

# 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

Welcome to Proskauer's first annual *Value Insights: Delivering Value in Labor and Employment Law*. We hope that the results of our survey provide in-house counsel with tools to more effectively help their business partners achieve their objectives and to work with outside counsel to provide value in managing labor and employment matters. We want to thank all participants for their significant contributions to the development of this survey and to the insights we share, including our Advisory Committee, our Proskauer labor and employment alums and those who responded to the survey. As their input makes clear, value is not a mere "buzz word" that is "of the moment." Rather, it is an important principle that will continue to guide all of us as we work together to address the challenges of the modern workplace and the ever-evolving legal landscape.

If you have any questions or comments about the survey or our Value Insights report, we would love to hear from you.



**Elise M. Bloom**  
Partner, Proskauer Labor & Employment Law Department  
Member, Executive Committee  
Co-head, Class & Collective Action Practice  
Former co-chair, Labor & Employment Law Department  
+1.212.969.3410  
ebloom@proskauer.com

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## Introduction

The environment for in-house counsel is increasingly challenging: competitive pressures are requiring counsel to adjust the way they do business, their approach to legal strategy and how they allocate resources. These pressures are magnified in the labor and employment law context by the continuous evolution of the laws and regulations governing the workplace. Labor and employment litigation is rapidly increasing. For example, the number of workplace retaliation, race discrimination and harassment claims were up in 2015,\* and the number of Fair Labor Standards Act actions are expected to hit a record high in 2016.\*\* As a result, labor and employment matters consume significant amounts of in-house counsel's time, attention and budget.

With this in mind, Proskauer sought a deeper understanding of how in-house counsel can maximize the value they provide to their business partners and, correspondingly, how they can most effectively partner with outside counsel. We commissioned leading legal industry consultancy Acritas Research Ltd. to work with us to conduct a survey to explore current practices in assessing and handling labor and employment matters; investigate trends in managing such work; and identify areas where improvements may be warranted. Furthermore, we formed an Advisory Committee of leading in-house counsel to help shape our inquiries and guide our process.

### **Advisory Committee:**

Elizabeth Finn Johnson, former Senior Counsel, Employee Relations at Coca-Cola

Neil Rosolinsky, Deputy General Counsel, Litigation & Employment at Citizens Financial Group, Inc.

Elizabeth Cowit, former In-house Counsel at Condé Nast

William Daley, Vice President and Chief Counsel, Labor & Employment at ConAgra Foods, Inc.

David Stafford, Senior Vice President, General Counsel at McGraw-Hill Education

Christopher Miller, Head of Litigation & Technology Law at DreamWorks

Mylene Brooks, Director, HR Compliance and Labor Relations at Cedars-Sinai Medical Center

### **Methodology and Survey Group Composition**

Acritas began the survey process by holding exploratory conversations with Proskauer labor and employment lawyers, as well as Proskauer alumni who are in-house labor and employment counsel. Acritas also interviewed our Advisory Committee to craft the survey questionnaire.

Next, Acritas conducted the survey online and by phone with more than 100 respondents who are in-house decision makers on labor and employment matters. We then worked with Acritas to refine the results through further conversations with the Advisory Committee.

The combination of Acritas' research expertise and the Advisory Committee's real-world experience — enhanced by Proskauer's perspective from more than 75 years on the front lines representing employers — reinforced our belief that we could provide meaningful insights to the in-house counsel community. While many of the survey's findings were in line with our expectations, others surprised us, and the research has given us the opportunity to start what we hope will be an ongoing dialogue about delivering value in labor and employment law.

\* EEOC Press Release, EEOC, EEOC Releases Fiscal Year 2015 Enforcement and Litigation Data (February 11, 2016)

\*\* Law360 Aaron Vehling, FLSA Class Actions to Hit Record High in 2016, Law360 (January 12, 2016)

## Anatomy of respondent population

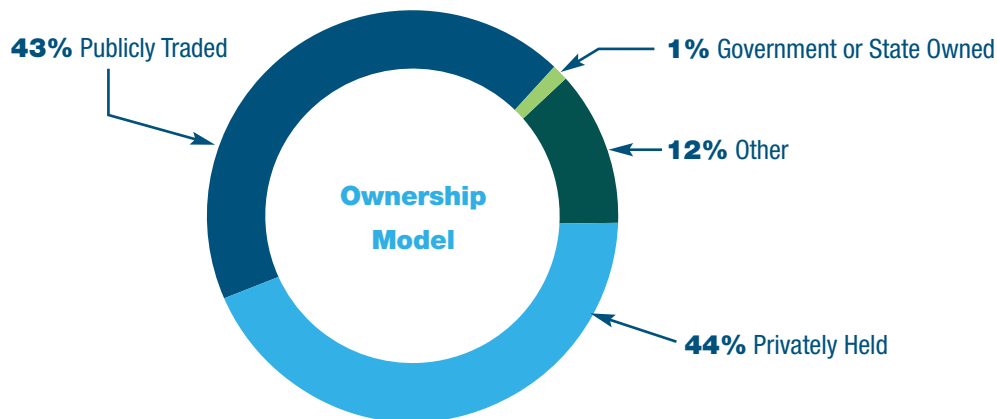
The survey focused on obtaining the views of a broad range of in-house counsel and labor and employment specialists:

- Respondents came from many industries including, for example, Technology, Media and Telecommunications, Financial Services, Manufacturing, Healthcare, Insurance, Energy/Utilities, Retail, Real Estate and Pharmaceuticals.

