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A blurred, high-contrast image of a person in an office environment, possibly sitting at a desk or working on a computer, which serves as the background for the main text area.

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BNA**

# Workforce Strategies

## **The Gig Economy: HR's Role in Navigating The On-Demand Workforce**

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## INTRODUCTION

There are unique issues facing companies in the growing “on-demand” or “gig economy.” The gig economy describes employment opportunities typically created on a contract basis, often through web-based applications. They feature flexible or short-term work arrangements for consumer services such as ride sharing or food delivery.

Companies in the gig economy, thus far, have relied on an independent contractor employment model to fill these positions. However, this new employment relationship presents human resources with new challenges.

This issue of *Workforce Strategies* will offer HR guidance on how to manage a workforce that increasingly demands autonomy and customized work arrangements, while offering best practices for HR professionals working in the “gig economy.”

## WHAT IS THE 'GIG ECONOMY'?

The gig economy relies on a cadre of independent contractors to complete jobs. Work is typically assigned via a website or mobile web application, with work schedules set by the worker. These workers are generally considered to have more flexibility in how they do their jobs than traditional employees.

Gig workers are often tagged as independent contractors, meaning they can largely control when and where they do their jobs, but they do not have taxes withheld from their income and are not entitled to overtime and minimum wage protections. They also are not entitled to benefits like workers' compensation and unemployment insurance.

Jen Schramm, manager of workplace trends and forecasting at the Society for Human Resource Management, told Bloomberg BNA that a recent SHRM study, "Business and Human Capital Challenges Today and in the Future," shows that many organizations are considering a move to less traditional employment models.

She said these types of models focus more on utilizing a contingent workforce and more project-based work assignments.

### Shift to 'Project-Based' Employment

The study, released Dec. 9, featured 80 interviews with chief HR officers from large employers, including Starbucks, 3M, McDonald's and others. It found that, although 86 percent of respondents said their organizations use a traditional employment model, 40 percent anticipate they will use a non-traditional (or project-based) employment model in the next decade.

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Forty percent of the respondents to a SHRM survey said they anticipate using a non-traditional (or project-based) employment model in the next decade.

Schramm said these type of work arrangements will require a different set of management skills for line managers.

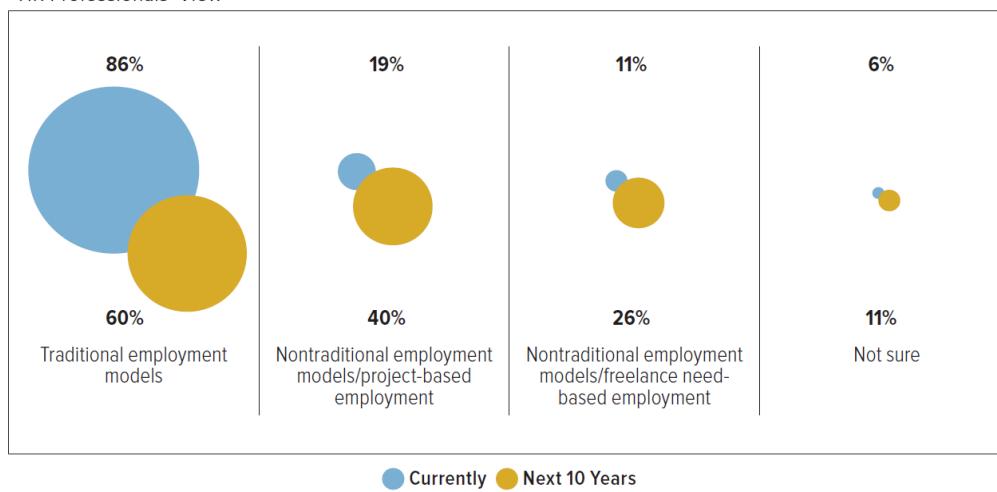
"HR will be tasked with not only managing the logistics of non-traditional work arrangements, but also making sure line managers have the management skills needed to manage virtual teams, remote workers as well as the impact on morale and continuity related to constantly changing and evolving work teams," she said.

### Get Acquainted With Worker Classification Rules

The rise of on-demand services—like app-based transportation providers Uber and Lyft and food delivery services like Postmates and Caviar—have raised questions about how some workers should be classified for employment and tax purposes.

