



DRAFT A BLUEPRINT FOR SUCCESS IN A COVID-19 WORLD

Compensation, Benefit and Legal Issues Facing Construction Leaders

September 29, 2020



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Accounting • Tax • Business Insight



**Drewry Simmons
Vornehm, LLP**

ATTORNEYS

Today's Presenters



Christopher S. Drewry - Partner, Drewry Simmons Vornehm

Chris concentrates his practice in the areas of labor and employment and construction law. He has experience representing businesses in a variety of employment issues including general employment counseling, hiring, discipline and termination, drafting employee handbooks, personnel policies and employment contracts, handling EEOC and related claims, and instruction on wage and hour compliance



Daniel M. Drewry - Partner, Drewry Simmons Vornehm

Dan concentrates his practice in the areas of construction law and labor and employment law. He has experience representing all participants in the construction industry, including public and private owners, general and prime contractors and subcontractors. Dan assists his clients in all types of project delivery systems and performance and payment disputes, including project delays and impacts, constructive changes, and defaults, as well as contract drafting and negotiations.



Bradley J. Sack, CPA – Senior Manager, Barnes Dennig

Brad adds over 20 years of public accounting experience to the firm's assurance practice. Throughout his career, Brad has worked with a diverse group of companies ranging from small to large, domestic to international and privately held to publicly held, primarily in the construction, real estate, and service industries. Brad regularly consults with his clients on internal controls, the application of accounting principles as well as general business matters.



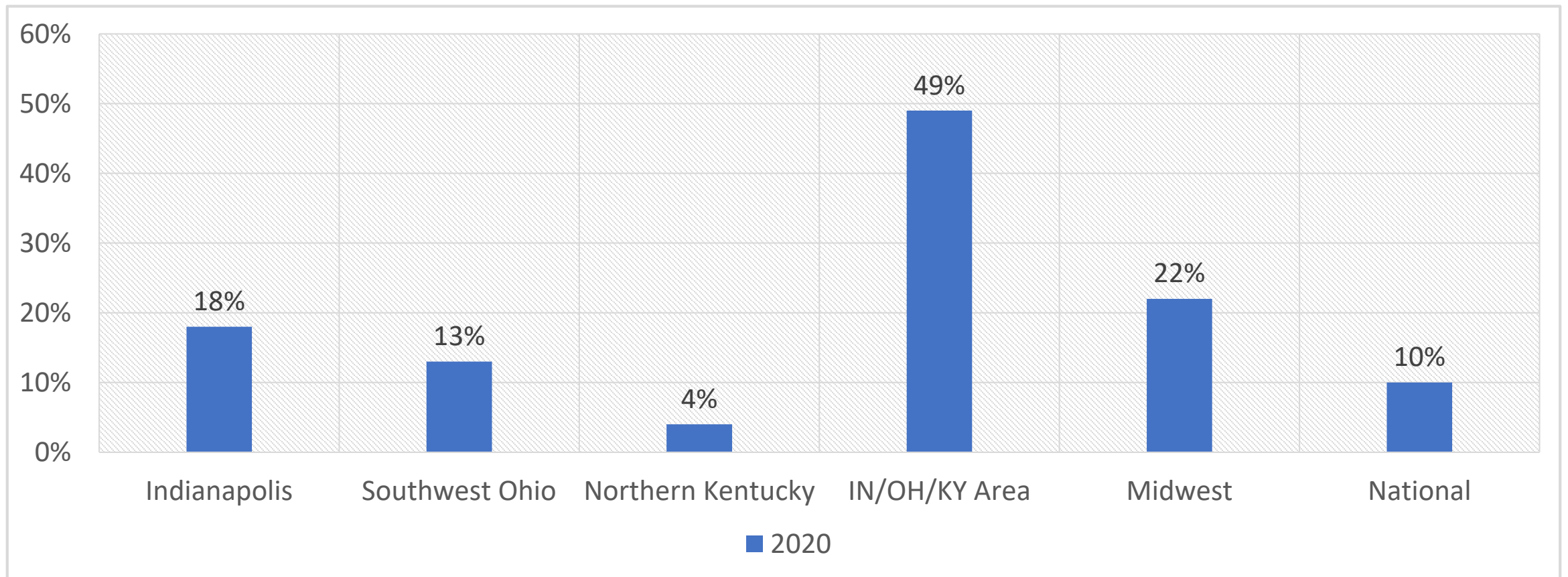
Contractor's Compensation & Benefits Study

The history of this study

- 198 different companies have participated in the study since the inception 19 years ago
- 118 specialty contractors, 77 general contractors
- 28 companies have participated in the last three consecutive studies
- 21 companies have participated in the last two consecutive studies
- 23 were new companies, participating for the first time
- 10 participated in 10+ studies
- 68 companies participated in the 2020 study; 31 general contractors and 37 specialty contractors

