APR – MAY '17

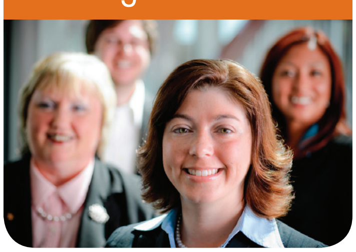
# Uplink®

The Peoplelink Online Newsletter

## IN THIS ISSUE »



Raising the Bar in Staffing Since 1987



# Building TRUST between Your Employees and Freelancers


*by Jon Younger, Michael Kearns*

More companies and nonprofits are turning to external experts, on a project or temporary basis, to tap into unique skill sets and experience that they otherwise might not be able to access, afford, or locate in their market. At the same time, more individuals are turning to freelancing as an alternative to full-time company employment. This blending of internal and external talent can have huge benefits to the organization — cost savings, access to new capabilities, speed and flexibility — but having a blended workforce creates special challenges that most managers aren't prepared to deal with. The increased use of external talent creates suspicion and generates concern and even resistance from internal employees, who worry about issues including:

- Is this the beginning of a reduction in force?
- Will I be replaced? Will my job be eliminated as a full-time position?
- Outsiders are often "hired guns" who don't work the same way that we do or share our commitment to the organization. Will this impede our ability to achieve our goals?
- Will an outside expert's skills or opinions be valued more than mine or other full-time employees'?
- Will they get to do all the new, interesting work?

When problems of collaboration exist between members of a team, whether they are internal or external, performance suffers. And when trust erodes between your employees and freelancers, your organization almost certainly will not be able to take full advantage of the expertise you've brought on to help your internal team.

To avoid these problems, organizations need to consistently build trust between internal employees and the contractors with whom they are expected to work. Here are five practices, based on our work with dozens of organizations, that can help foster trust and promote collaboration on your blended teams.

**Clearly communicate your company's blended workforce vision.** We know that, in the absence of clear communications about change, employees tend to think the worst. In order to counter the

CONTINUED ON PAGE 7

*Jay Mattern, CEO*

# WHAT Great MANAGERS DO DAILY

So much depends upon managers. A Gallup study found that at least 70% of the variance in employee engagement scores is driven by who the boss is. This is disconcerting because the same research found that about 70% of people in management roles are not well equipped for the job. This state of affairs is hurting not just employee engagement and quality of life, but also corporate performance.

Most companies understand the importance of having highly effective managers, but few invest in support to help them get there. One reason is that it's difficult to measure and quantify what good management actually looks like. While there has been a lot of great work done to identify qualitative traits of great managers — they create trust, focus on strengths, instill accountability, avoid politics, etc. — these traits don't provide much insight into how great managers spend their time on a day-to-day basis that differentiates them.

But there's new data that can help. Microsoft's Workplace Analytics product analyzes metadata from the digital breadcrumbs of a customer's millions of de-identified email and meeting interactions to generate an objective and granular set of behavioral KPIs across the organization (for example, how much time managers spend in one-on-ones with employees, how quickly they respond to emails from each direct report, how large and diverse their networks are, etc.). Among other things, these KPIs can then be combined with other data sets to understand what behaviors differentiate sub-populations of employees.

Here's what makes managers of highly engaged employees different than the rest on a day-to-day basis:

**Managers lead by example when it comes to working hours.** Two metrics that provide a proxy of active working time per week are utilization and after-hours time. "Utilization" essentially looks at the average amount of time between your first and last email or meeting of the day across several months of data and estimates total weekly working time for each employee. It's an imperfect metric, but does provide a good directional sense of working norms. "After hours" is the amount of time spent in email or meetings outside of an employee's normal work hours, which are typically 8 a.m. to 5 p.m.

The data shows that managers in the top quartile of utilization — a.k.a. those who work the longest hours — end up with employees

who work up to 19% more hours relative to their colleagues who report to less highly utilized managers. This is perhaps unsurprising. What might be more surprising is that even though they are working more hours, the engagement scores of these employees are actually 5% higher than their lower utilization colleagues. It's also true that employees of managers in the lowest 25% of utilization have lower than average engagement scores (2-4% lower). This suggests that people are more engaged if they work for a manager who is working at least as much as they are.

**However, managers need to ensure even allocation of work.** Using the same metrics as above, employees who put in more hours than the rest of their team are more likely to be disengaged. More specifically, highly utilized individual contributors that work 120% longer hours than their peers are 33% more likely to be disengaged and twice as likely to view leadership unfavorably as highly utilized employees working similar hours as their team.

This intuitively makes sense in that it would be frustrating to be staring at hours of additional work on your desk while watching all of your teammates — or your boss — happily go home at 5 pm. While in some cases employees may volunteer to take on extra workloads on their own, it is a core function of a manager to allocate work across their team. This

CONTINUED ON PAGE 8

# How to Outsmart the Robots and Hold On to Your Job

*Hannah Morgan*

In order to stay relevant, acquire and develop creative and interpersonal skills that can't be easily automated.