**71%**  
Senior legal roles within their organizations

**23%**  
Focused exclusively on labor and employment matters

- All respondents were responsible for decision-making in labor and employment matters or contributed to such decision-making.
  - 71% had senior legal roles within their organizations
  - 23% focused exclusively on labor and employment matters



- Publicly traded companies (43%) and privately owned entities (44%) accounted for essentially equal proportions of respondents.

### U.S. Revenue



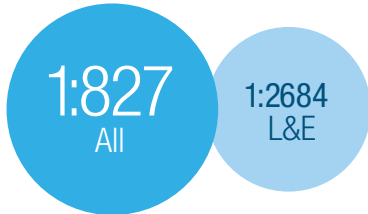
### Number of Employees



- Company size as measured by U.S. revenue was roughly half over \$1 billion and half under. Companies with over 1,000 employees comprised 61% of respondents.

# Snapshot: What do in-house legal departments look like and how do they spend their time?

## Average Ratio of In-house Lawyers Per Employee

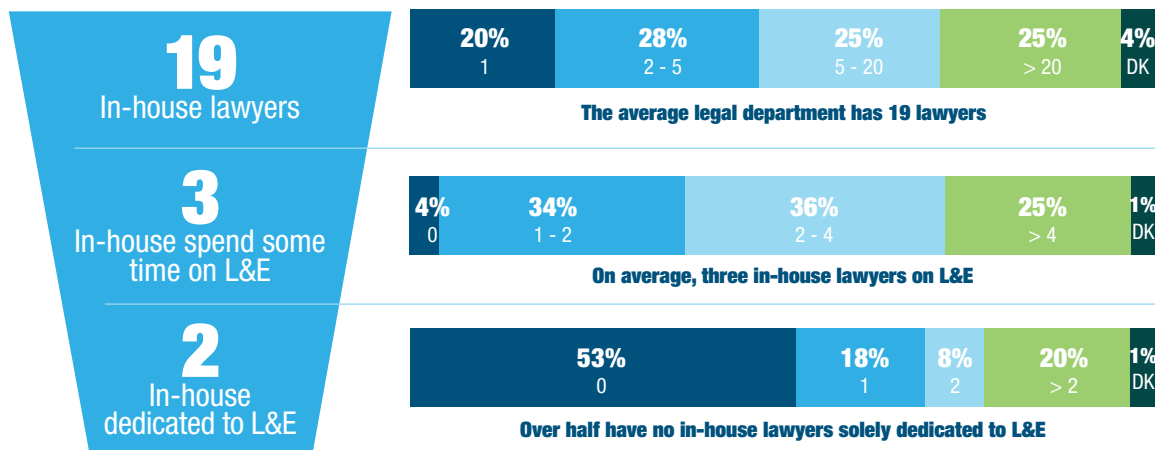


When viewing legal departments as a whole, the average ratio of lawyers to employees is one per 827. This ratio falls dramatically — to one per every 2,684 employees — when only labor and employment lawyers are considered.

## Lean Staffing, Especially for Labor and Employment

Of those surveyed, in-house legal departments are composed of an average of 19 lawyers, but nearly half of departments (48%) have five or fewer lawyers. When one considers the proliferation of labor and employment law regulations and lawsuits, it is surprising that 53% of in-house legal departments have no dedicated labor and employment lawyers at all — and 80% have only one or two labor and employment lawyers.

Almost half of the legal departments surveyed who reported that they have in-house lawyers who focus on labor and employment said the primary reason for having dedicated labor and employment lawyers is because those lawyers develop a deeper knowledge of the business and culture. Just over one-third believe it is a more cost-effective way to handle labor and employment matters than using outside counsel.



DK = Do Not Know

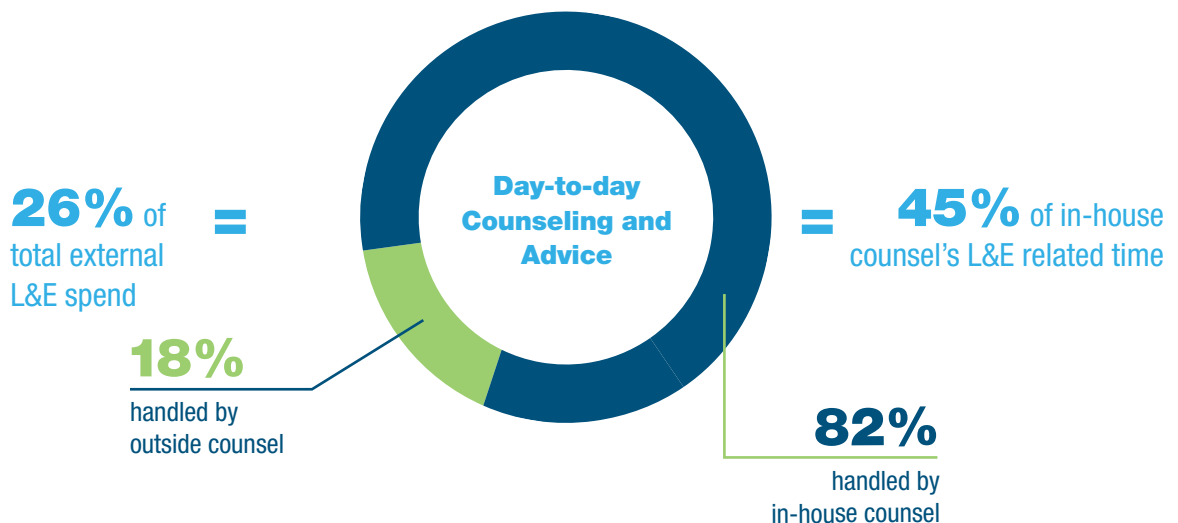
### How Do In-House Counsel Spend Their Time?

