

**Baker
McKenzie.**

■ THE RISE OF THE
**MODERN
WORKFORCE**



The rise of the modern workforce

What is the modern workforce?

The modern workforce includes all staffing models that fall outside the traditional employer-employee relationship. It is a more flexible and global workforce consisting of freelancers, temps, agency workers and crowd sourcing.

This modern workforce is evolving as the pace of technological change and need for agility increase — it is estimated that 1.3 million people are currently engaged in the “gig” economy in the UK,¹ while 31 million workers in the US are predicted to be contingent by 2020.²

Why are global businesses embracing the modern workforce?

Technological and digital advancements offer businesses many benefits, such as increased flexibility, reduced costs, reduced administrative burdens and quick access to high-level talent. Increasing numbers of highly skilled individuals have embraced freelance working and can be engaged “on the fly” to fulfill critical job functions.

Indeed, the competitive business world doesn’t want to stop there, declaring a war on “friction,” which basically means the desire to remove any obstacles in the way of maximizing customer satisfaction and operational efficiency.

The desire for a so-called “frictionless environment,” however, comes with challenge and risks. For example, social and political pressure to increase employment protections for individuals working in the “gig economy” is growing, and we are seeing governments taking steps to regulate and protect in this area.

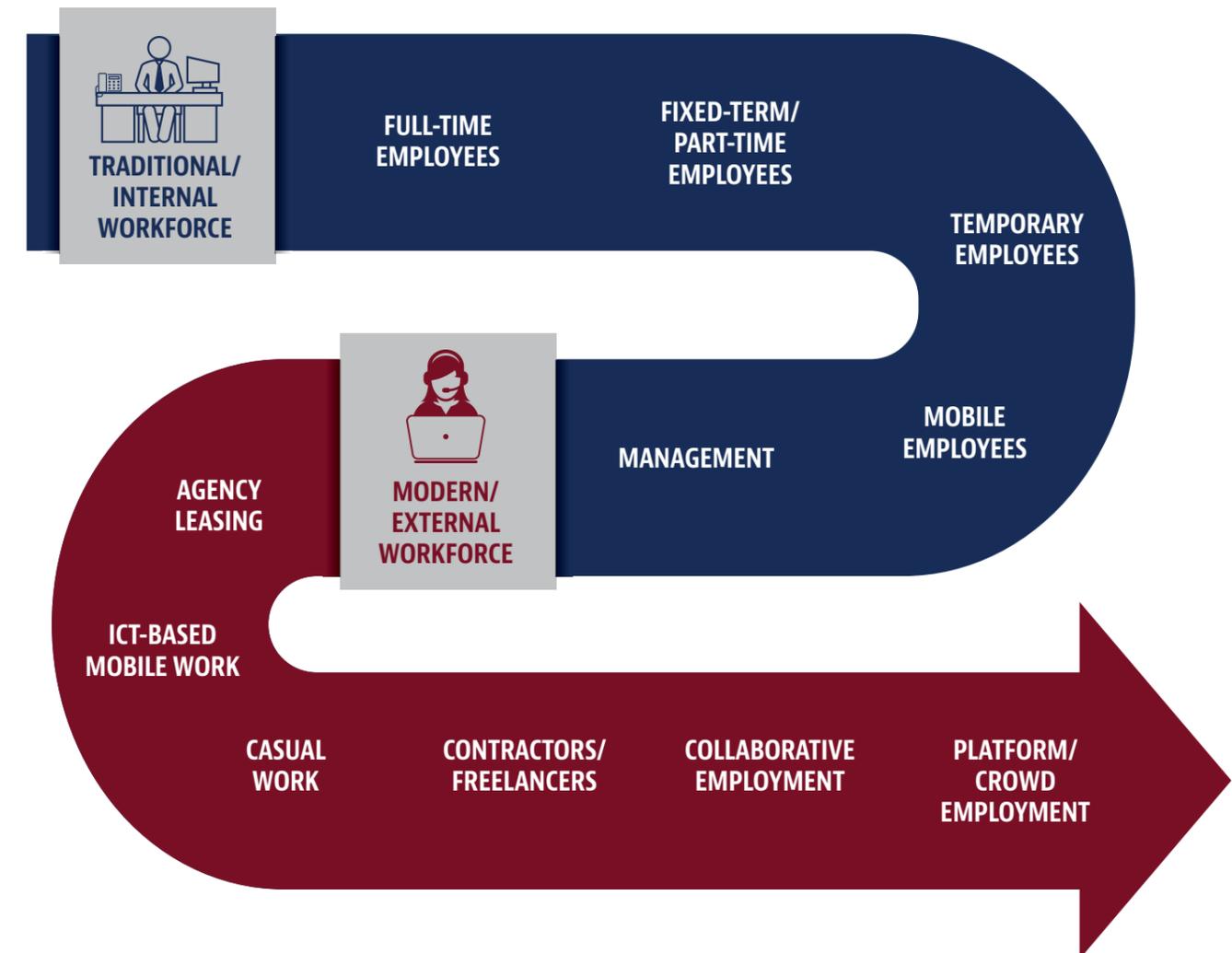
Creating a fit-for-purpose workforce while protecting your business requires knowledge across many areas of regulation, including employment, remuneration and benefits, mobility, data privacy/protection, tax and protection of confidential information/trade secrets. Nevertheless, the rewards of adopting new staffing models, be it crowd working, employee sharing, fixed-term staffing or other such models, can be considerable.