**What Type of Employment Models Do You Currently Use/Expect to Use in the Future?**

HR Professionals' View



Note: Currently n = 345; Next 10 Years n = 310. Percentages do not equal 100% due to multiple response options.

Source: Business and Human Capital Challenges Today and in the Future (SHRM, 2015)

**Graphic 1. "Business and Human Capital Challenges Today and in the Future," SHRM**

As laws around the use of contract workers are examined, Schramm advises HR professionals to stay informed of the risks of improperly classifying a gig worker as an independent contractor or temporary worker.

Schramm said HR professionals will need to develop policies that make clear how the use of non-traditional work arrangements, such as independent contractors and contingent workers, fit into their staffing strategy.

She urged employers to have clear policies around “the duration of such assignments, the types of work and decisions such workers are involved in and any issues related to confidential data or information.”

## CHALLENGES FOR HR

The problem illuminated by gig work is that the work arrangements fall across a wide spectrum that isn't easily accounted for by the traditional employee or independent contractor categories. The distinction between categories typically depends on how much control an employer exerts over how a worker does the job and gets paid.

The nature of the relationship between the gig worker and the employer will create challenges for HR as more employers anticipate using non-employee workers and more workers demand customized work arrangements.

According to a report released Oct. 19 by the Institute for Corporate Productivity (i4cp), "Beyond Uber: Driving the Evolution of Work," 95 percent of surveyed executives are using, or anticipate using, more non-traditional skilled workers.

Jay Jamrog, senior vice president of research at i4cp, told Bloomberg BNA that the rise of the gig worker and gig economy signals the expansion of personalized work arrangements.

"While most companies have for a long time used contingent and part-time workers, consultants, and other kinds of [workers] who gravitate towards the gig economy, they continue to see this as a growing part of their workforce," Jamrog said.

He said a concern among companies surveyed by i4cp is the complexity of managing a growing group of non-employee workers. Employers acknowledge that significant improvements in strategic workforce planning are needed, Jamrog said.

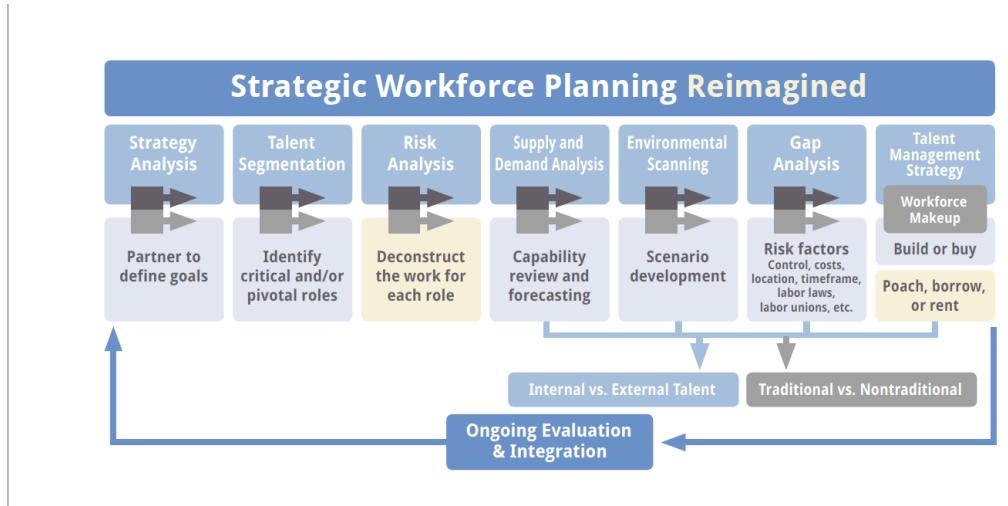
"HR should ask: 'Do we need full-time employees on this assignment? Do we need to develop employees? Do we need to borrow employees? Do we need to rent employees?' So a wider spectrum of the type of talent companies need based on the work that has to be done must be defined more clearly," he said.

According to Jamrog, there's a consensus emerging that "it's not just HR's job. It's HR's job along with the line manager to really determine what work has to be done and who can best do the work."