In-house counsel at surveyed companies spend the largest portion — 45% — of their labor and employment-related time on day-to-day counseling and advice, and such counseling and advice accounts for just over one quarter (26%) of their total external legal spend on labor and employment work. The vast majority of counseling work (82%) is handled internally. The level of time and spend for day-to-day counseling resonated with the survey’s Advisory Committee. One member expressed relief that her own experience was similar to that of her peers in other companies: “I was never quite sure if how we handled counseling was ‘normal.’ It’s reassuring to know that our approach is right in line with industry practice.” This reassurance also applies much more broadly across the survey results and is — in our view — one of its most valuable outcomes: giving in-house counsel peer-generated benchmarks to validate and confirm that their approach in handling labor and employment matters is in sync with the mainstream and provides maximum value to their business partners.

When asked if there were any specific types of counseling that outside firms are more frequently asked to handle, members of our Advisory Committee noted that outside firms add value in the form of second opinions that serve as “reality checks” for in-house counsel. Additionally, because many in-house legal departments do not have dedicated employee benefits and executive compensation lawyers, this is an area of counseling more often handled by outside counsel.

Another member of the Advisory Committee noted that he wished he had more or additional resources to handle the day-to-day counseling so that he could devote more time to strategic issues for the betterment of the business.

### The Majority of In-house Time Is Spent on Counseling



## Dispute risk assessment: How do in-house counsel find out about, assess and try to mitigate risk?

The survey asked respondents to identify the two most common ways in which they are informed that a labor or employment dispute has arisen. The vast majority — 88% — report that their human resources departments advise them directly. Slightly less than half — 43% — receive a letter from the claimant’s lawyer and 36% are notified directly by managers in other business units. Only 13% are advised by the employee.

We find the 88% figure significant because it underscores the importance of human resources’ role on the front lines of labor and employment issues. In our view, a close coordination between in-house counsel and human resources is essential to effective risk management.

### Assessing Risk

**19%**  
have a formal risk assessment process

The survey’s most surprising result is that few respondent companies — just 19% — have a formal process for assessing the risk profile of a dispute. Formal risk assessment processes are far more common at companies with the largest headcount; 44% of companies employing over 10,000 employees reported having a formal risk assessment process.

One member of our Advisory Committee noted: “That only 19% have formal risk assessment processes] is astonishing. Considering how much companies spend on litigation — not just on fees, but reserves and settlements, too — you’d think they would make sure to have a robust plan in place to figure out what their risks are ahead of time.”

When asked to identify the most important criteria considered when assessing risk, the top four were:

- Economic Exposure
- Disruption to the Workplace (including management distraction)
- Setting Bad Precedent
- PR/Reputational Exposure

The importance of these criteria varied depending on the size of the company and the role of the particular respondent. Fifty-nine percent of companies with revenue greater than \$6 billion were more likely to be most concerned with PR/reputational exposure. Those occupying senior legal roles were most focused on economic exposure, while labor and employment specialists were concerned about workplace disruption.

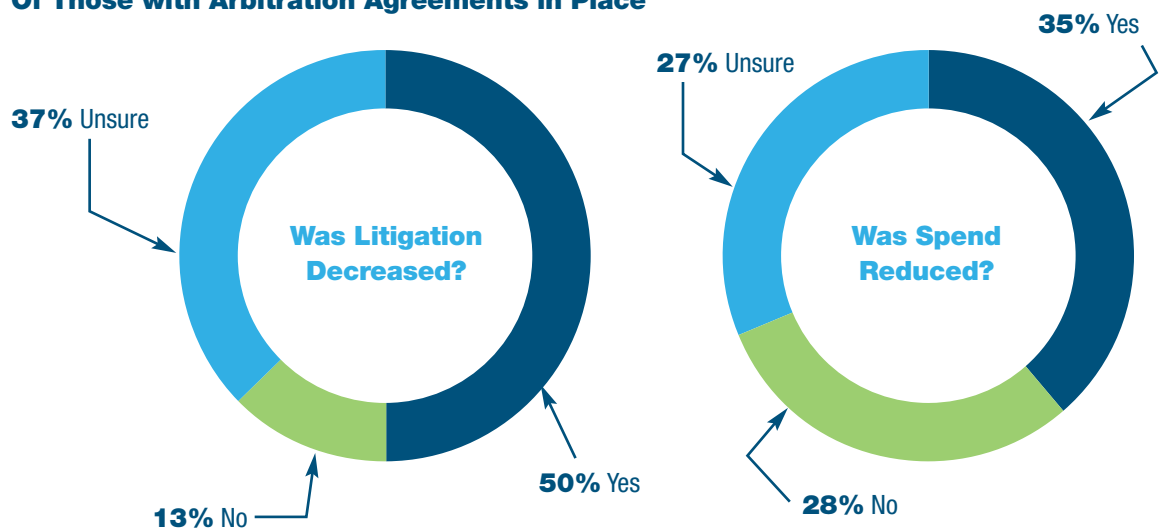
The survey results offer little to explain why more companies do not engage in formal risk assessment. Regardless of the reason, we believe this finding provides in-house counsel with an opportunity to increase the value they provide by collaborating with their business partners to develop robust risk assessment processes that meet both business and litigation objectives. In-house counsel can also add value by considering ways to mitigate risk.