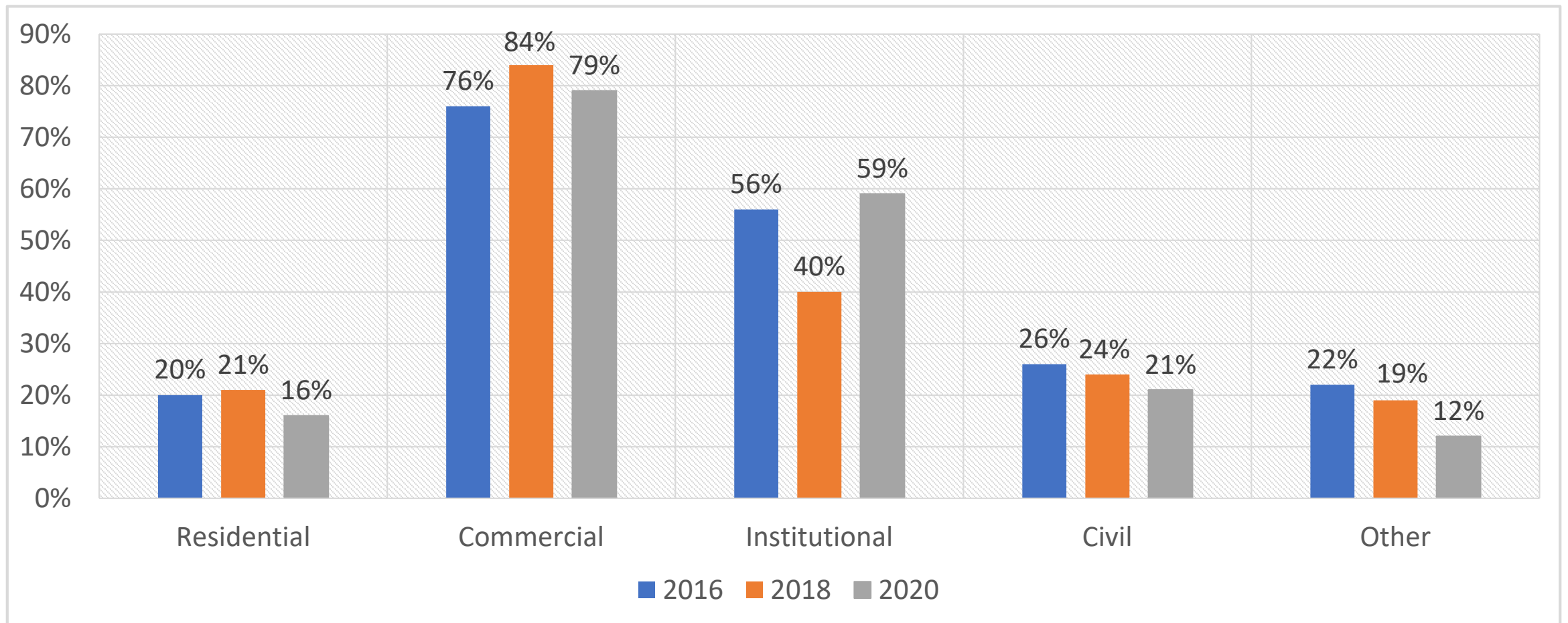
Geographic Market Coverage

Companies were permitted to select multiple regions

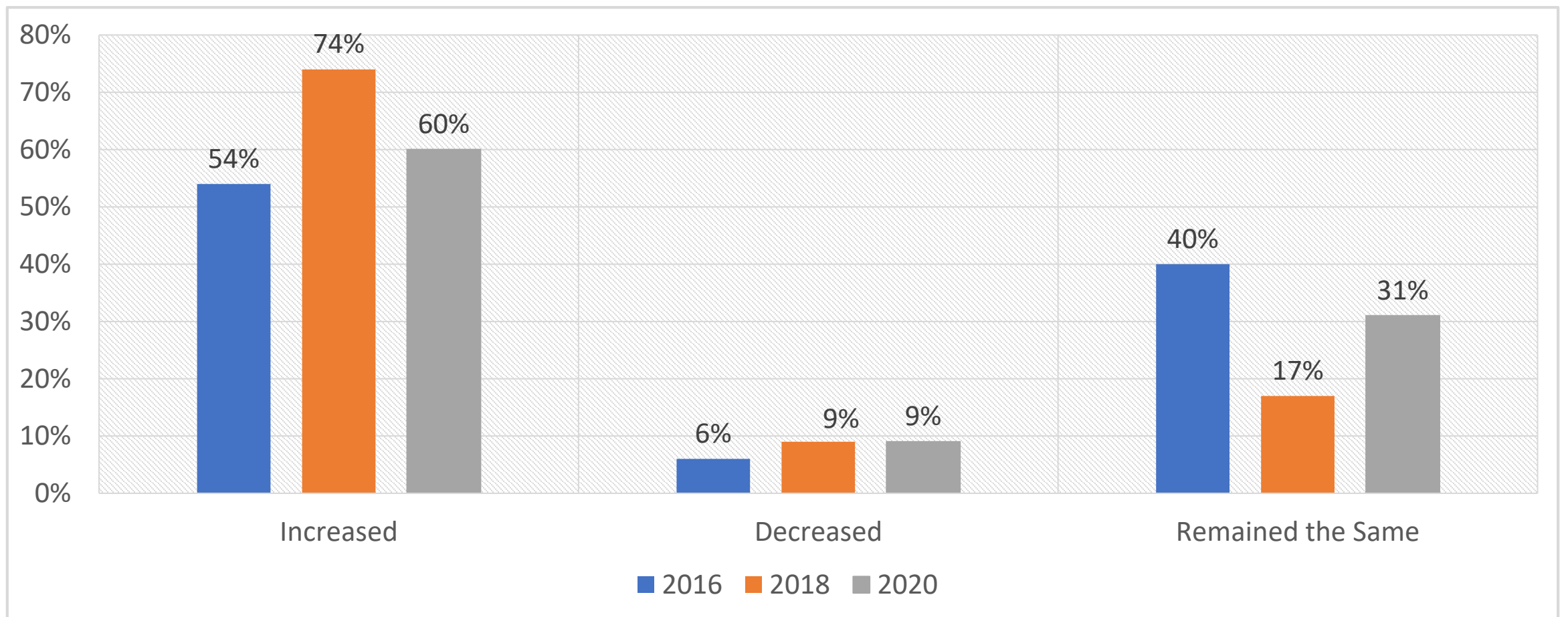


Primary Type of Construction

Comparative



Expected Future Employee Levels as of Q2



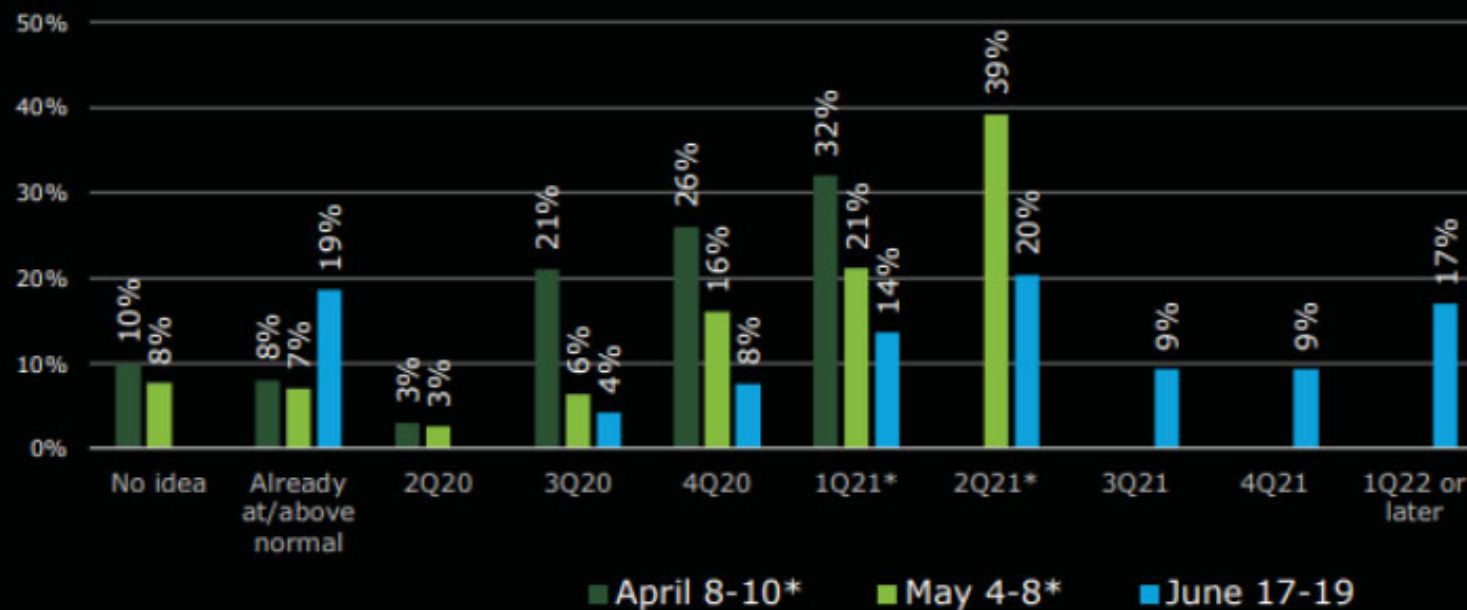


Poll Question

- Do you see the number of employees increasing or decreasing?
 - Increasing
 - Decreasing
 - Staying the Same

What is your best guess for when your company will return to a pre-crisis (or near-normal) level of operations?