There's been a lot written about artificial intelligence, and many fear their jobs will disappear as a result of driverless cars or self-checkout lanes in stores. The truth is, for decades your work has been replaced by automation in factories and by personal computers, but you found a way to adapt. Adaptation is the key.

There are jobs that are less likely to be replaced by artificial intelligence and skills you can develop to help you keep your job.

## What jobs are at risk of being replaced due to AI?

The jobs disappearing today include bank tellers, receptionists and customer service representatives. Jobs like accounting clerks, legal assistants, even surgeons are at risk in the near future. Any job that follows predictable steps can be automated. For example, restaurants have begun implementing stations where you place your own order, eliminating the need for workers. In some instances, business processes change to accommodate automation. Where one person may have been responsible for many tasks, the tasks that are easily automated are taken over by robots.

A better question is, what jobs or functions can't be automated? The short answer is, any job that requires creativity or where human-to-human interaction is vital. A robot might have difficulty addressing the pros and cons or consequences of medical procedures. They lack empathy or the ability to interpret the patient's emotions. Creating an advertising campaign requires a higher level of creativity and understanding of human psychological traits, which would be difficult for robots to replicate. Motivating a team or group to implement procedural changes isn't something a robot could manage, either.

The real risk isn't losing your job, but losing certain functions of your job that are easily automated. This will require you to adapt and possibly update your skills for next-level responsibilities.

## Develop skills that make you irreplaceable.

Your job security now and into the future requires that you out-think the robots. Robots are great at repetitive tasks, searching data, or any task that doesn't require adapting, creative thinking or making decisions.

You need a basic understanding of technology to outsmart robots. Make sure you stay on top of the latest tools of the trade. Even a basic understanding of coding or any specific STEM (science, technology, engineering and math) skill enhances your ability to understand the root cause of a problem. At this time, only a human can creatively develop solutions to address interpersonal or operational solutions.

And don't discount the soft skills. Soft skills range from interpersonal communication to complex problem-solving with dozens of skills in between. Learn how to negotiate, speak in public, resolve conflict, build cohesive teams or think like a designer. These are things robots just can't do.

Developing emotional intelligence is another way to hold on to your job. Emotional intelligence includes your self-awareness, self-management, empathy and social effectiveness. Honing skills within these areas not only improves your performance, you also enhance skills artificial intelligence can't compete with. Your ability to motivate, influence and assess people makes you a valuable asset to any team.

## Ready, set, learn.

According to Accenture's Creating the Future Workforce study, 90 percent of the U.S. workforce is optimistic about technology and 80 percent have a positive attitude about the use of automation. So it comes as no surprise that 86 percent of the U.S. workers surveyed said they would invest in training during their free time. The next logical question is where to find relevant, affordable training to invest in?

Check professional associations for webinars available to members. There are MOOCs (massive open online courses) by top educational institutions and training portals like LinkedIn's

CONTINUED ON PAGE 4

# Meet **KAREN MCFARLANE** »

## Area Sales Manager
## Gastonia, NC

**» How long have you been in the staffing business?** 17 years

**» What was your first job? What do you remember most about it?** I started through a school co-op as a Cashier at Hardee's. I enjoyed meeting different people and the free lunch.

**» Who was the worst boss you ever had and why?** Not Kelly Riley (lol!) but a manager many moons ago in a call center in Clearwater, Florida because she thought she was the reason for any success and her team was the reason for her failures.

**» What motivates you each day to sell and service your clients?** Passion for what I do and the ability to see the growth opportunity before me.

**» What are some of your long-term goals?** A position that allows me to coach and develop others.

**» What makes Peoplelink unique, from your perspective?** The family feel, the biggest little in action. I come to work every day with people I genuinely care about.

**» What makes you successful as a Manager?** Showing a sincere interest in listening and paying very close attention to concerns and frustrations and working on a solution so that all parties are happy with the end result.

**» What is the best advice you could give to other Peoplelink staff members?** Love your job and be passionate about your success, but never sacrifice who you are as an individual.

**» What is your favorite movie?** Me Before You . **Book?** The Thorn Birds **Drink?** Top shelf Margarita with salt!

**» If you could have any car you want, what would it be?** A restored 68 Camaro

**» What is your home city? What is the greatest feature about your home city?** Gastonia. The location! A couple hours from the beautiful Carolina Mountains and a few hours from the Beach.

**» How do you unwind when you're not at the office?** Nothing quite better than quality time with family and friends.

**» What do people like most (least) about you?** My crazy personality and sense of humor. Least? Sometimes I just do not shut off… haha!