### Arbitration Agreements: Are They Useful in Mitigating Risk?

One possibility often considered in trying to mitigate risk is the use of arbitration agreements. However, the survey found that only 30% of companies have arbitration agreements in place — and just 14% require such agreements for all employees. Fifty percent of the respondents with agreements felt that litigation was reduced as a result, however, over one third (37%) were not sure whether litigation was reduced. Even fewer — 35% — felt that arbitration agreements helped to reduce spend on outside counsel, and 28% affirmatively stated that spend was not reduced. Thus, the common assumption that use of arbitration agreements helps mitigate risk warrants further examination in our next survey.

**30%** have arbitration agreements in place

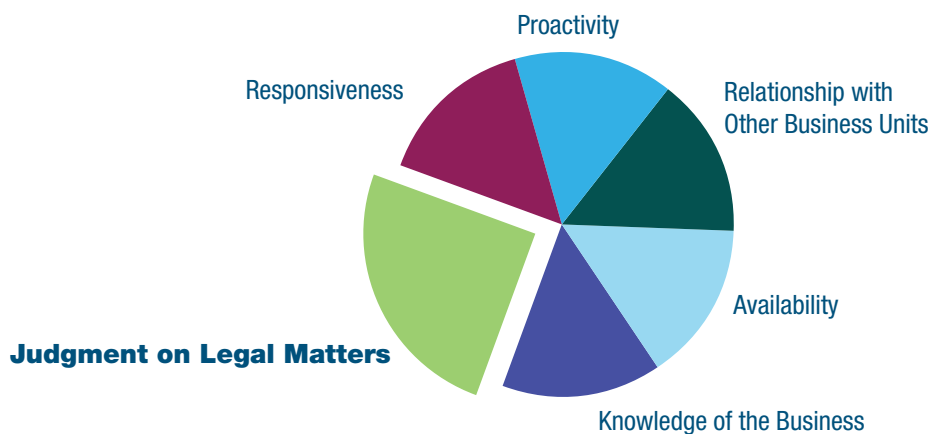
### Of Those with Arbitration Agreements in Place





## Evaluation criteria: How do businesses measure the value that in-house counsel provide?

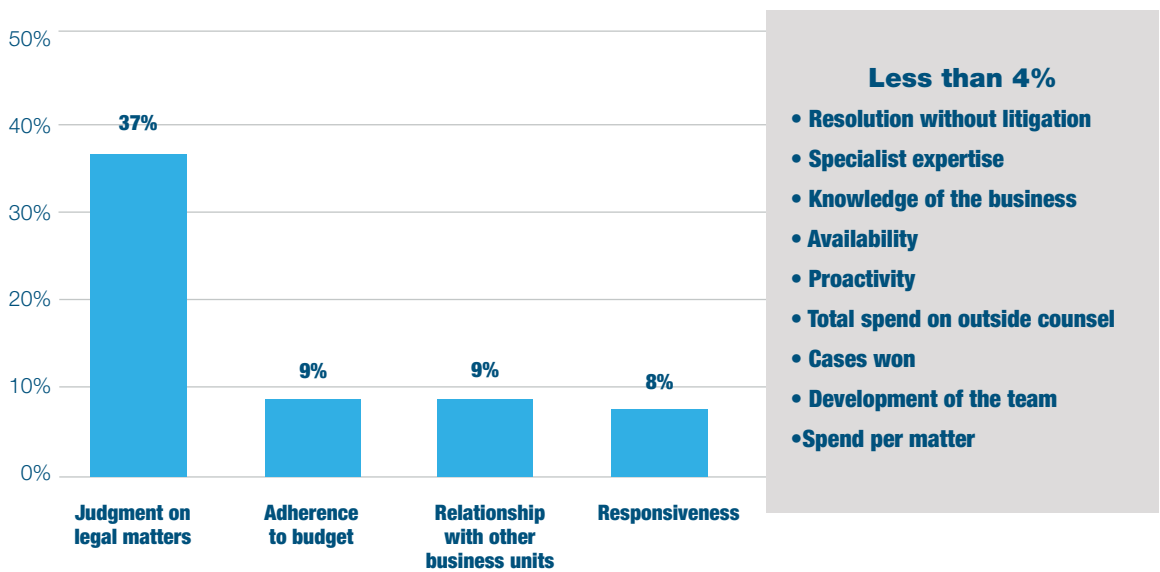
While doing the legwork to prepare the survey, it became apparent that there was a lack of clarity regarding the specific criteria used to determine whether in-house counsel are providing value and performing as expected. Thus, in an effort to benchmark the value in-house counsel provide, the survey endeavored to understand how in-house counsel are evaluated. We asked respondents to identify qualities their companies use to evaluate in-house counsel. The six qualities most frequently used to evaluate in-house counsel performance are below, — and all were used by at least 50% of the respondents.