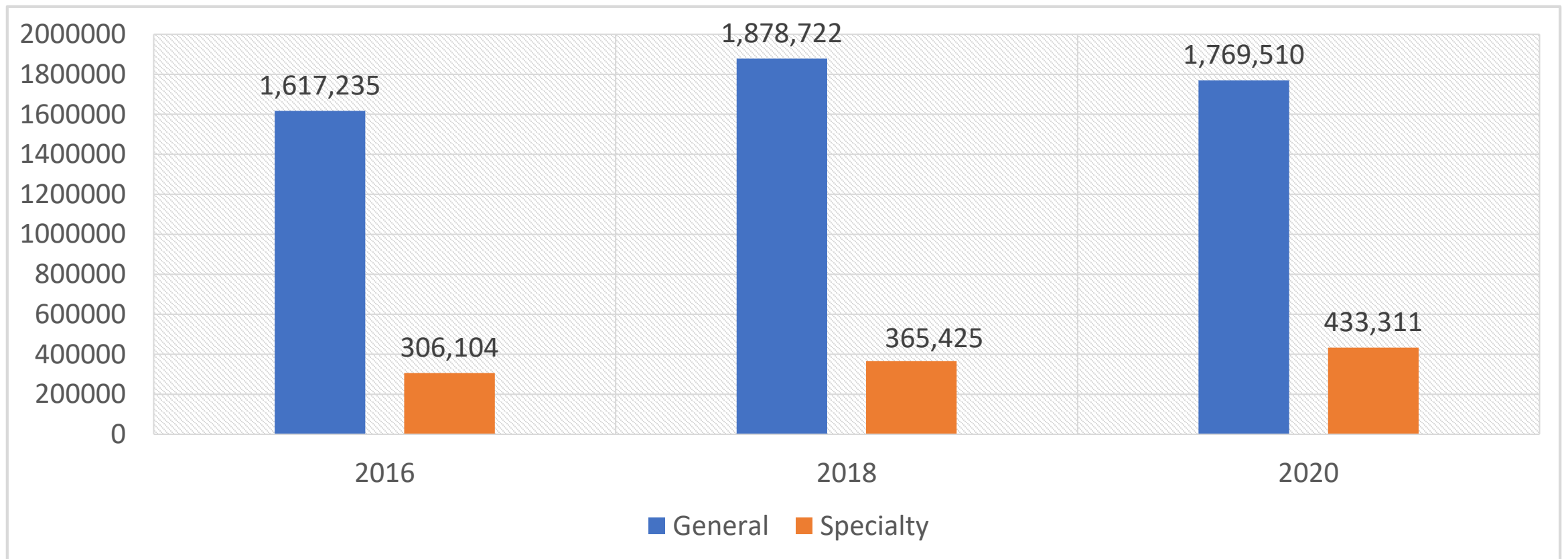
Nearly 20% of CFOs say they are already at or above pre-crisis operating levels, and another 12% expect to reach this milestone by the end of this year. Just over half say 2021, and 17% say 2022 or later.



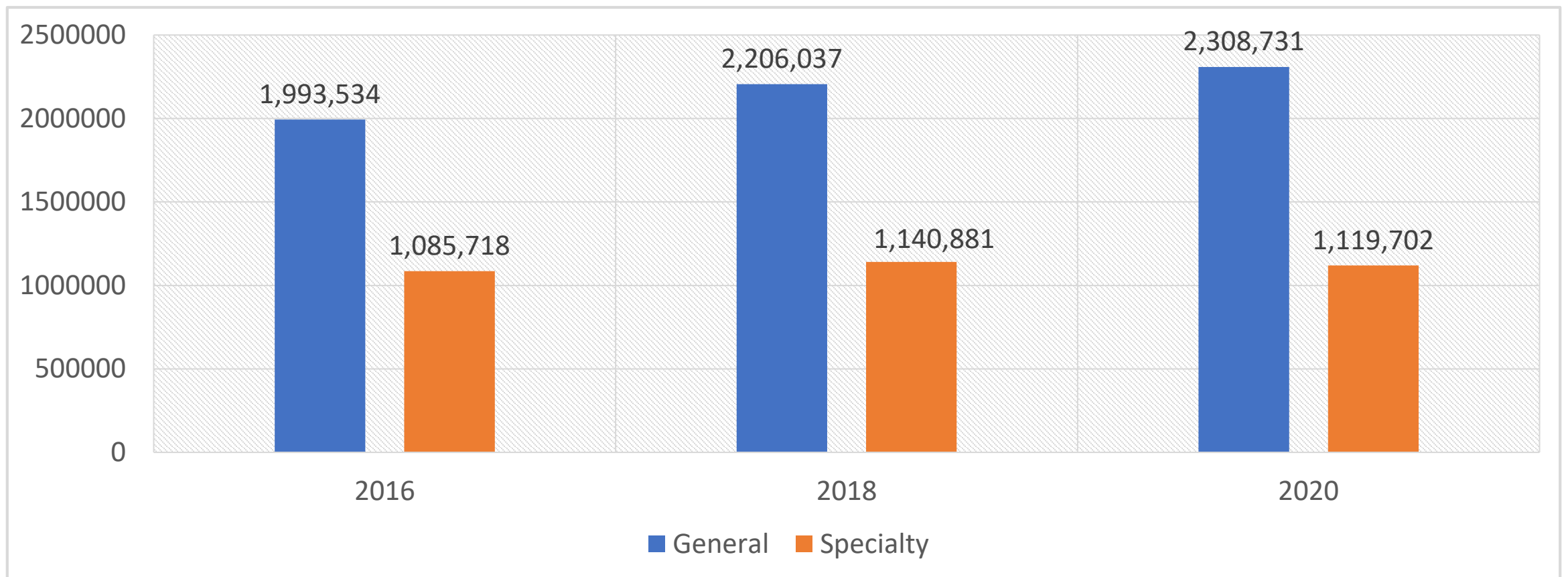
* For the April poll, respondents' options ended at 1Q21 or later; for the May survey, the options ended at 2Q21 or later.

Deloitte.