**» Anything else you can think of???** Be fearless in the pursuit of what sets your soul on fire!

---

# Bright Ideas

CONTINUED FROM PAGE 3

Lynda or Udemy.com, which host thousands of courses. Ask around and see if anyone can recommend local, in-person classes. And don't forget to see what training your employer offers. Attending a college or university to acquire a degree may not be the wisest investment. Enhancing your soft skills shouldn't take two to four years to complete. You may want to investigate shorter-term leadership programs or classes that include experiential learning. One of the best ways to learn soft skills is through practice. Identifying a mentor with strengths in areas you are looking to improve allows you to practice and get immediate feedback.

### Practice flexibility.

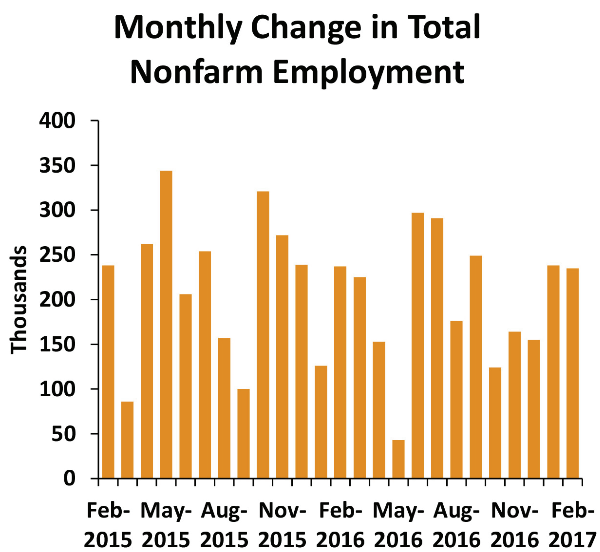
You crave stability, but you also value flexibility. One thing is certain, the nature of jobs will continue to morph. If you keep an open mind and are receptive to change, it will be easier for you to survive in the tumultuous world of work. You also must realize that you will not stay in one job forever. Even if you hold the same job title, the type of work you do and the role will look very different after several years. If you choose to stay with one company, you will hold several different roles, learning new skills in each. As you consider new opportunities, look for companies that celebrate flexible work offerings, encourage a collaborative work culture and offer resources for your professional development. Companies that offer these benefits are more likely to help you stay a step ahead of the robots. At the end of the day, it is up to you to manage your performance, skill development and happiness at work.

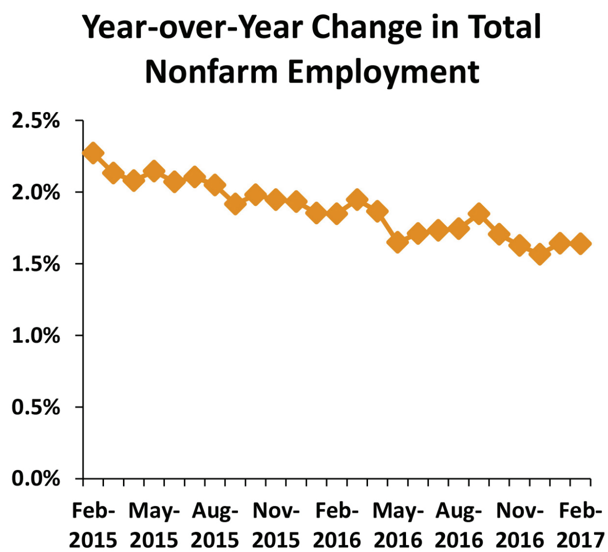
# MARCH US JOBS REPORT

*Andrew Braswell, CCWP*

***Event:*** On a seasonally adjusted basis, total nonfarm employment increased by 235,000 and the unemployment rate fell slightly by 8 basis points to 4.70% in February, according to the U.S. Bureau of Labor Statistics (BLS) in its monthly jobs report. Temporary help services employment increased by 0.10% in February, adding 3,100 jobs. The temporary penetration rate was unchanged at 2.04%, below the all-time high of 2.05% previously reached in December 2015 and November 2016.