1 <https://www.cipd.co.uk/knowledge/work/trends/gig-economy-report>

2 <https://gigeconomy.ey.com/Documents/Gig%20Economy%20Report.pdf>

How the world works is changing

We are all under ever-increasing internal and external pressures to adopt modern working methods and to embrace alternatives to traditional workplace models.



Modern workforce models being used by global businesses



Platform/crowd employment

Where an online platform matches businesses with specific needs to workers with the appropriate skills — with larger tasks, the work is often split among a number of people drawn from a "virtual cloud" of workers.



Collaborative employment

Where a group of freelancers or small organizations might club together creating the scale to offer services to much bigger clients.



Contractors/freelancers

While these models are not new, the size and scale of businesses' deployment of these models is growing.



Casual work

Where the employer is under no obligation to guarantee work but can call on workers on demand, say, at times of peak production or activity. This is a common feature in a number of jurisdictions with most national regulations including some level of protection in terms of pay rates or minimum hours.



ICT-based mobile work

Where workers can do their job from any place at any time, supported by modern technology. This is common in certain sectors like IT, but could be further adopted across a wide variety of sectors.



Agency/employee provision/leasing

Where employees are retained by a professional employer organization or company for them to work for the organization's client or business.



Portfolio work

Where a self-employed, often highly skilled individual completes work for a number of clients.