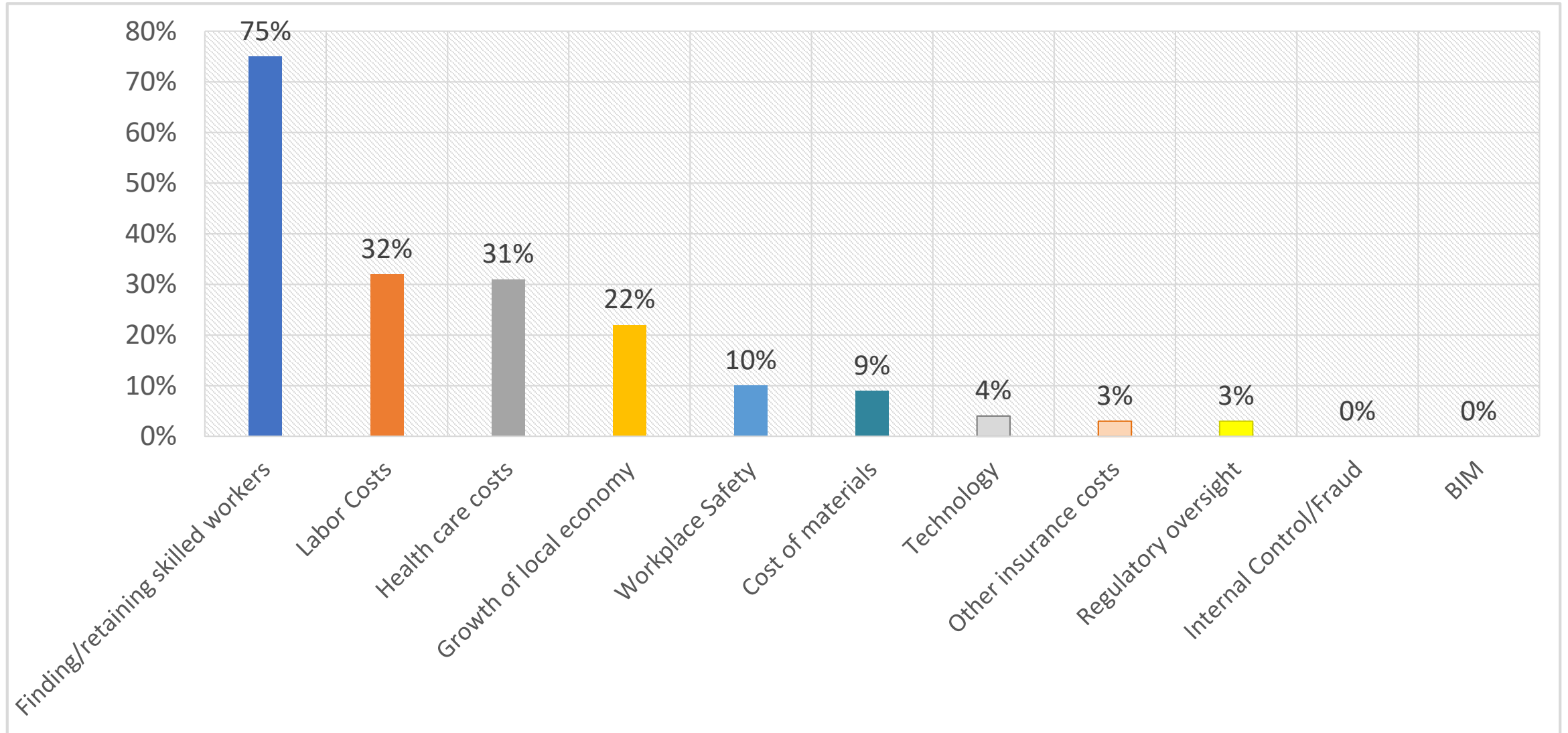
Gross Revenue per Field FTE Employee

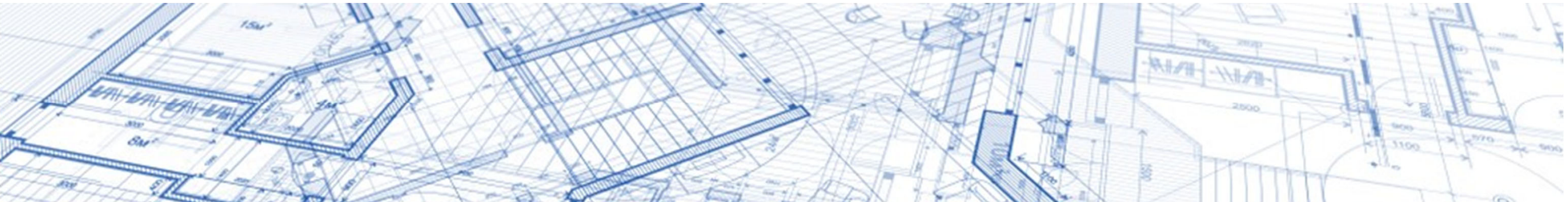


Gross Revenue per Non-Field FTE Employee



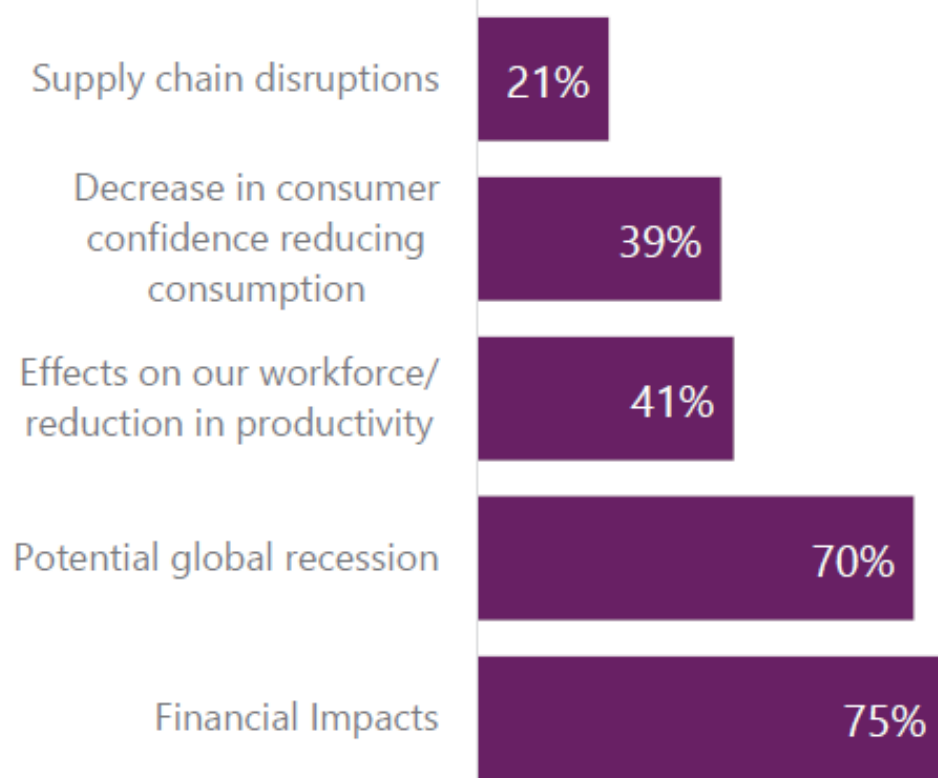
Top Operational issues Facing Contractors in 2020