## Employment up 235K in Feb., up1.6% y/y

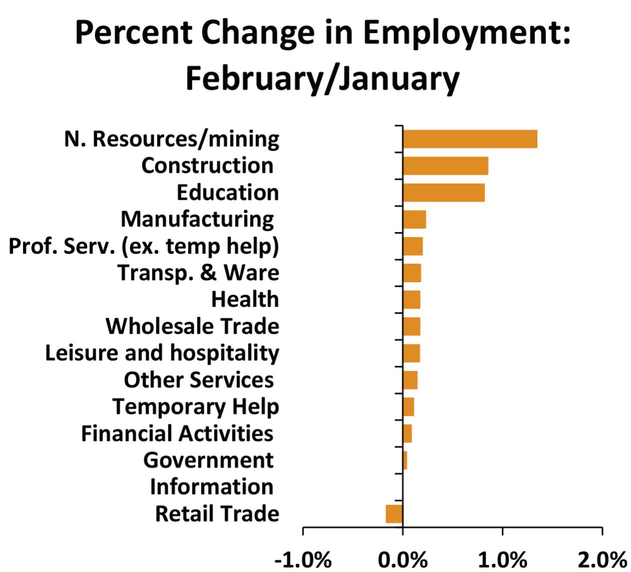


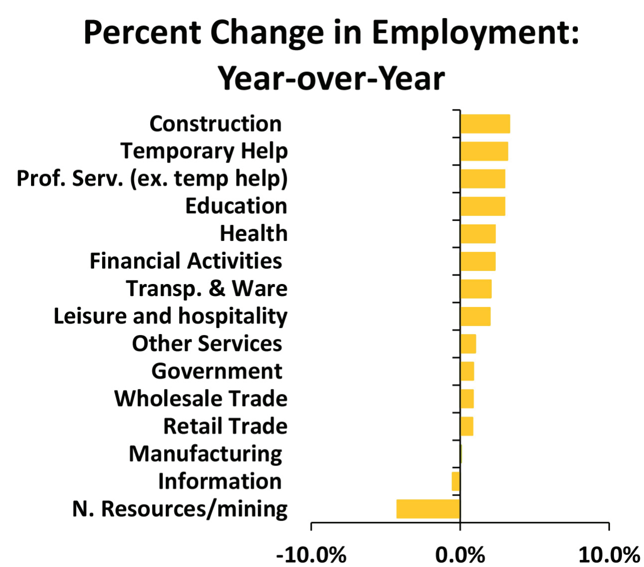




***Background and Analysis:*** On a year-over-year (y/y) basis (February 2016 over February 2015), total nonfarm employment was up 1.6%, and monthly job gains have averaged approximately 196,000 over the past 12 months. Temporary help employment was up 3.2% y/y, with monthly job gains averaging approximately 7,600 over the past 12 months.

The economic sectors that most drove total nonfarm employment growth in February included construction (+58,000), professional services (excluding temporary help, +33,900), and healthcare (+32,500). The only sector that declined on the month was retail trade (-26,000).

## Employment trends by industry




Sources: US Bureau of Labor Statistics and Staffing Industry Analysts

CONTINUED ON PAGE 6

# MARCH US JOBS REPORT

CONTINUED FROM PAGE 5

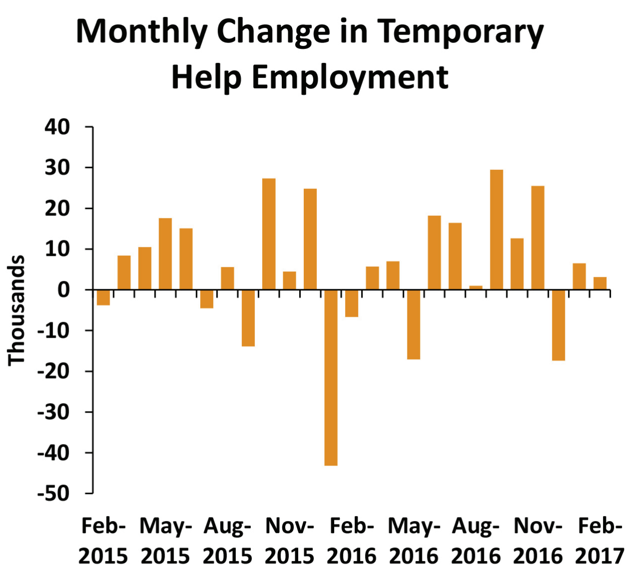
***BLS Revisions:*** The change in total nonfarm payroll employment for December was revised from +157,000 to +155,000, and the change for January was revised from +227,000 to +238,000. With these revisions, total nonfarm employment gains during the two-month period were 9,000 greater than previously reported.

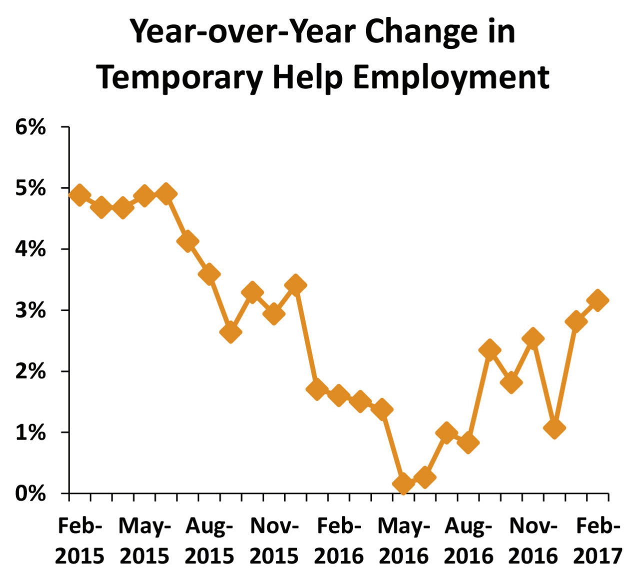
***Staffing Industry Analysts' Perspective:*** The year has started off with two solid months of total nonfarm jobs growth, with February's +235K exceeding the median forecast of economists surveyed by Bloomberg of +200K. The unemployment rate moved lower despite a 10 basis point sequential increase in the labor force participation rate, to 63.0%.