Given the extensive commentary in legal trade publications regarding the pressures on in-house counsel to reduce outside counsel costs and legal spend, we were surprised to see adherence to budget, resolution without litigation and total spend on outside counsel among the six least used evaluation criteria. Only approximately one third of companies consider these factors when looking at in-house counsel performance. And, only 17% of companies look at spend per matter. So it appears that at a macro level, companies are focused on those qualities that shape the relationship between the in-house legal team and their business partners. They want in-house counsel who are available, responsive and proactive and who use their knowledge of the business to provide legal acumen on matters.

### Single Most Important Criteria

When asked to identify the single most important criterion in evaluating in-house counsel, judgment on legal matters was the winner by a wide margin (37%). There was considerable discussion among the Advisory Committee regarding this result. Several Advisory Committee members were of the view that business partners — particularly C-level executives — value responsiveness above all other qualities. Nevertheless, only 8% of respondents ranked responsiveness as the most important quality. Relationship with other business units and adherence to budget ranked almost as low as responsiveness — each at only 9%.



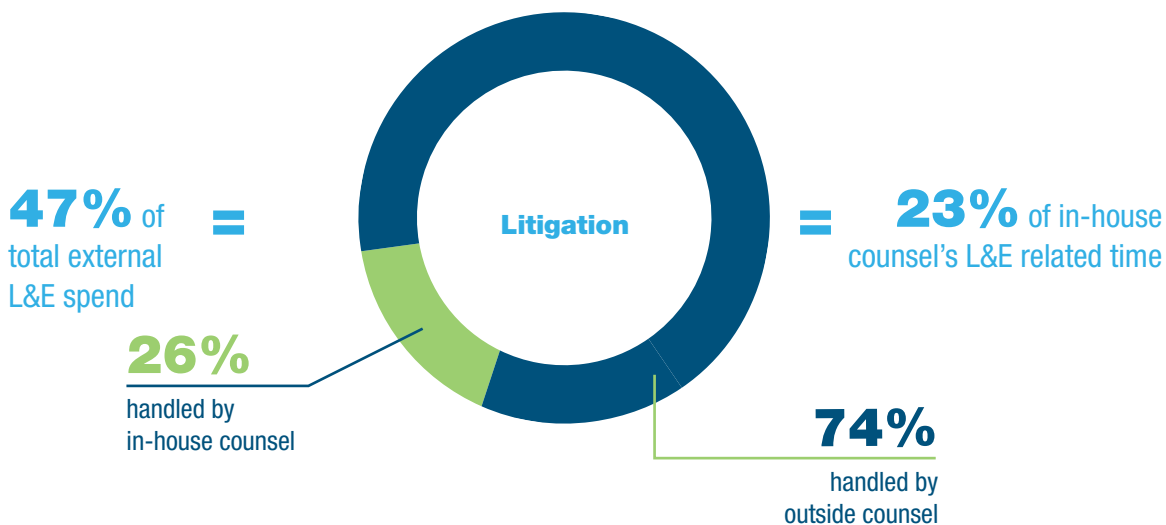
Again, three of the four most important criteria focus on the relationship between the in-house legal team and their business partners. With respect to the least valued qualities, most of those focused on cost or spend were among the least important criteria for in-house counsel to succeed. The exception was adherence to budget, which tied with relationship with other business units as the second most important criteria. But adherence to budget is really about predictability rather than cost.

One confounding finding was that while 58% of companies used knowledge of the business as a key evaluation criterion, only 2% said knowledge of the business was the most valued quality in an in-house counsel. This seems to fly in the face of what we heard from Advisory Committee members and survey respondents who expressed a desire for their in-house legal team (and outside counsel) to be more savvy about the business.

## Litigation: When do in-house counsel go outside?

Unlike day-to-day counseling and advice, labor and employment litigation is usually the province of outside counsel. In-house counsel spend about half the amount of time working on litigation (23%) that they do on counseling – although litigation does comprise the second-largest portion of their labor and employment-related work. Outside counsel handles 74% of litigation work and such matters consume nearly half of the respondent companies' total labor and employment external spend (47%).