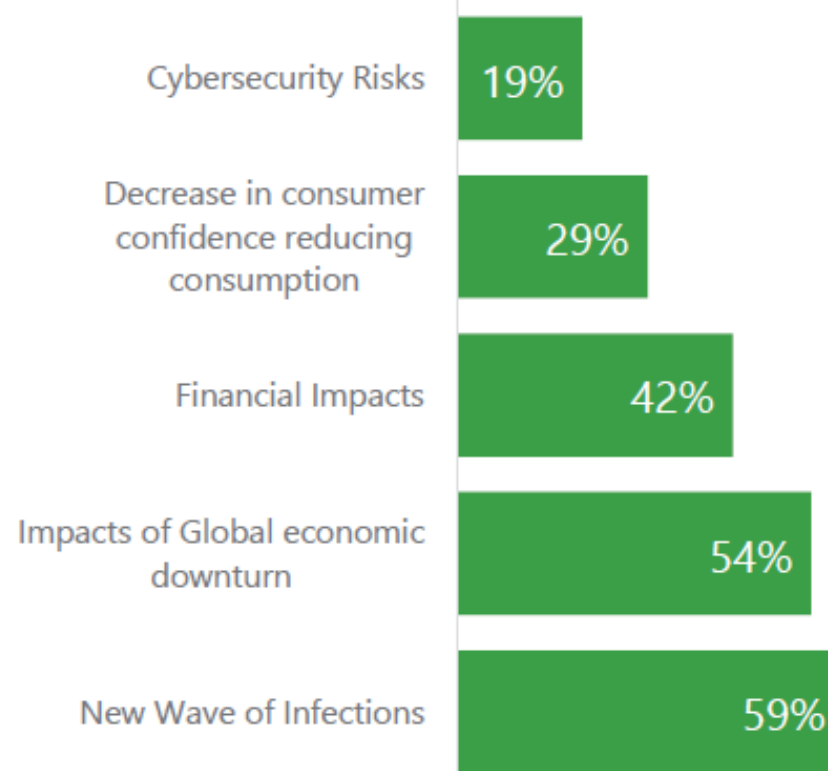


What are your top 3 concerns with respect to COVID-19? (Select up to three)

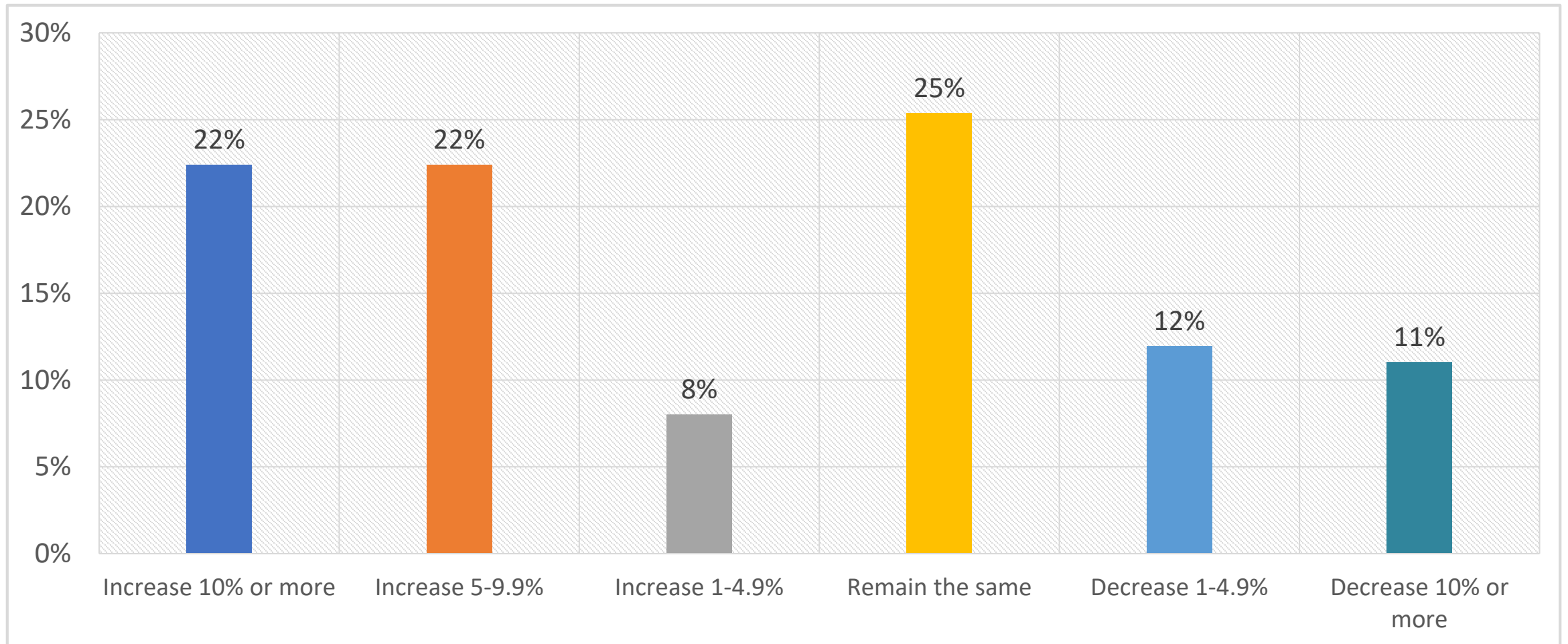
April 2020



June 2020



Anticipated Revenue Projections as of Q2 2020*



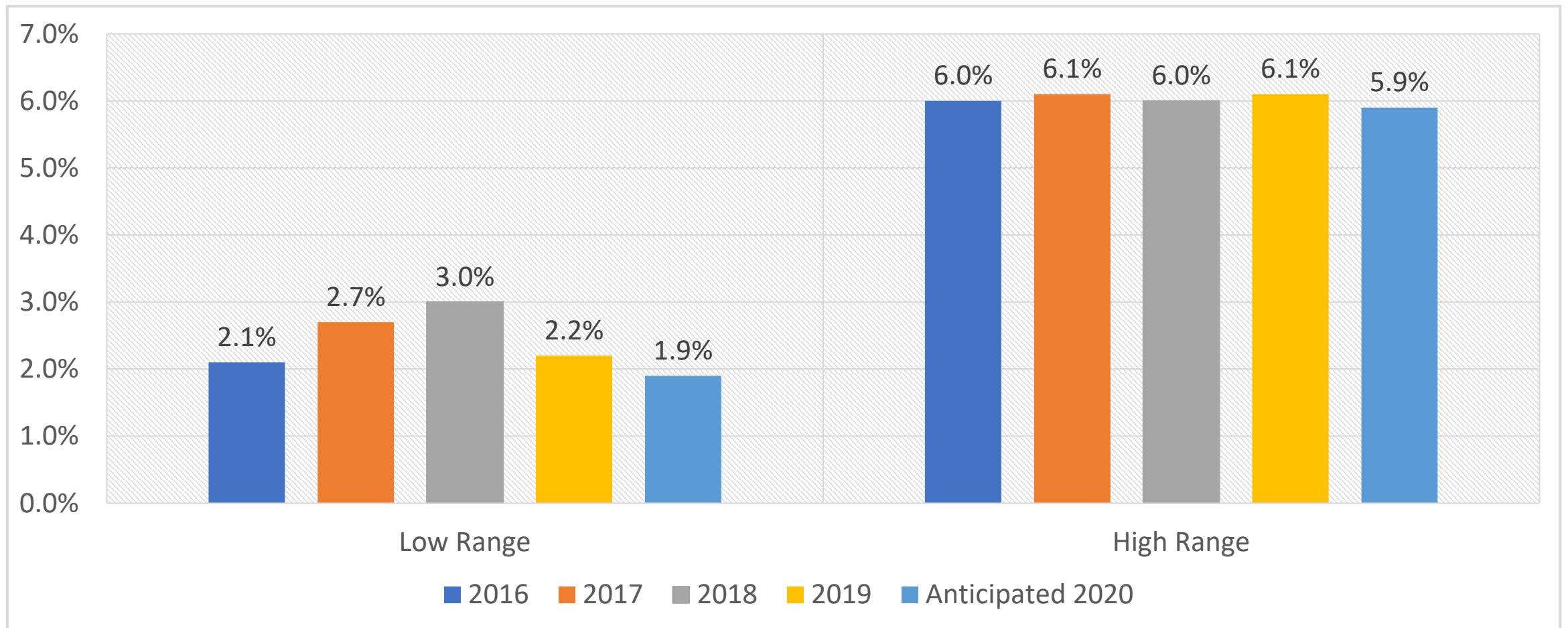
*Respondents were asked “Do you project your revenues from 2019 to 2020 to do the following?”