### **HR's Role in Managing a Blended Workforce**

The skills needed to manage varying types of employees simultaneously go beyond having business acumen and traditional project management skills.

"In our research, what we've seen, is that first-line supervisors have to have better influencing skills, better collaborative skills and the ability to really build trust," Jamrog explained.



Graphic 2. "Beyond Uber: The Evolution of Work" Institute for Corporate Productivity

He said with the rise of the gig economy and workers' desire for more flexible and customized work arrangements, leaders will play a critical role in effectively managing talent.

"For example, a leader today—a first-line supervisor—they have to manage workers very differently in this new kind of workforce," Jamrog said. "Not only do they have to manage their direct reports, but they also manage people that don't report directly to them, and then maybe 50 percent of their workers are not full-time employees."

Jamrog said with the increasing use of gig workers, the most important HR professional will be "that HR business partner on the ground floor of understanding the business' needs."

"That person has to be a developer of talent who really knows how to leverage all streams of talent. As a developer of talent, the experiences you give employees come from outside the company and inside the company. It's being much more strategic and understanding how to leverage talent to make more money for the company. So it's all about leveraging talent in the [gig economy] and that's not just internal talent, its external talent too," he said.

### Managing Company Culture

Broadening core strategic workforce planning to include not just full-time employees, but all different types of employees, including gig workers, has leaders concerned about how to maintain and manage company culture, Jamrog said.

He said employers should consider: "How will we maintain our culture, build our culture? Or how will our culture change if we have 50 percent of our workforce that are not full-time employees? What will that mean?"

Presently, about 34 percent of the U.S. workforce is free-lancers, Jamrog said. "If that goes up to 50 percent, which is the prediction for the next few years,

With the rise of the gig economy and workers' desire for more flexible and customized work arrangements, leaders will play a critical role in effectively managing talent, Jamrog said.

what does that mean for your company's culture and how can you maintain your culture? Many [leaders] I speak with say this is what keeps them up at night, really keeping a handle on that," he said.

## MANAGING ‘GIG’ WORKERS ALONGSIDE TRADITIONAL WORKERS

According to practitioners, a better understanding of what drives the phenomenon of gig work will help HR manage traditional employees alongside an increasing contingent of gig workers.

The real challenge for HR, they said, lies in the fact that a growing number of workers want what the gig economy offers—more control and flexibility.

“What is driving this is workers want more control and flexibility over their lives. People want more flexibility over when they work, how they work, where they work and so what’s happening is even full-time employees want some of that, too,” Jamrog said.

He said HR must acknowledge that “as long as the economy doesn’t tank, we are going to continue to have more and more workers—especially those with professional skills—attracted to platforms, online or not, that allow them to work where they want, when they want and how they want.”

He also said companies will “really have to think about customizing compensation, benefits and learning and development” for these employees.

Individual development plans also will become key, Jamrog said.

### Abandon One-Size-Fits-All Work Model

Jamrog said that although many companies currently can’t compete with the level of customization gig work offers, innovative HR departments are coming up with creative ways to offer a more appealing way of working to their employees.

He said one company, looking for a way to retain top-performing employees, is working to develop a freelance work arrangement so the employees can have more flexibility and control over their schedules and still work for the organization. “So there are ways to customize the working relationship. There is no one size fits all. HR has to get over one-size-fit-all work models,” Jamrog said.

He said that because workforce management is innately “all about the work,” companies should first ask: “What is the work that needs to get done? Who are our key contributors in getting that work done? Are they outside the company or inside? What do we have to do to establish an environment that fits this desire for more control and flexibility?”

“Right now, a lot of top professionals are so overworked what you are seeing is a ground swell of this movement towards what the gig economy offers,” Jamrog said.

### Don’t Let ‘Compliance Culture’ Get in the Way

Jamrog added those organizations that insist on maintaining a traditional one-size-fits-all work model will struggle under the allure of the gig economy.

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The real challenge for HR lies in the fact that a growing number of workers want what the gig economy offers—more control and flexibility.

“HR is so tied to the policy manual. Yes, we need policies, we want consistency and clarity around what happens in the workplace, but we have to have much more flexibility,” he said.