Construction had its strongest monthly employment increase in several years, and has added nearly 100K jobs already in 2017. In addition to the steady leadership of professional services and healthcare, solid gains were also seen in education (+29K), manufacturing (+28K) and leisure & hospitality (+26K). Strength was broad-based in February, as retail trade was the only sector that contracted, which is notable following its healthy gain in January (+40K). Natural resources & mining had the best month on a percentage basis, growing 1.3% and further evidencing the initiation of a new uptrend with its fourth straight monthly increase.

The longer-term picture continues to improve, as the 3.2% y/y growth rate was the highest since December 2015. The temporary penetration rate hovers just one basis point below the all-time high for the third straight month, and we maintain our expectation that new highs in this metric will be reached in 2017 as business confidence continues to improve.

## Temp help employment up 3K in February, up 3.2% y/y




Sources: US Bureau of Labor Statistics and Staffing Industry Analysts

# Building TRUST between Your Employees and Freelancers

CONTINUED FROM PAGE 1

misunderstandings that engender distrust, we encourage leaders to clearly define their longer-term vision for the blended workforce. Will the workforce be made up primarily of internal employees, with outside experts added only when necessary? Or will the organization regularly and structurally depend on external talent to augment their ability to do important, strategic work?

We are finding more and more organizations shifting from the first approach to the second. As organizations make this change, good employee communication is essential. A clear message helps shape how employees respond and helps to avoid misunderstanding, both inside and outside the organization. More than simply messaging, managers must think through and identify how they plan to keep top internal talent and to attract talent in future. For example, some years ago UBS Americas increased its use of IT freelancers, and it produced a worrisome level of attrition until the IT leaders recognized and addressed the communications gap.

**Make employees part of the process of workforce design.** One way to reinforce good relations between employees and external experts is to involve internal project managers and well-respected internal professionals in the shaping and execution of the blended workforce vision. If employees feel that their voices are heard, their input is reflected in the vision, and they have a deep understanding of the value of the model, they are much more likely to support it.

Employees should also be involved, where possible, when specific decisions are made to bring in external experts, both during planning and in the selection of specific talent to join the team. This is good practice whenever new team members are brought in, whether they are temporary staff or new employees, and it will increase the likelihood that you find talent that integrates well and has greater support from the team.

**Look for more than technical expertise.** Most organizations have defined the behavioral competencies on which they assess employees. We suggest that these competencies be employed in the selection, monitoring, and performance management of freelancers. By selecting contractors who may have different levels of technical expertise but similar behavioral commitment — for example, to good listening and communication skills, treating others with respect, cooperation, or punctuality and follow through — it will be far easier to establish trusting relationships between internal staff and external experts. Perhaps the most important factor to look for is whether the individual freelancer has a history of integrating effectively into teams, getting the job done well, and making a positive contribution to the skills of the internal employees with whom they've worked.

**Ensure an effective onboarding process for freelancers.** All freelancers should have a basic orientation, whether they are on-site or working remotely. Onboarding is certainly different and less in-depth for them than for full-time employees, but it's no less important. We recommend using the following important topics and activities, allowing sufficient time for questions and discussion (half a day is usually enough):

- an overview of the organization, the project, and why it is important to the future of the company
- the culture of the organization and its implications
- the competencies expected of internal employees that are also expected of external experts working with the organization on a project or contract basis
- how performance is managed, for example, the frequency of performance reviews and the important factors in that review
- the unique expectations placed on freelancers
- typical examples of outstanding internal-external relationships, why and when the relationship turns sour, and what externals can do to avoid or deal appropriately with these situations

**Give managers tools to build blended teams.** Help managers get better at identifying and bridging the divide between internal employees and external professionals. There are a number of ways that training can provide meaningful insight on how to manage individual and team relationships in ways that promote harmony and team performance.

For example, through training, a manager might learn how to productively involve internal staff in interviewing and selecting outside experts. An early team meeting might engage internal staff in anticipating potential


CONTINUED ON PAGE 8

CONTINUED FROM PAGE 7

problems associated with a blended team and brainstorming solutions. A regular agenda item on weekly team reviews could include a discussion of how internal-external collaboration is working, what problems have arisen, and how effectively they are being resolved. And training will help managers become more thoughtful about how to invest freelancer time in making internal employees better, through training events, mentoring, or leading team discussions of innovative practices.