Poll Question

- What do you project your revenues from 2020 will do in the following the following 12 months?
 - Increase 15% or more
 - Increase 1-15%
 - Remain the same
 - Decrease 1-15%
 - Decrease 15% or more

Anticipated Changes in Pay

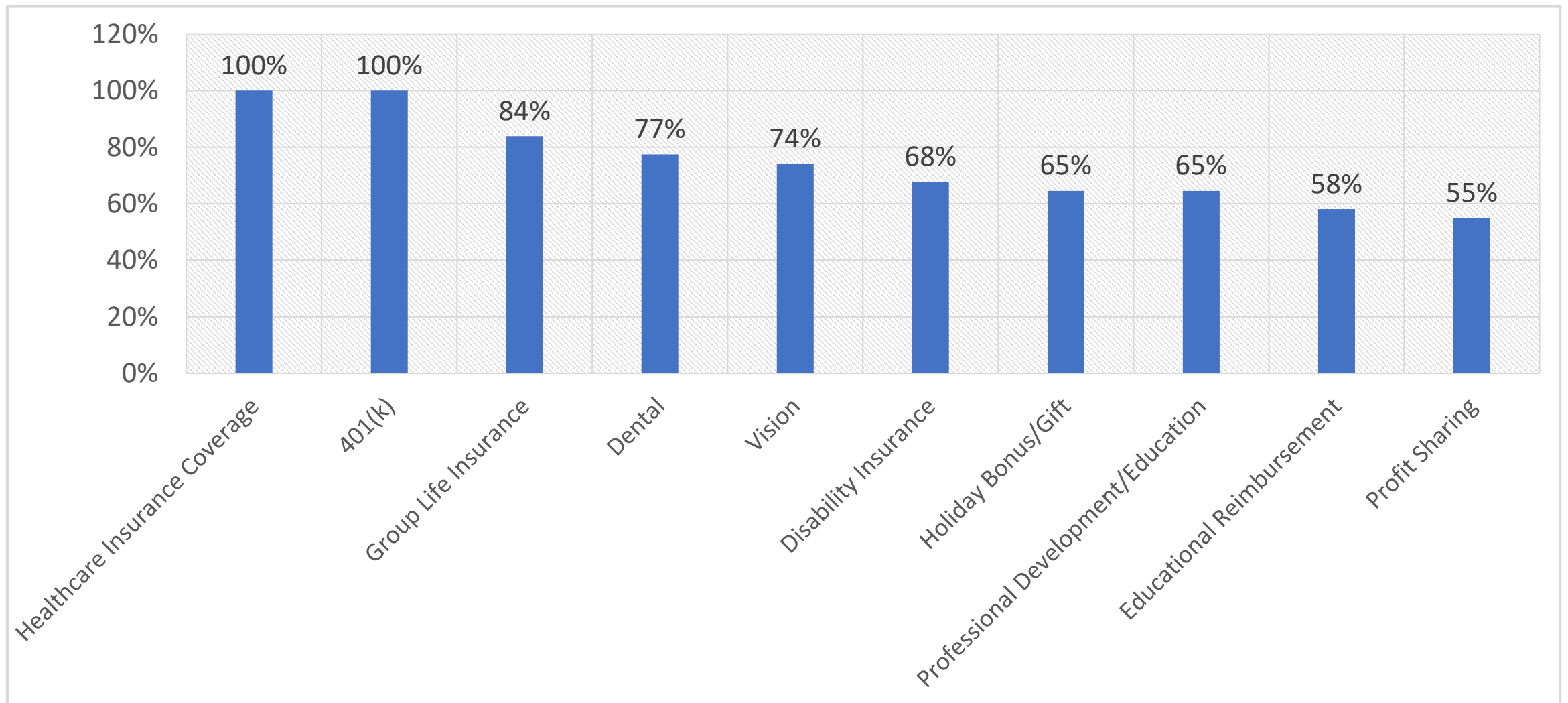




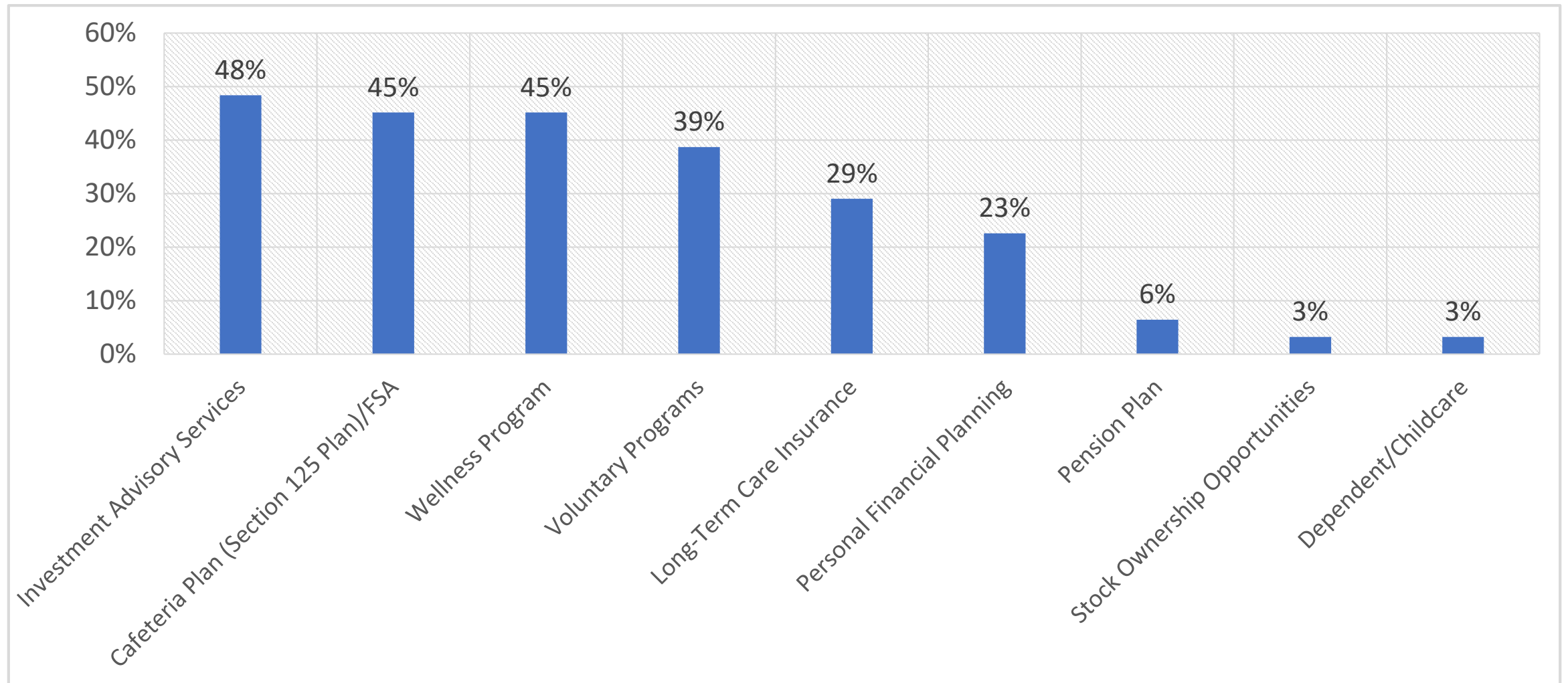
Poll Question

- Are you considering cuts to salary and bonus?
 - **Cuts to just Salary**
 - **Cuts to just Bonuses**
 - **Cuts to both Salary and Bonuses**
 - **Cuts to neither**