Because the gig economy is challenging how work has traditionally been done, Jamrog said, HR practitioners are going to have to have the flexibility to negotiate customized work arrangements and HR will have to change its “compliance culture,” he said.

“We need to treat everybody fairly and can’t be seen as giving one person favor over another. So this whole customization of work arrangements scares companies because it can open them up to lawsuits,” Jamrog explained.

He said HR has to start thinking differently about how it manages employees. “You’ve got to be open and honest about what’s being done, how workers are being treated and what customizing there is—complete and utter transparency,” he said.

Some full-time employees are “very jealous of these people who are in the gig economy because there’s the perception they have a better deal,” Jamrog said.

“This gig economy is going to force us to have much more customized work arrangements and greater transparency. So you will see much more regulation around gig work,” Jamrog said.

### KEY FINDINGS FROM SURVEY ON FREELANCING IN AMERICA

- *Freelancers are seeing more demand for their work* — Twice as many freelancers have seen an increase in demand in the past year as have seen a decrease (32% increase, versus 15% decrease).
- *Technology is helping freelancers find work* — Nearly seven in ten (69%) freelancers said technology had made it easier to find freelance work, and 42% said they have done freelance work via the Internet.
- *As demand increases, so does reputation* — Almost two out of three (65%) freelancers said freelancing as a career path is more respected today than it was three years ago.
- *The potential for earnings is helping to drive freelancing’s growth* — 80% of non-freelancers surveyed said they would be willing to do additional work outside of their primary job if it was available and enabled them to make more money.
- *There’s room for growth* — Three times as many freelancers expect their hours to increase in the next year as expect their hours to decrease (38% expect to increase hours, versus 12% expect to decrease).
- *Millennials (workers under 35) are more likely to freelance* — 38% of Millennials are freelancing (compared to 32% of those over 35) and Millennials are also most optimistic about the future of the freelance job market, with 82% saying that the best days are ahead (compared to 74% of those over 35).

**Graphic 3. “Freelancing in America: A National Survey of the New Workforce,” Edelman Berland and commissioned by Freelancers Union in partnership with Elance-oDesk**

## NAVIGATING COMPLIANCE CONCERNS

Labor laws, not fashioned for individual worker preferences, were written to protect workers en masse and have not necessarily caught up with modern, customized work arrangements.

Gerald L. Maatman Jr., a partner in Seyfarth Shaw LLP's Chicago office, told Bloomberg BNA that the current test in the U.S. for figuring out if someone is an employee or independent contractor is a very "fact-based, individualized issue."

He added that because two people can look at the same work arrangement and come to two different conclusions, HR needs very precise "internal procedures, controls and tools" to be sure employees are correctly classified.

### Questions HR Should Ask

Maatman said there are three questions HR professionals should ask when assessing gig work arrangements: Can the jobs be performed by an independent contractor, as opposed to an employee? Does the worker possess the characteristics of an independent contractor? Does the employer have adequate internal procedures, controls and tools to establish and maintain independent contractor status? He added, "I think that third question really deals with the issue."

According to Maatman, when working with employer clients on their internal processes, he asks if HR personnel are doing things such as creating evidence that the independent contractor agreement is a negotiated agreement between the company and the independent contractor; ensuring that the company's gatekeepers have been provided with training on the issue of employee classification, and making sure the relationship between the company and the independent contractor is managed consistently with terms of an employment agreement.

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HR needs very precise "internal procedures, controls and tools" to be sure employees are correctly classified.

Because there is often a disconnect between a company's policy and its actual practices, Maatman said, identifying risks is important. Having too much control over the independent contractor but having him or her "sign a piece of paper that says 'I'm an independent contractor'" is inadequate, he said.

"What courts are saying is that labels aren't as important as the facts and circumstances of what somebody does while performing their work," Maatman said. "So the way in which the company or its supervisors or other employees interact with the independent contractor is equally important as the agreements that the HR professional puts into place."

There are "risk processes" and internal processes that companies should set up to get ahead of issues that can arise with employee classification, Maatman said.

"The HR department should be looking at written policies and procedures, practices such as onboarding, treatment on the job, training and documenting. So it's

kind of a holistic approach, but it requires very intensive work and changes. The level of new processes, new policies, new training are pretty substantial investments of time by HR departments to cut down on risk,” he said.