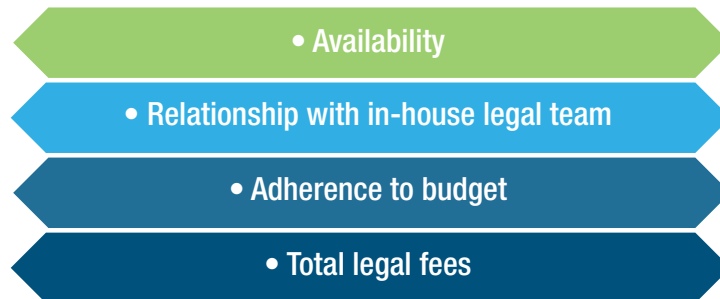
### Outside Counsel Handles Most Litigation Work



While the survey did not directly ask why 74% of litigation is outsourced, written and oral responses to certain survey questions suggest that a number of factors are at play. The most frequently cited factor was lack of resources. The size and composition of most in-house legal teams simply cannot keep up with the volume and pace of labor and employment litigation. The fact that outside counsel has experience in the jurisdiction and with the court and/or with plaintiff's counsel was an additional factor cited by survey respondents. Another important factor discussed was the subject matter expertise of outside counsel: unlike in-house counsel, outside counsel have often had the opportunity to work on many similar matters for different clients in many industries.

Given in-house counsel's reliance on outside counsel for litigation, we asked respondents to rate the importance of those qualities they use in selecting outside counsel to handle single plaintiff and class action employment litigations. While the responsiveness of in-house counsel was ranked relatively low among criteria in evaluating in-house counsel, those same in-house counsel (over 65% of respondents) overwhelmingly ranked responsiveness as among the most important criteria when evaluating outside litigation counsel.

Additional outside counsel qualities which were deemed very important for both types of litigation (in order of ranking) included:



That responsiveness, availability and relationship with the in-house legal team are considered more important than adherence to budget and total legal fees underscores the sophisticated analysis in-house counsel must undertake to evaluate and ultimately deliver value in managing labor and employment litigation of any type. Contrary to what we read in the legal trades every day, it is not just about the money. Indeed, similar to what we found companies value most in their in-house legal team, companies are looking for outside counsel to handle their litigation (whether single plaintiff or class actions) who develop deep and strong relationships with the in-house team. And also like the evaluation of the in-house legal team, an outside counsel's knowledge of the business was only rated by about 25% of respondents to be among the most important qualities. Again, this seems to contradict the commentary we heard from survey respondents (see page 14).

### **Class Actions**

This analysis is even more complex for in-house counsel faced with selecting outside counsel to handle employment class actions. Hourly rates — the oft-cited bane of the in-house/outside counsel relationship — was ranked as the least important factor in choosing counsel for class actions. Responsiveness and specialist expertise were ranked as the most important qualities. And, cases won, which was (interestingly) the least important criterion in single plaintiff matters, was viewed as significantly more important in class actions. This suggests that when in-house counsel are faced with class actions, they can add most value by retaining outside counsel with expertise in the area and a proven track record.

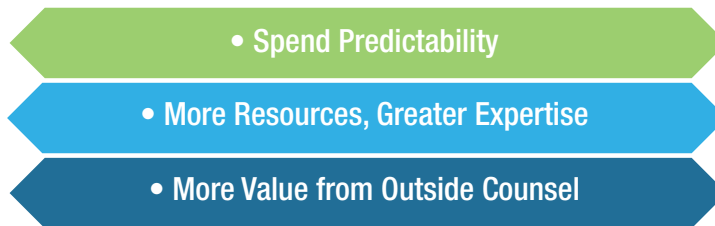
### **Single Plaintiff**

And while hourly rates ranked higher in selecting outside counsel for single plaintiff matters, it was still only eighth out of the 12 qualities considered. Responsiveness, specialist expertise, availability and relationship were the top four selection criteria in single plaintiff cases.

These “non-monetary” factors — responsiveness, availability, specialist expertise and relationship — combined with adherence to budget and total legal fees, create powerful selection criteria that in-house counsel can use to require better value propositions from their outside counsel and to drive business results in both single plaintiff and class action employment litigations.

## The future: Anticipated value trends

We asked respondents to opine about future industry trends and to identify the single most desired area of change regarding the way in-house teams are resourced or service is received from outside counsel in relation to labor and employment work. Several themes emerged and demonstrated that in their ongoing efforts to increase the value they provide to their business partners, in-house counsel see a need for:



### Spend Predictability

Many of the trends identified as most likely to increase in the coming 12 months focus on efforts to create predictability around legal spend, including the use of alternative fee arrangements, fixed fees and success fees (collectively AFAs), as well as more use of Requests for Proposals. Forty-six percent of respondents believe that their use of AFAs will increase and zero respondents forecast a decrease in their use of AFAs.



Indeed, when asked to specify the single most desired area of change regarding the relationship of in-house and outside counsel, different pricing models and approaches ranked at the very top (along with more use of in-house resources — discussed below). This was closely followed by cost reduction/lower outside counsel rates. Consistent with this, the use of hourly rates was one of the trends identified as most likely to decrease.