There is little doubt that freelancers are a growing and increasingly important source of expertise, and that the shape of workforce is changing as internal and external professionals work together, whether sitting next to one another or cooperating remotely from hundreds or thousands of miles away. Whether proximate or remote, collaboration is essential and depends on a foundation of trust. The suggestions above are not exhaustive, but they are eminently doable and will set your organization on a positive path.

## From the CEO's Desk »

CONTINUED FROM PAGE 2

finding clearly shows that uneven allocation leads to disengaged employees.

**Effective managers maintain large internal networks across their company.** A good measure is the size of a person's network based on the number of connections to other employees that they actively maintain. The primary algorithm used to define a connection has both a frequency and intimacy threshold. Put more simply, in order to qualify as a connection, one must interact with another person at least twice per month in an email or meeting with five or fewer participants. This allows for a reasonably accurate view of the number of people an employee actually works with on a regular basis. It has been consistently found that larger networks are correlated with a number of different positive business outcomes.

Employees who report to a manager with a relatively large internal network — in the top quartile of all managers, more specifically — have engagement scores up to 5% higher. Additionally, these employees had networks up to 85% larger than those of their colleagues reporting to managers with smaller networks.

Also, managers with small networks can have a significantly negative impact on their teams. Employees who had networks 110% or more larger than their manager are 50% more likely to be disengaged and twice as likely to view leadership unfavorably. One interpretation of this is that employees rely upon their manager to provide a coordination role with other teams across the company and they are unable to do that effectively if they don't have a big enough network. Employees who already have larger networks than their manager may simply see little value in the relationship and feel unnecessarily constrained by the hierarchy.

**One-on-ones remain vital.** You can quantify actual time managers spent in one-on-one meetings with direct reports based on calendared meeting invitations. The average manager spent 30 minutes every 3 weeks with each of their employees. Perhaps unsurprisingly, employees who got little to no one-on-one time with their manager were more likely to be disengaged. On the flip side, those who get twice the number of one-on-ones with their manager relative to their peers are 67% less likely to be disengaged. What happens when a manager doesn't meet with employees one-on-one at all, or neglects to provide on-the-job training? Employees in this situation are four times as likely to be disengaged as individual contributors as a whole, and are two times as likely to view leadership more unfavorably compared to those who meet with their managers regularly.

**Lastly, managers are engaged at work, too.** The disengagement rate of employees reporting to disengaged managers is up to two times higher than for those reporting to engaged managers. This further reinforces the Gallup finding that managers have a disproportionate impact on employee engagement scores, and that if companies are serious about improving their overall engagement, they would do well to begin with a focus on their managers.

Bad management is estimated to cost the U.S. economy up to $398 billion annually. Historically, the lack of objective data has made it difficult for companies to instrument the quality of their managers and therefore even more challenging to provide effective training and ongoing feedback loops to improve it. Our data is a start, highlighting some traits of good managers that are actionable on a daily basis. The opportunity is huge for better-run organizations and a higher quality of life for workers. In the future, it's a good bet that the most successful companies will continue be the ones with the best managers.

# SHINING STAR MARCH


Left to Right: Raja Wessel (Archway HR Manager), Trisha Salinas (Archway Receptionist), and Melody Towle (Sr. Staffing Specialist, Peoplelink).

Peoplelink is pleased to announce that Trisha Salinas has been chosen as our March *Shining Star* employee. Trisha is the Receptionist at Archway. She reports to the South Bend, Indiana Peoplelink branch.

Trisha has worked for Archway through Peoplelink since July of 2016. She handles all incoming calls, sets appointments, helps with client services' assignments, and organizes company activities. Trisha assists Peoplelink with setting up contingent employees in the Archway computer system, making badges, and directing new contingent employees to their assignment location. According to her supervisor, Raja Wessel, Trisha has gone above and beyond in her role and is a true team player.

While on the job, Trisha enjoys being a go-to team member, performing every task to the best of her abilities. In her free time, Trisha enjoys comedy, sports, and spending time with family and friends.

Congratulations to Trisha for being Peoplelink's March *Shining Star* employee!

Find your shining star! Contact Peoplelink at 574.232.5400.

# HR News

## War for talent just got more difficult to manage: Here's why

*By Christian Schappel*

If you're in the market for top talent this quarter, news has come out about what you're up against — and none of it's going to make your job easier.

Several new reports have surfaced about what the job market looks like right now — and what it's likely to look like in the months ahead.