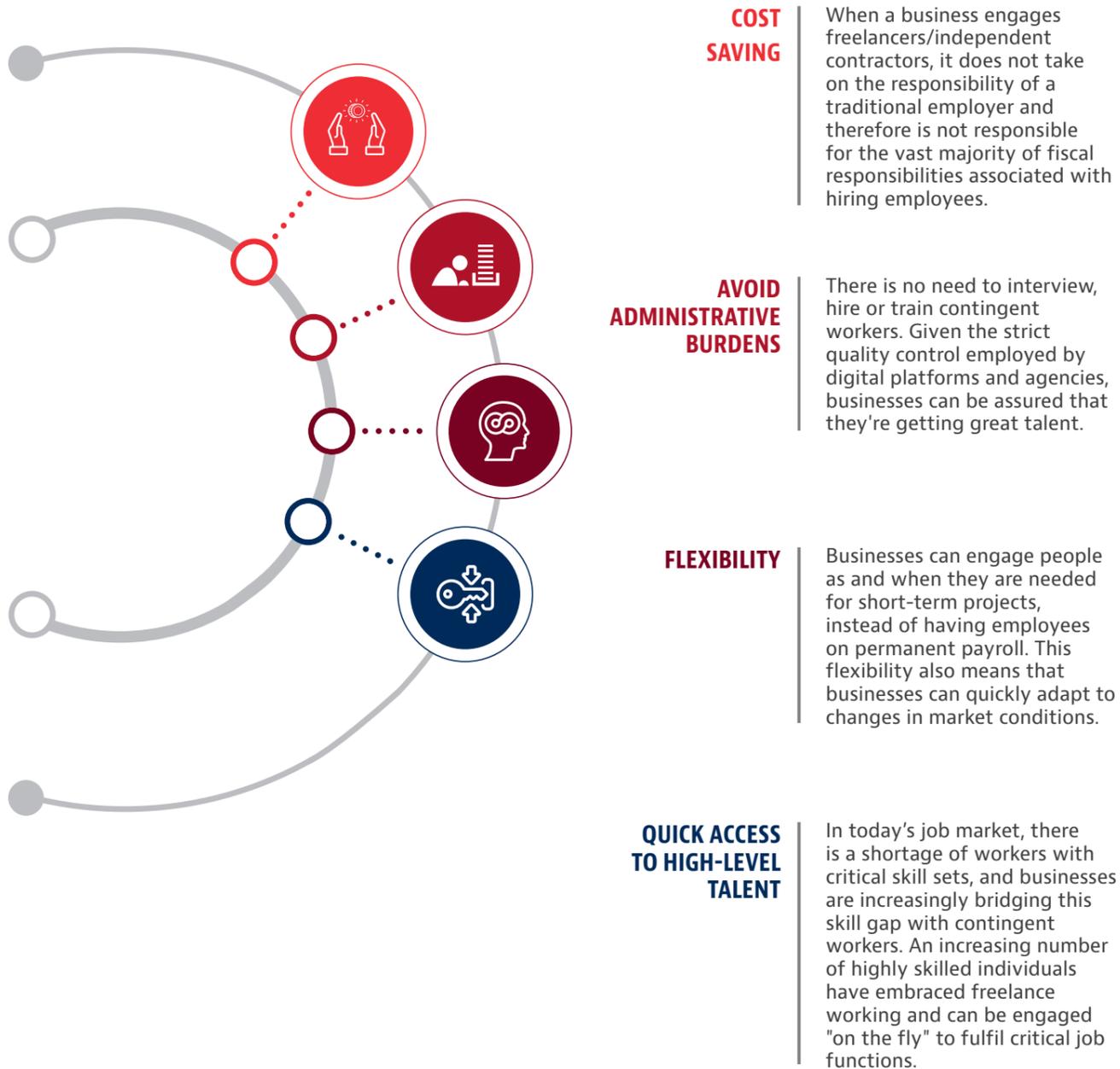


Mobile contingent workers

Individuals who are engaged as contingent workers under temporary, part-time or "independent" positions and who are deployed to other countries to fill short- or long-term engagements.

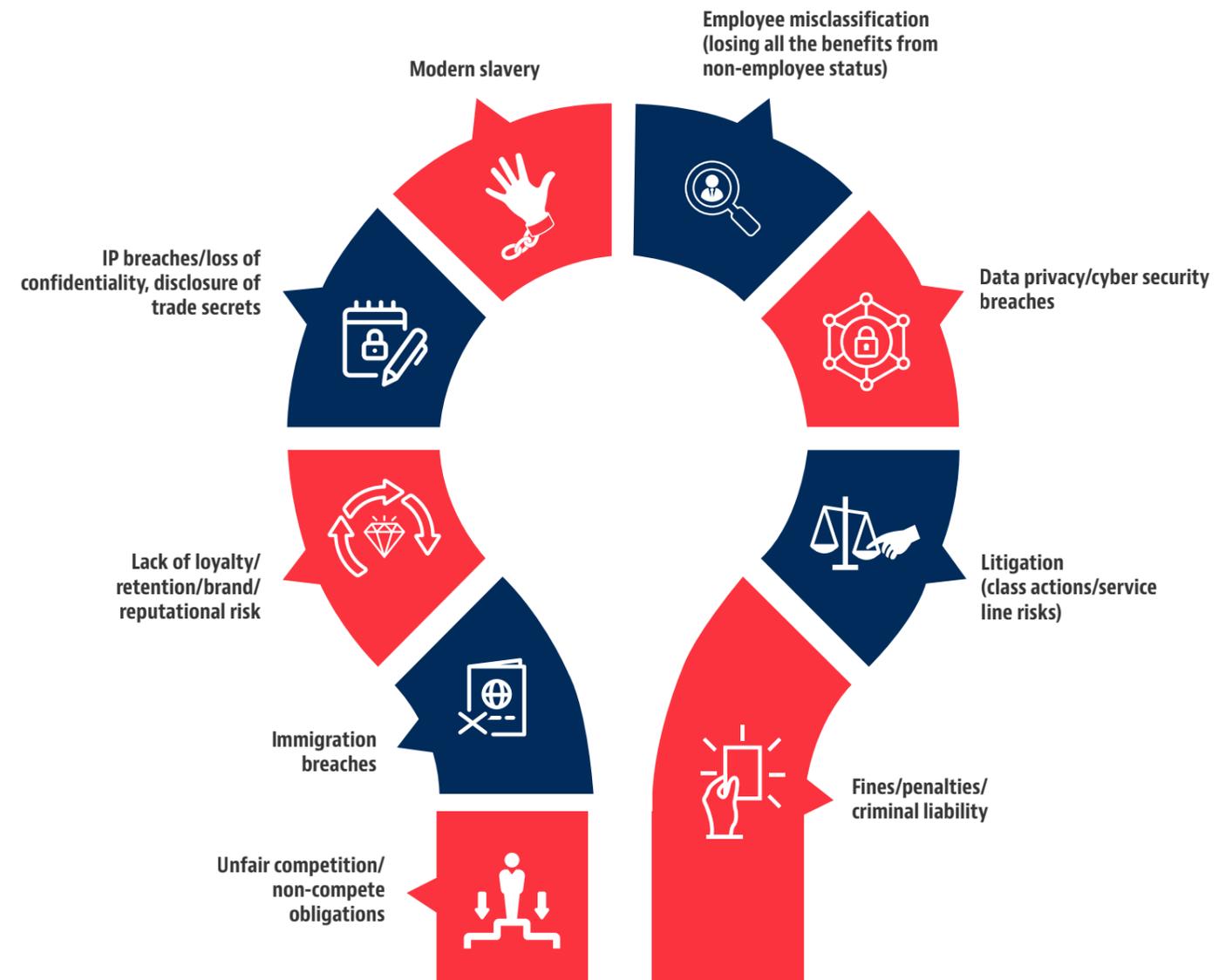
What are the benefits of the modern workforce?