### More Resources, Greater Expertise

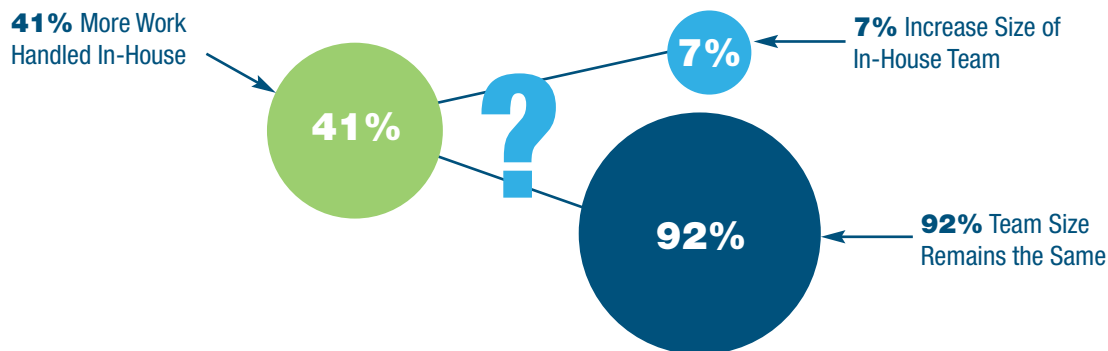
The trend seen as likely to have the most significant future impact was moving more work in-house. Like AFAs, reducing spend and providing a way to manage the budget was cited as the driving force behind this anticipated change. To move more work in-house, it would seem reasonable to assume that the size of an in-house legal team would need to increase. The desire to increase the size of in-house legal teams, as well as to enhance their expertise, was hence a common theme for the survey respondents. As one respondent noted:

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“[B]ecause it [increasing the size of the in-house legal team] will allow us to do more work in-house...save money and increase familiarity with our business with the in-house lawyers...”

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### More Work Handled In-house



But the data does not support the notion that respondents will actually increase the size of the in-house legal team. While 41% of respondents predict that more work will be shifted to the in-house legal team in the coming year, only 7% of respondents actually predict an increase in the size of the in-house legal team. The vast majority - 92% - said that the team size would remain the same.

### More Value from Outside Counsel



So what does this mean for outside counsel? Given that so few respondents see an increase in the number of in-house lawyers, the expressed desire to move work in-house may be somewhat aspirational. While “do more with less” is certainly a common corporate mantra, the legal work still has to be handled and there are limits to an in-house legal team’s capacity given the many and varied demands on their time. So, not surprisingly, respondents are split on whether the use of outside counsel will go up or down in the coming year: 18% expect to increase their use of outside counsel while 14% predict a decrease in their use of outside counsel. The most frequently cited reason for an increase in the use of outside counsel was the volume of legal matters. As one respondent reported:

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“We’re going to have more lawsuits and we don’t have the bodies to handle that in-house.”

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And, consistent with other results, in-house counsel want their outside lawyers to provide more value by being more creative in pricing (and moving away from hourly rates), increasing efficiency and adhering to budgets to assist them in managing spend predictability:

## How much will this cost?

One of the most surprising findings of the survey came with the responses to the question, “Do you anticipate an increase or decrease in your legal spend on labor and employment in the next 12 months?” Despite all that has been written in the legal publications about how in-house counsel have to reduce costs — a mantra that was frequently repeated by survey respondents — 23% of respondents said they expected to increase their spend on labor and employment and only 18% expected to reduce spend. Those that expected to increase spend cited a predicted increase in disputes and the heightened and ever-changing regulatory environment governing the workplace, as well as execution of company growth strategies.



The 23% of respondents who predicted an increase in legal spend may prove to be the more prescient, particularly given the proliferation of class actions. A recent article noted that companies paid \$70 million more than they did in 2014 to handle class actions – spending a total of \$2.1 billion on class action lawsuits in 2015. In addition to the increased volume of class actions, the article reported that General Counsel identified more of these matters as complex.\* In addition to more spend, statistics like these suggest that there may also be an increased need for outside lawyers with the qualities discussed on page 10 to handle class actions.

One of the factors that may also be contributing to the view that legal spend will go up is the increase in eDiscovery in labor and employment matters. Forty-two percent of respondents believe that eDiscovery will increase in the coming 12 months; and eDiscovery was among the top three trends in terms of greatest future impact because of the proliferation of emails and electronic data and the cost and time associated with review. As two respondents noted:

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“It is the most costly, most time-consuming, and least effective way of getting relevant information.”

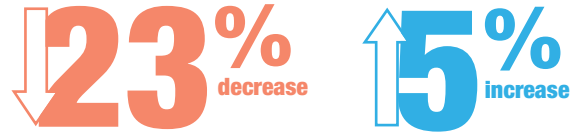
“More to collect, review and be responsible for, in terms of amount of data.”

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\* Law360 Aebra Coe, GCs’ Class Action Expenses Increase After 4-Year Decline, Law360 (March 21, 2016, 7:00 PM ET).

### Number of Outside Law Firms Used

Another interesting result came in response to the question that asked respondents to forecast whether use of outside law firms would increase or decrease. Twenty-three percent of respondents see a decrease in the number of outside law firms, as compared to only 5% who see this as likely to increase.



Why a decrease in the number of law firms while use of outside counsel generally remains constant? The answer seems to lie in a strong desire to better partner with those outside counsel who – as is the goal for the in-house legal team as well – better understand the business and its objectives. Numerous respondents commented that their outside lawyers needed to improve in this area.

