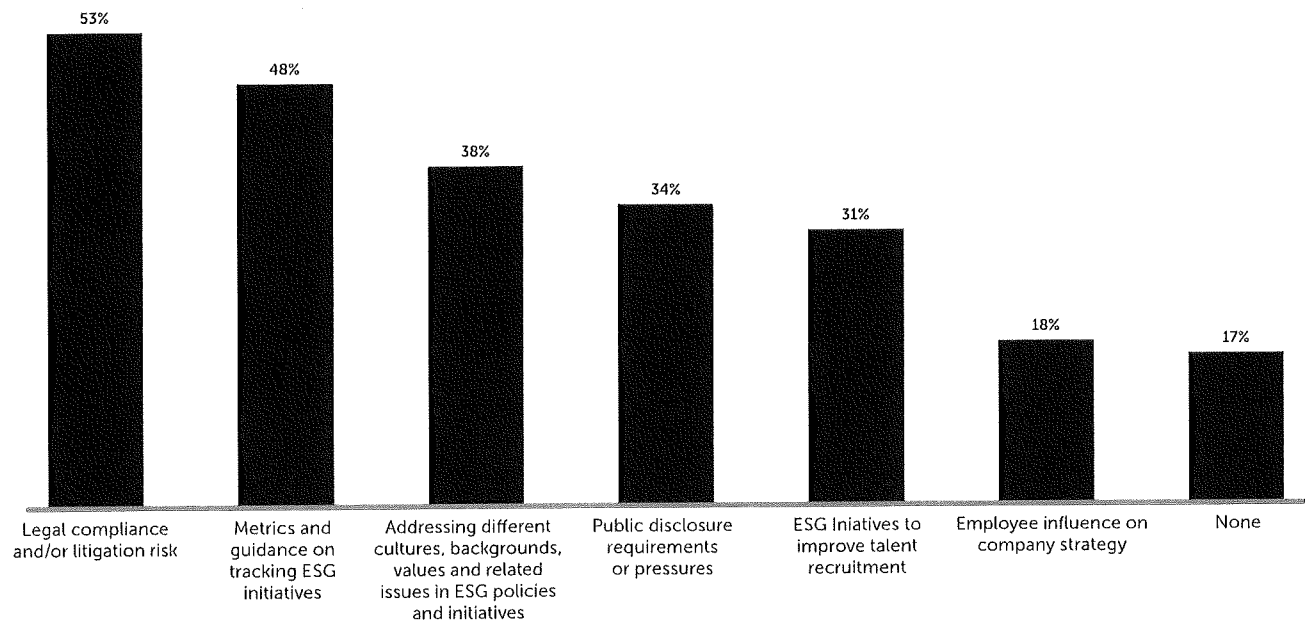
Generative AI tools have received significant attention for their ability to swiftly produce complex, unique content that can rival the quality of human work. However, despite the potential benefits for increasing productivity and efficiency, generative AI also presents important considerations around accuracy, bias and ethical use. What's more, data entered into a chatbot is not secure, which can pose risks to companies dealing with sensitive or proprietary information.

Despite these complexities, only one in 10 respondents say their organizations have developed guidelines for employees regarding the use of generative AI in the workplace – and 40% say their organizations have no policies around generative AI in place and do not intend to implement any. Most survey respondents are taking a wait-and-see approach, with half either planning to develop generative AI policies (17%) or seeking counsel on the issue (33%).

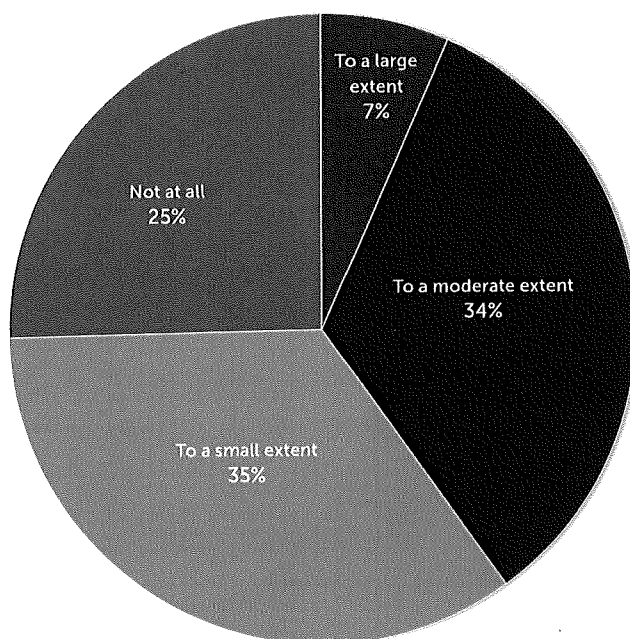
However, the current lack of generative AI policies could change quickly, given the technology's rapid-fire incorporation into search engines and other commonly used workplace tools. As adoption of AI tools spreads and companies become more cognizant of the risks around confidential information and accuracy, employers will likely increase their focus on developing clear and comprehensive rules for generative AI usage in the workplace.

Environmental, Social and Governance (ESG) and Corporate Responsibility

With the increasing focus on ESG initiatives, which of the following are key areas of focus for your organization? (Select all that apply)



To what extent has your organization grappled with finding a balance in addressing sociopolitical issues amid increased political polarization and heightened expectations from employees and other stakeholders to take a stand on social issues?



As the focus on ESG initiatives and metrics increases, so too does the associated compliance and litigation risks for organizations. Areas of potential exposure include green product claims, misleading proxy statements and mounting disclosure requirements (e.g., the U.S. Securities and Exchange Commission's rule on climate-related disclosures), among others.

It follows then that more than half (53%) of respondents cited ESG-related legal compliance and/or litigation risk as a key priority. Other top concerns involve factors that contribute to those risks – tracking ESG initiatives, addressing different backgrounds in ESG policies and complying with public disclosure requirements or pressures. For instance, while IE&D considerations are an important component of ESG, such initiatives can create vulnerabilities of their own if they are not approached strategically along with a consideration of related legal limitations.

There can be a risk in committing to making disclosures without an understanding of what the related metrics are and whether they are helpful. Instead, organizations can be deliberate and strategic in their efforts to increase transparency in order to minimize risk and maximize potential upside.

Organizations are also facing greater scrutiny around how, and when, they address sociopolitical issues. Amid heightened expectations from employees and stakeholders, employers are relatively split on whether they've grappled with finding a balance in addressing these matters – 60% say they have to a small extent (35%) or not at all (25%), while roughly 40% say they have to a moderate (34%) or large (7%) extent.

The reasons for this split are manifold. On the one hand, in the wake of the pandemic and increased attention on social justice, many companies have already made their values clear – and can therefore respond to global events. On the other hand, responding to one issue can put pressure on employers to respond to others, and organizations may not be clear on where and when to draw the line. Increased political polarization and a rapidly changing legal framework that gives corporate entities personhood, and therefore a voice in the sociopolitical sphere, put employers between a rock and a hard place as they navigate this novel terrain.

Methodology and Demographics

In March 2023, 515 professionals from a variety of industries completed The Littler® Annual Employer Survey via an online survey tool.

Respondents were based across the U.S. and included:

- General counsel/in-house attorneys (55%)
- Human resources professionals (39%)
- C-suite executives or other professionals (6%)

Companies represented were of a variety of sizes:

- More than 10,000 employees (34%)
- 5,001 to 10,000 employees (11%)
- 1,001 to 5,000 employees (24%)
- 501 to 1,000 employees (9%)
- 101 to 500 employees (17%)
- 1 to 100 employees (5%)