We are seeing clients being excited by, and looking to better understand, the rewards which non-traditional models can bring.



Risks and challenges facing global businesses

Businesses want to know how far they can go within existing legal frameworks, and are naturally wary of the risk factors which new models may bring.



Minimizing misclassification risk

Misclassification risk

Global businesses need to manage the risks posed by the rise of the modern workforce, one of the most significant being misclassification. The "employee/worker" versus "self-employed" debate has raged on in numerous lawsuits worldwide, with individuals seeking labor protections, additional benefits and the right to legally unionize. In the US, some of the big players have been hit with multimillion dollar settlements, while in the UK companies have been forced to grant additional rights to their workforce. In Germany, dawn raids are par for the course in investigating possible cases of misclassification, and the sanctions are severe. Recent reform there has restricted the use of temporary agency workers and increased sanction in case of bogus self-employment and illegal temporary agency work. Elsewhere in Europe and in Latin America, misclassification of employees carries significant sanctions and liabilities.

What should businesses do to minimize misclassification risk?

To minimize the misclassification risk (that is, the risk that the individual will be viewed as an employee rather than as a bona fide independent contractor), it is critical to ensure that the individual is independent and operating business-to-business rather than employer-to-employee. Ideally, the services should be non-exclusive with a fee provided against invoices issued by the individual or their own independent organization.

If asked to determine the true legal nature of a relationship, courts in many jurisdictions will apply some form of an "overall impression" test, which often involves an examination of various factors, including, but not limited to, those set out in our "overall impression" test:



The "overall impression" test:

- 1 the degree of control exercised by the company engaging the services of an individual as a contractor
- 2 whether the individual performing the services provided their own equipment
- 3 whether the individual hired their own employees and whether the individual has clients other than the company engaging him/her
- 4 the degree of financial/economic risk the individual took
- 5 the degree of responsibility for investment and management the individual had
- 6 whether and how much the individual had an opportunity of profiting from sound management in the performance of the services
- 7 whether the individual was regarded as part of the company's organization or integral to the company's business
- 8 whether the company bore any responsibility in relation to insurance and tax for the individual performing the services, or whether the individual was otherwise provided with certain benefits as if he/she were an employee of the company
- 9 whether the individual performing the services was carrying on business in the trade in question and what the traditional structure of the trade or profession was
- 10 the parties' own views of their relationship

How the individual is referred to in any Consultancy Agreement, Contractor Agreement or Services Agreement is helpful in determining the relationship but is not determinative. Labor courts/authorities tend to look at how the relationship actually developed, even if it conflicts with the contents of the agreements.

How we can help you

By leveraging our global network of over 700 labor and employment lawyers across the globe, we can help businesses introduce and maintain optimal modern workforce arrangements within the constantly changing legal and commercial environment.

Our services include:

COMPLIANCE



We can advise you on modern workforce obligations by jurisdiction and on the likely developments globally. We can help identify countries with the highest reputational, regulatory, financial and employee relations risks of non-compliance.

AUDITS AND RISK MANAGEMENT



We can conduct global compliance audits to assess modern workforce risks in your business. We can advise and provide support to address the risks arising across multiple areas, such as employment, remuneration and benefits, mobility, data privacy, tax and protection of confidential information/trade secrets. Our audit service also enables us to provide practical advice to mitigate risks before a joint/related employer claim is brought.

LITIGATION AND CRISIS SUPPORT



Our experienced employment litigators can provide rapid counsel, support and resource planning for misclassification claims, class actions, taxation authority challenges, joint/related employer threats, criminal allegations, dawn raids and information security breaches.

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