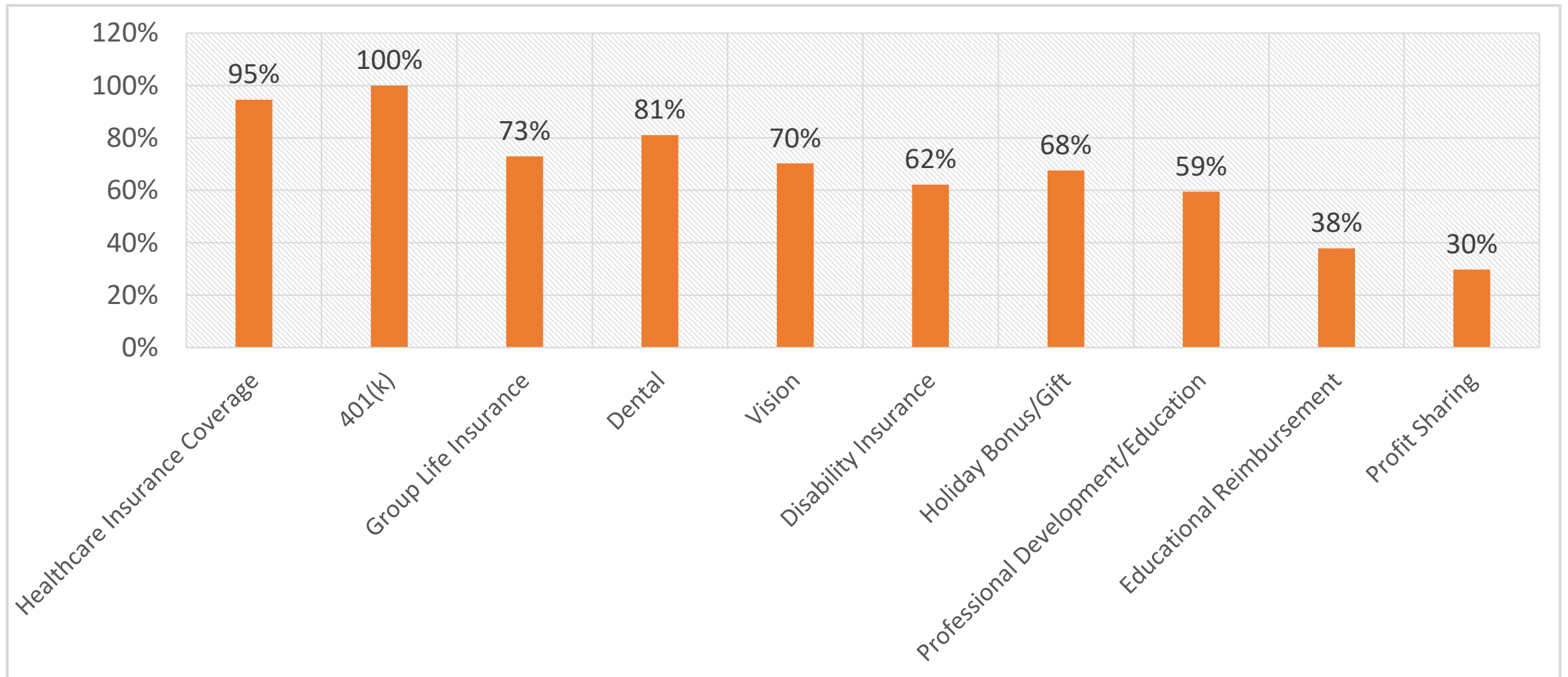
General Contractor Benefits Offered



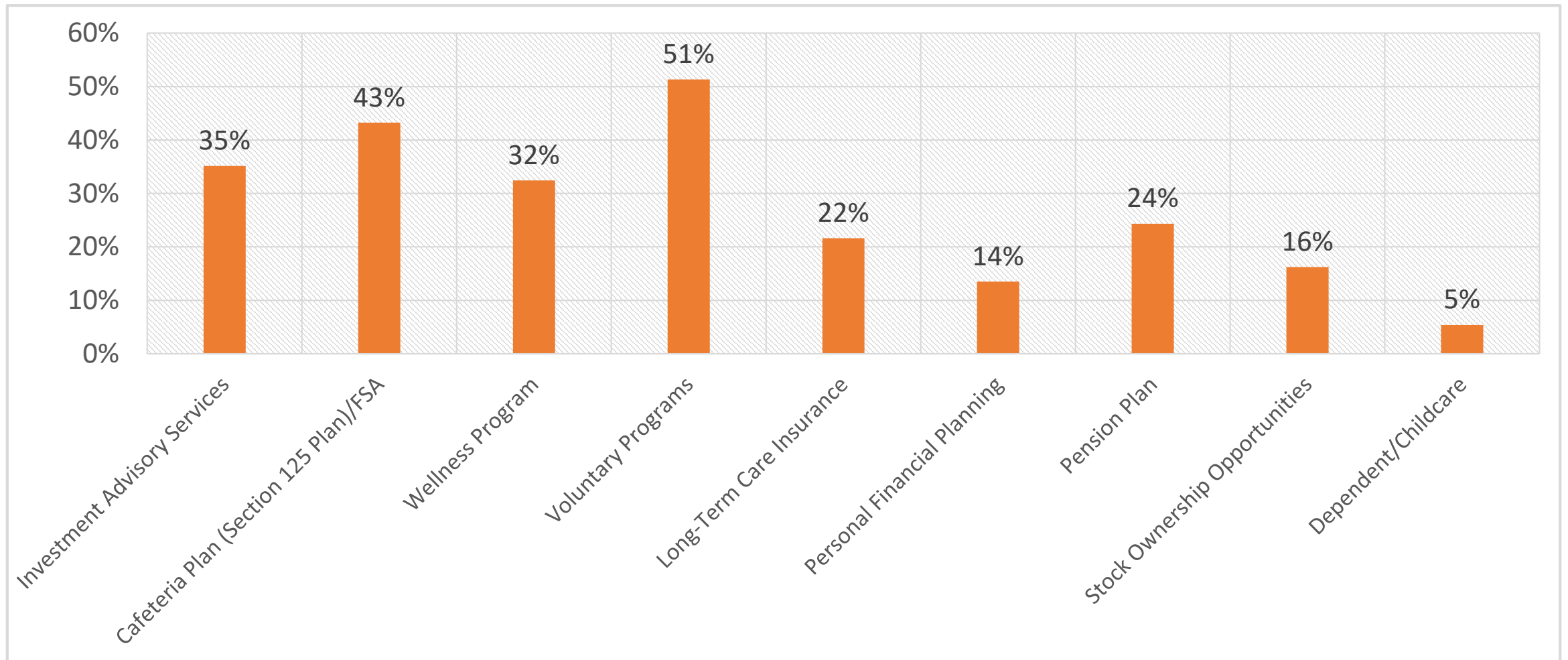
General Contractor Benefits Offered (Continued)