### **Freelancers Face a Unique Set of Challenges**

Sara Horowitz, founder and executive director of the Freelancers Union, told Bloomberg BNA she believes it’s “still not clear if the classification system has caught up to all the different ways people are working today.”

Because freelancers face a unique set of challenges, “policy makers need to take a look at the freelance workforce and modernize classification rules in order to better address some of the issues that have emerged, including around misclassification,” she said.

Horowitz, also an attorney and deputy chair of the Federal Reserve of New York, said that any company looking to grow and compete in the new economy should be looking for ways to attract and retain top freelancing talent, adding that freelancers are not necessarily looking for “traditional employment benefits.”

“Freelancers provide great sources of labor and expertise for companies looking to fill unique needs and skillsets. By making them an integral part of the business, and likewise helping them grow professionally like other workers, an HR department can expand the ability of the overall organization to adapt to changing markets,” she said.

### **Challenges Ahead to Contractor Status and Gig Business Model**

“Workplace Class Action Litigation Report,” published in January 2016 by law firm Seyfarth Shaw, found that based on developing class action litigation trends, employers should anticipate challenges to independent contractor status and the gig business model.

“Increased scrutiny of independent contractors is also on a collision course with the growth of the ‘on-demand’ marketplace or ‘gig’ economy, where the use of independent contractors is at the heart of many businesses’ operating models,” the report said.

It went on to say that pending class action litigation against on-demand ride sharing service Uber could have “far-reaching consequences and a profound impact on the viability of many other new economy businesses and might also deprive individuals of the informal work arrangements that are often available to independent contractors but incompatible with the highly regulated nature of an employment relationship.”

### **Flexible Arrangements**

Maatman said now that traditional employers have to compete with the flexible employment that the gig economy offers, HR should not necessarily shy away

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Any company looking to grow and compete in the new economy should be looking for ways to attract and retain top freelancing talent, Sara

Horowitz, founder and executive director of the Freelancers Union says.

from allowing customized work arrangements, but should have practices in place to ensure individual employee requests for customized work arrangements are handled properly.

Maatman, using one example of an employee requesting to become an independent contractor or to work on a freelance basis, said the question for employers is, “If I allow one employee to shift their status from employee to independent contractor while denying the request of other employees, do employment discrimination laws apply?” The answer, he said, is “they certainly do.”

Maatman advised HR practitioners to look at everybody’s situation individually and ask if changes make sense for the business.

“As long as an employer is looking at those business issues and making an honest assessment, and as long as [the employer] acts in a way that is consistent with their business needs, then it’s not going to be discriminatory,” he said.

## CASE STUDY 1

Each dispute over independent contractor status is different, and no case provides a universally applicable example. It can be useful, however, to consider how individual states deal with the issue and how the courts view the claims. The two reports that follow—an agency order in Florida and court ruling in California—illustrate these differences.

### **On-Demand Drivers Are Contractors, Florida Agency Rules**

Two former Fla.-based Uber drivers sought unemployment benefits after their access to the ride sharing service's booking app was revoked. They argued that because they had been earning a living through the app and had then lost that source of income, they were entitled to state benefits.

In a Dec. 3 order issued by the Florida Department of Economic Opportunity, Jesse Panuccio, the department's executive director, said on-demand drivers for the ride-sharing service Uber Technologies Inc. were independent contractors and not employees under Florida law.

The two drivers at various times used Uber's online application to provide transportation services to passengers, but their access to the company's software application was revoked "for different reasons and at different times," the final order said. The drivers filed claims for Florida unemployment insurance, claiming to be employees of Raiser LLC, the subsidiary licensed to administer Uber software in Florida.

"The agreement between drivers and Uber specifies that the relationship is one of independent contractor, and the actual course of dealing confirms that characterization," the final order said.

The drivers had significant control over work details, used personal vehicles, chose when to serve and whether to work through or for "competing platforms or other companies when not using the Uber application," the order said, referring to Uber's driver app.

Although California and Oregon had recently found that drivers using Uber's software were employees under their state laws, those findings weren't persuasive, the Florida order said. Those opinions "largely ignore the contract, and misconstrue the actual course of dealings," appearing to rest on the fact that without drivers, Uber couldn't be in business, the order said.