**Bottom line:** Expect the competition for top talent to be pretty fierce.

Some stats that paint the picture of what you're up against:

- About 40% of the nearly 2,400 HR pros and hiring managers **surveyed by CareerBuilder** recently said they plan to hire full-time employees in 2017. That's up from 36% last year — and it's a 10-year high for the survey.
- The CareerBuilder survey also revealed 66% of employers plan to increase salaries on initial job offers (with 30% increasing offers by 5% or more).
- A survey that was just released by **Business Roundtable** revealed 41% of CEOs plan to increase hiring in the next six months, up from 35% in the fourth quarter.
- A long-running employment outlook survey of 11,000 U.S. employers revealed employers have the strongest second-quarter outlook since 2009, with more than one in five companies planning to increase staffing in the second quarter.
- Not only will competition for talent be high, but also it looks like it's getting harder to retain top talent, as private **payroll processor ADP** released estimates that about 500,000 U.S. workers left one job for another in the fourth quarter of 2016, up from 406,000 in the same period in 2015 and 365,000 two years ago.

## Older Workers Prop Up Labor Market, Even as Waves of Baby Boomers Retire

*By Joseph Coombs*

Older workers are helping to keep the labor force participation rate afloat even as large numbers of Baby Boomers leave the workforce for retirement, new research shows.

The labor force participation (LFP) rate, or the percentage of people who are employed or actively looking for work, has been near 63 percent for the past few years, down from 66 percent at the dawn of the Great Recession, according to data from the U.S. Bureau of Labor Statistics (BLS).

One reason for that decline is assumed to be the large number of Baby Boomer retirements. But in a Feb. 6 analysis for the Federal Reserve Bank of Atlanta, bank economist Ellyn Terry writes that retirement rates actually "ticked down" between the fourth quarter of 2015 and the fourth quarter of 2016.

Delayed retirement "completely offset the effect of [an] aging population," Terry wrote. The LFP was 62.8 percent in the fourth quarter of 2015 and 62.7 percent in the fourth quarter of 2016, according to Terry's report. The data show that although actual retirements dropped the LFP by 0.15 points in the fourth quarter of 2016 compared with the fourth quarter of 2015, delayed retirements boosted the LFP by 0.15 points during that same period.

Terry argues that the labor market has

actually shown strength in the face of Baby Boomers' influence on the LFP.

The proportion of people who are employed or actively seeking work "has been essentially flat," Terry said, "which is striking because there is a powerful demographic trend—an aging population" that should be pulling that percentage down.

Other data from the BLS show that mature workers have had plenty of success finding and staying in jobs. The unemployment rate for workers ages 55 and older was 3.4 percent in February, far below the overall rate of 4.7 percent for the month and down from 3.8 percent in February 2016.

There were 34.9 million 55-and-older workers in the U.S. labor force in February, up from 34 million in February 2016, according to BLS data. Meanwhile, workers ages 55 and older will constitute nearly one-fourth (24.8 percent) of the labor force in 2024, up from 21.7 percent in 2014 and 15.6 percent in 2004, according to the BLS.

In some cases, employers may be holding onto older workers to retain their highly valued skills, said Tim Driver, CEO of RetirementJobs.com, a website that matches companies with older workers seeking employment. However, there is another cost-saving advantage to having a mature workforce, he said.

"To the extent employers make a concerted effort to attract and retain older workers, the main driver is not fear of losing skills," Driver said. "It is longer tenure. Tenure of workers age 50-plus is three times longer than workers under age 50. Young adults are prone to changing jobs. They're not bad people, of course. They're determining what career is right for them, so they're less likely to settle in and stay.

"On the flip side, employers enjoy a 'turnover advantage' with older workers, saving them tremendous sums of money in hiring, onboarding and training."

Research from the Society for Human Resource Management (SHRM) shows that many employers are recognizing the value of a mature workforce. In addition to having more experience, older workers

CONTINUED ON NEXT PAGE

## HR News

CONTINUED

were cited by 71 percent of HR professionals as being "more mature/professional" than younger workers, according to SHRM's Preparing for an Aging Workforce survey, conducted in 2014 and sponsored by the Sloan Foundation. The survey collected responses from 1,913 HR professionals, 70 percent of whom also said that older workers had a "stronger work ethic" than younger employees.

Low unemployment among those ages 55 and older is primarily a function of workers' needs, said Jim Seith, a senior director at the National Council on Aging, an Arlington, Va.-based nonprofit that advocates for those ages 60 and older.

"I think it says that many older workers must work to pay bills, especially health care, so they are more likely to stick it out," Seith said. "Of the small and shrinking percentage of older workers who can afford to fully retire, some work because they want to stay active and involved."

# FMLA violations: Expect double damages to be new normal, ruling says

*By Jared Bilski*

As if you needed another reason to double-check your managers' Family and Medical Leave Act (FMLA) training. Still, a recent court ruling just gave employers a pretty big one.

In a nutshell, the court said if a company winds up guilty of an FMLA violation in court, it'll most likely have to fork over double damages.