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“For my outside team, greater depth and knowledge of my business.”

“Find ways to build understanding of our business for our outside counsel.”

“Outside attorneys need to be better versed in building strong relationships with both the business and [inside] counsel.”

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## Final Thoughts

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When contemplating our survey results, it became clear that for every Value Insight gleaned, additional questions and considerations arose. We look forward to exploring more avenues of inquiry in future surveys. To assist in-house counsel in being value leaders and promote dialogue within their own organizations, we pose the following queries for reflection and discussion:

- What does your in-house legal team look like?
- How does your in-house legal team spend its time?
- Do you need to grow to become more effective value providers?
- Do you understand how the in-house legal team is evaluated and what the company values most?
- How can you enhance your team's judgment on legal matters and knowledge of the business?
- Does your business take steps to proactively identify legal risks in an effort to reduce the number of disputes?
- What process does your company use to assess the risk profile of a legal dispute?
- What are the primary business objectives and considerations when managing risk at your company?
- Does your company use arbitration agreements?
- Is your in-house team equipped to handle litigation and, in particular, the increasing volume of class actions?
- When and why do you seek the assistance of outside counsel?
- How do you select outside counsel?
- How do you measure the value that your outside counsel provide?
- How frequently are you using Alternative Fee Arrangements ("AFAs")?
- Has AFA use reduced your legal spend and/or improved predictability?

Thank you for reading our Value Insights report. We hope the findings are helpful and that the questions posed above further stimulate your interest in exploring value in labor and employment law. If there are any particular areas of interest that you would like us to consider exploring in our next survey, please email us as at [proskauervalueinsights@proskauer.com](mailto:proskauervalueinsights@proskauer.com)

## Contacts

Please direct any comments and questions about the study to:



**Neil H. Abramson**

Partner  
New York  
Labor & Employment Department  
+1.212.969.3001  
nabramson@proskauer.com



**Anthony J. Oncidi**

Partner  
Los Angeles  
Labor & Employment Department  
+1.310.284.5690  
aoncidi@proskauer.com



**Mark W. Batten**

Partner  
Boston  
Labor & Employment Department  
+1.617.526.9850  
mbatten@proskauer.com



**Stacey C. S. Cerrone**

Senior Counsel  
New Orleans  
Labor & Employment Department  
+1.504.310.4086  
scerrone@proskauer.com



**Elise M. Bloom**

Partner  
New York  
Labor & Employment Department  
+1.212.969.3410  
ebloom@proskauer.com



**Catherine A. Duke**

Legal Director  
New York  
Labor & Employment Department  
+1.212.969.3959  
cduke@proskauer.com



**Scott A. Faust**

Partner  
Boston  
Labor & Employment Department  
+1.617.526.9650  
sfaust@proskauer.com



**Sarah Burdette**

Associate Director  
of Business Development  
New York  
Labor & Employment Department  
+1.212.969.5611  
sburdette@proskauer.com



## Beijing

Suite 5102, 51/F  
Beijing Yintai Centre Tower C  
2 Jianguomenwai Avenue  
Chaoyang District  
Beijing 100022, China  
t: +86.10.8572.1800  
f: +86.10.8572.1850

## Boca Raton

2255 Glades Road  
Suite 421 Atrium  
Boca Raton, FL 33431-7360, USA  
t: +1.561.241.7400  
f: +1.561.241.7145

## Boston

One International Place  
Boston, MA 02110-2600, USA  
t: +1.617.526.9600  
f: +1.617.526.9899

## Chicago

Three First National Plaza  
70 West Madison, Suite 3800  
Chicago, IL 60602-4342, USA  
t: +1.312.962.3550  
f: +1.312.962.3551

## Hong Kong

Suites 1701-1705, 17/F  
Two Exchange Square  
8 Connaught Place  
Central, Hong Kong  
t: +852.3410.8000  
f: +852.3410.8001

## London

110 Bishopsgate  
London EC2N 4AY, United Kingdom  
t: +44.20.7280.2000  
f: +44.20.7280.2001

## Los Angeles

2049 Century Park East, 32nd Floor  
Los Angeles, CA 90067-3206, USA  
t: +1.310.557.2900  
f: +1.310.557.2193

## New Orleans

Poydras Center  
650 Poydras Street  
Suite 1800  
New Orleans, LA 70130-6146, USA  
t: +1.504.310.4088  
f: +1.504.310.2022

## New York

Eleven Times Square  
New York, NY 10036-8299, USA  
t: +1.212.969.3000  
f: +1.212.969.2900

## Newark

One Newark Center  
Newark, NJ 07102-5211, USA  
t: +1.973.274.3200  
f: +1.973.274.3299

## Paris

374 rue Saint-Honoré  
75001 Paris, France  
t: +33.(0)1.53.05.60.00  
f: +33.(0)1.53.05.60.05

## São Paulo

Rua Funchal, 418  
26° andar  
04551-060 São Paulo, SP, Brasil  
t: +55.11.3045.1250  
f: +55.11.3049.1259

## Washington, D.C.

1001 Pennsylvania Avenue, NW  
Suite 600 South  
Washington, DC 20004-2533, USA  
t: +1.202.416.6800  
f: +1.202.416.6899