"But the same is true of all middlemen," the order said, noting that "Uber is no more an employer to drivers than is an art gallery to artists" and describing the company as "a middleman or broker for transportation services."

### **Uber Ordered to Face Class Action Over Employee Status**

Drivers in California working for Uber Technologies Inc. filed a lawsuit asserting that the company misclassified them as independent contractors.

A federal judge in California ruled Sept. 1 (O'Connor v. Uber Techs. Inc., 2015 BL 283249, N.D. Cal., No. 13-cv-03826, order 9/1/15) that the company will have to defend a group lawsuit brought by drivers seeking the pay and benefits of employees.

The ruling by the U.S. District Court for the Northern District of California could affect drivers around the country, even though the San Francisco case is limited to 160,000 drivers in California.

Changing drivers' status would entitle them to unemployment and workers' compensation as well as the right to be represented by a union. The ruling means Uber's California drivers can, as a group, press the central claim of the case, that they can seek reimbursement for mileage and tips.

Other courts in the U.S. will likely look to Judge Edward Chen's reasoning in evaluating other such challenges, employment specialists said.

The ruling is "a very big deal," said Beth A. Ross, an employment lawyer who won a similar case against FedEx Corp. In the FedEx misclassification case brought by its drivers, a class action, the company agreed to a \$228 million settlement that is being considered by Chen.

Uber's financial exposure as a result of Chen's ruling is significant because the mileage and tip claims "are worth a fortune," Ross said. "The dollars add up really, really fast," she said, noting that the 2,000 drivers in the FedEx case pale in comparison to about 160,000 in Uber's.

An important factor in determining whether the case could proceed was a determination that Uber exercises control over its drivers.

"Uber's uniform and unilateral right to control its drivers' compensation is important common proof that bears directly on the class members' work status," Chen wrote.

## CASE STUDY 2

In the following case study, Ruth Palombo Weiss interviews the Institute for Corporate Productivity's Kevin Martin about the institute's study on the trend toward the use of more non-traditional skilled workers.

### **The Evolution of Work: An Interview with Kevin Martin**

The composition of corporate workforces is undergoing dramatic change driven by both the demands of workers and the strategic needs of employers. A new study published by the Institute for Corporate Productivity (i4cp), "Beyond Uber: Driving the Evolution of Work," has huge implications for senior leaders implementing talent management programs and initiatives. The Association for Talent Development's Senior Leaders and Executives Community of Practice spoke with Kevin Martin of i4cp about the study.

By Ruth Palombo Weiss

**Q: The study states, "One trend that was clear: 95 percent of the executives i4cp interviewed are using or anticipate using more non-traditional (non-employee) skilled workers than ever before. While the use of non-traditional workers is not necessarily a new phenomenon, what is new is the shift in the type of non-traditional worker these employers seek, as well as the strategies employed to utilize these workers." Please share why you think this is happening.**

**A:** We see two primary forces at work here. The first is workers' demand for control and flexibility; the second is the need for greater organizational capability and agility. Driving these factors is the result of three economies: the gig economy, the starving economy, and the winner-take-all economy. The gig economy is the notion that instead of taking traditional 40-60 hour week salaries with benefits, workers are patching together a gig-type lifestyle of different jobs with different employers. That seems to be the result of a few things, including what we are calling the starving economy.

Generally the bond between the employer and employee contract, of "you stay here and we'll take care of you," is gone. In today's workplace economy, workers have to take care of themselves. Through the utilization of technology, people can work anywhere, any time. There is also desire on the part of employees to have more of their lives back. All of which points to the current demand for worker control and flexibility.

Millennials are demanding this style of working, while many skilled aging Baby Boomers either need or want to keep working beyond retirement, yet desire to do so on their own terms. The vast majority of employers are either using or planning to use more non-traditional workers. We're not talking about traditional

(business process or recruitment process outsourcing) models in which employers outsource an entire function or process. Rather, we see employers relying on highly strategic and targeted outsourcing aimed at specific work that must get done and focused on utilizing the best talent, no matter the location or employment status of that talent, to help the employer gain capability, capacity, and agility.