That's the takeaway from ***Crain v. Schlumberger Technology***, an FMLA ruling that essentially said if an employer is found guilty of violating the FMLA, it will have to pay the jury verdict as well as an additional amount equal to that figure in liquidated damages — aka, "double damages."

## BAD TIMING

In the case, an employee who'd been selected for a reduction-in-force (RIF) let the company know he needed to have surgery and would miss some work time (*Note: The decision to include him in the RIF was made prior to him even knowing he needed surgery*). Although he didn't specifically mention the FMLA, he did ask about the availability of short-term disability.

The company had planned to terminate the employee in March, but expedited his termination in February as a result of the surgery disclosure.

That prompted the employee to file an FMLA interference claim.

## THE RULING

A jury ruled that the employer had, in fact, interfered with the employee's FMLA rights and awarded him liquidated damages.

Under the FMLA, liquidated damages will be assessed unless the employer can show it tried "in good faith" to abide by the law.

The company tried to argue that the court shouldn't double the jury's original verdict award of $77,000 with the liquidated damages add-on. But the court affirmed the jury's verdict and liquidated damages award.

It said in all but the rarest of cases, if an employer violates the FMLA, it's likely to pay liquidated damages. That's because, according to the ruling, employers bear a "substantial burden" to prove good faith and overcome the "presumption of entitlement to liquidated damages."

To prove good faith, an employer must show it:

- acted with a subjective intent to comply with the FMLA, and
- acted objectively reasonable in its application of the FMLA.

The court said that even though the employer in this case had an FMLA policy in its handbook and reviewed the list of employees selected for the RIF to see if any had specifically requested FMLA, the employee here had mentioned short-term disability. Therefore, the company's failure to consider the potential application of FMLA was not reasonable.

**RESULT**: double damages.

# OSHA's Drug-Testing Rules Raise Challenges for Employers

*By Lisa Nagele-Piazza, SHRM-SCP, J.D.*

The Occupational Safety and Health Administration (OSHA) put controversial anti-retaliation provisions in its electronic record-keeping rule that some employers and their attorneys oppose. However, whether the agency's interpretation of these rules will survive the new presidential administration is unknown.

OSHA wants to prevent employers from discouraging or deterring workers from reporting workplace injuries and illnesses. The agency issued guidance explaining that certain safety incentive programs and blanket post-accident drug tests would likely deter reporting and would therefore violate the retaliation rules.

Speaking on a panel at the American Bar Association's Occupational Safety and Health Law Midwinter Meeting recently, Howard Mavity, an attorney with Fisher Phillips in Atlanta, said he's not too concerned about the limitations placed on safety incentive programs.

"Safety professionals hate these incentive programs because in some ways they are based on chance and don't alter behavior," he said, adding that a good program rewards behaviors that actually make a difference, like completion of effective training programs.

The drug-testing rules, however, are more problematic, he noted.

OSHA had said that employers should limit post-accident drug tests to situations where drug use likely contributed to the incident and for which a drug test can accurately show impairment caused by drug use.

The guidance talks about a few situations in which drug testing would likely deter reporting, said Douglas Parker, the executive director of Worksafe in Oakland, Calif. Worksafe advocates for improved health and safety laws, as well as remedies for injured workers.

"A classic example would be that employees are drug-tested whenever there's an injury," he said. "That's going to be suspect."

He said OSHA's position boils down to this: There must be a reasonable possibility that drug use was a causal factor in the incident.

Mavity said one problem with OSHA's position is that science hasn't meaningfully advanced in the last 30 years to measure drug impairment in the same way alcohol impairment can be measured.

Tests only show whether a drug is present in the person's body—not whether a drug has prevented the person from working safely.

Mavity noted that researchers have estimated that improved drug tests may be two years away.

Another issue with OSHA's position is that front-line supervisors may now have to be trained on how to recognize an impairment and determine whether drug use may have contributed to an accident, he said. "That's a nightmare."

## The Rule's Fate

Enforcement of the anti-retaliation provisions began on Dec. 1 after an unsuccessful attempt by business groups to obtain a preliminary injunction that would have temporarily delayed enforcement.

Lawsuits challenging the rules are still pending in Texas and Oklahoma.

For now, OSHA's position is the law of the land, Mavity said.

He doesn't see the restrictions on drug testing surviving the challenges, though. The regulation itself simply prohibits employers from having procedures in place that discourage workers from reporting injuries and illnesses. The rest is just the agency's interpretation, he said.

He noted, however, that many employers have already decided to change their policies to comply with OSHA's interpretation.

Ann Rosenthal, associate solicitor for occupational safety and health in Washington, D.C., said she has no idea if the rule will survive. OSHA has over 40 open investigations into possible violations of the anti-retaliation provisions.

"None of those investigations have been concluded so there are no results yet," she said, although she noted that she suspects some violations will be found.