**Q: What does such mass outsourcing mean for the future of employee development and talent management, a function for which most processes are developed and implemented internally?**

A: Over the next few years, 30 percent to 50 percent of an organization's workforce will not be employees of the company. Additionally, the composition of the workforce may come from various sources: someone on a rotational assignment from a key customer, from a critical partner, or from an aggregator of talent where people with certain skills sets now have a platform to auction off their time and know-how.

Many of these workers will be in skilled or customer-facing positions or working on projects that require a high degree of collaboration with others. They will bring much more diversity in the form of knowledge, experience, background, and so forth to the workforce and project teams. All of this will require a different kind of leader.

For the last few years, we've been seeing the definition of 'leader' being much more about influence and collaboration rather than hierarchy or command and control. In fact, our research shows that it's the social side of leading that has the greatest variability on leader effectiveness. What this means for employers is the need to develop leaders—especially at the middle and frontline levels—who are more effective communicators (both in person and via technology) and can influence and drive collaboration across a diverse group of stakeholders.

**Q: Will organizations rely on the agencies they are using to procure these workers to train them as well, or will organizations train these workers?**

A: We see both scenarios. However, there is one caveat and that is regulation. The lines are more blurred between employee and non-employee; there are more and more regulations each year, as well as penalties for crossing those lines. HR has got to be lock-stepped with legal departments in terms of the ever-changing labor laws. There are organizations out there, many of them in hospitality and the quick service restaurant businesses, which are not touching anything with talent management, because there are so many questions and lawsuits currently under way. Look no further than the National Labor Relations Board ruling of co-employment against McDonald's.

The major question is who will train these workers? Organizations want to have greater input on that, and this input could help negate issues such as sexual harassment that may occur in a franchise from a manager, who has never had training before. If a business gives that training, then co-employment may come into play and that business is now partly responsible.

**Q: Does training more independent workers require different delivery methods and considerations?**

A: Organizations must work on the ability of frontline leaders to communicate, identify, and resolve performance issues as well as drive collaboration with myriad types of workers, whether employee or not—located in the same office or not, people who are all over the place. One major area of capability must be on the use of technology to better communicate and collaborate. A lot of non-traditional workers for example, are only going to provide work in “off” or odd hours because that’s what their schedule allows or simply because it fits their lifestyle best. These workers want control and flexibility of when, where, how, and for whom they work.

The creation and sharing of knowledge should also be two-way. For example, take a highly skilled contractor who is helping a company build a new revenue recognition model for software as a service offering. Imagine the positive impact on revenue growth if he were to share his knowledge through creation of a two-minute video from his iphone that explains the revenue implications on sales quota and commission payout, as well as, revenue pitfalls to avoid when negotiating a deal with a prospect.

Of course, all of this must also apply to the 50 percent to 70 percent of workers who are actual employees of the companies, as well. Overall, we see the need to make development more personalized, more situational, role based, and available via a variety of modalities, including social and mobile.

*Reprinted with permission from the Association for Talent Development*

## CONCLUSION

The influence of the gig economy is growing and will continue to grow, according to HR practitioners and consultants interviewed by Bloomberg BNA.

A recent study, “Freelancing in America: A National Survey of the New Workforce,” conducted by the independent research firm Edelman Berland and commissioned by Freelancers Union in partnership with Elance-oDesk, estimated that 53 million Americans are freelancing, approximately 34 percent of the total workforce. According to the report, this number is expected to increase to 50 percent by 2020.

As the gig economy grows and greater opportunities—such as retailing custom creations on Etsy, securing writing jobs through Freelance.com or selling photography on Flickr—exist for workers, more individuals will seek to forgo the traditional work model, opting to take more control of when, where and how they work.

Organizations will have to do a better job of strategic workforce planning to accommodate the growing number of workers looking for more control and flexibility over their work.

## RESOURCES

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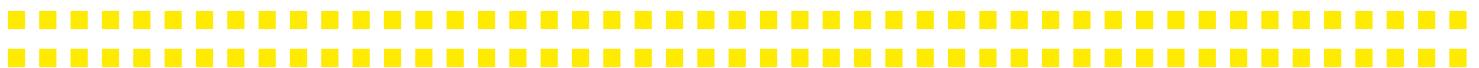
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