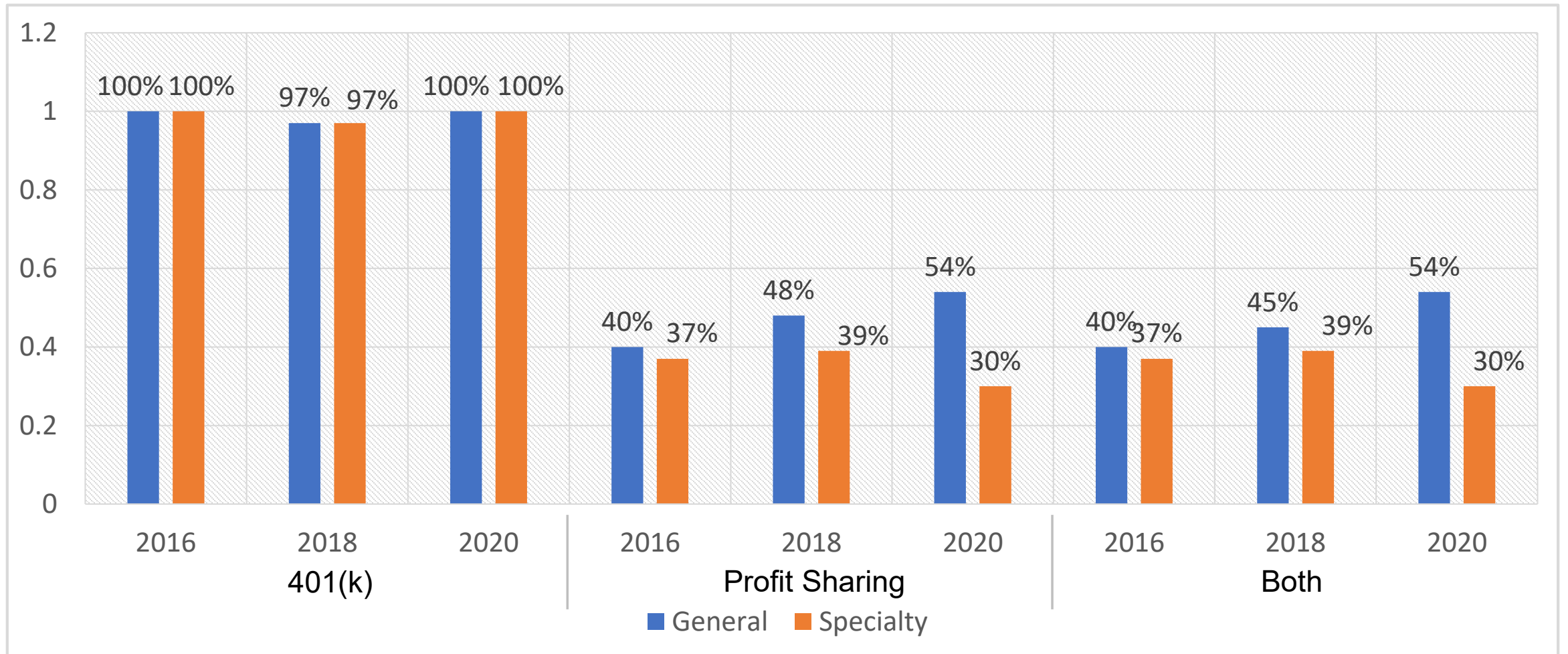
Specialty Contractor Benefits Offered



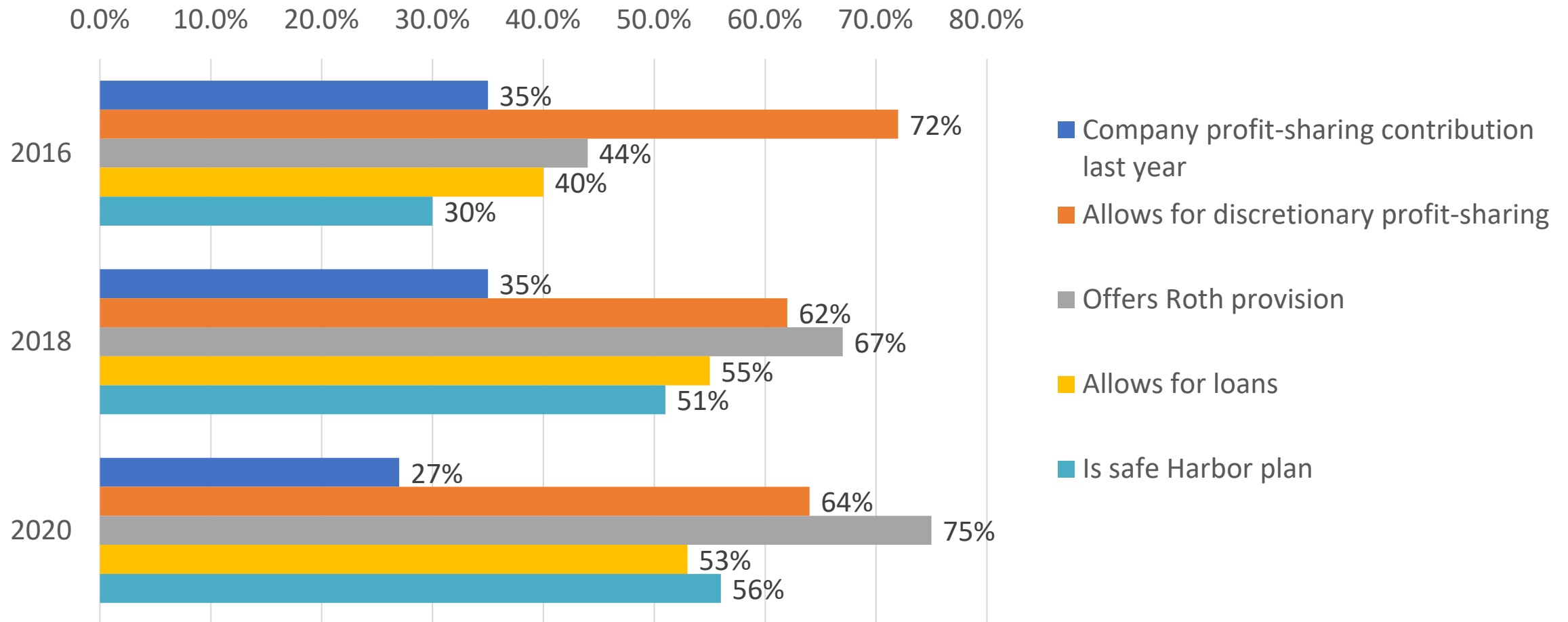
Specialty Contractor Benefits Offered (Continued)



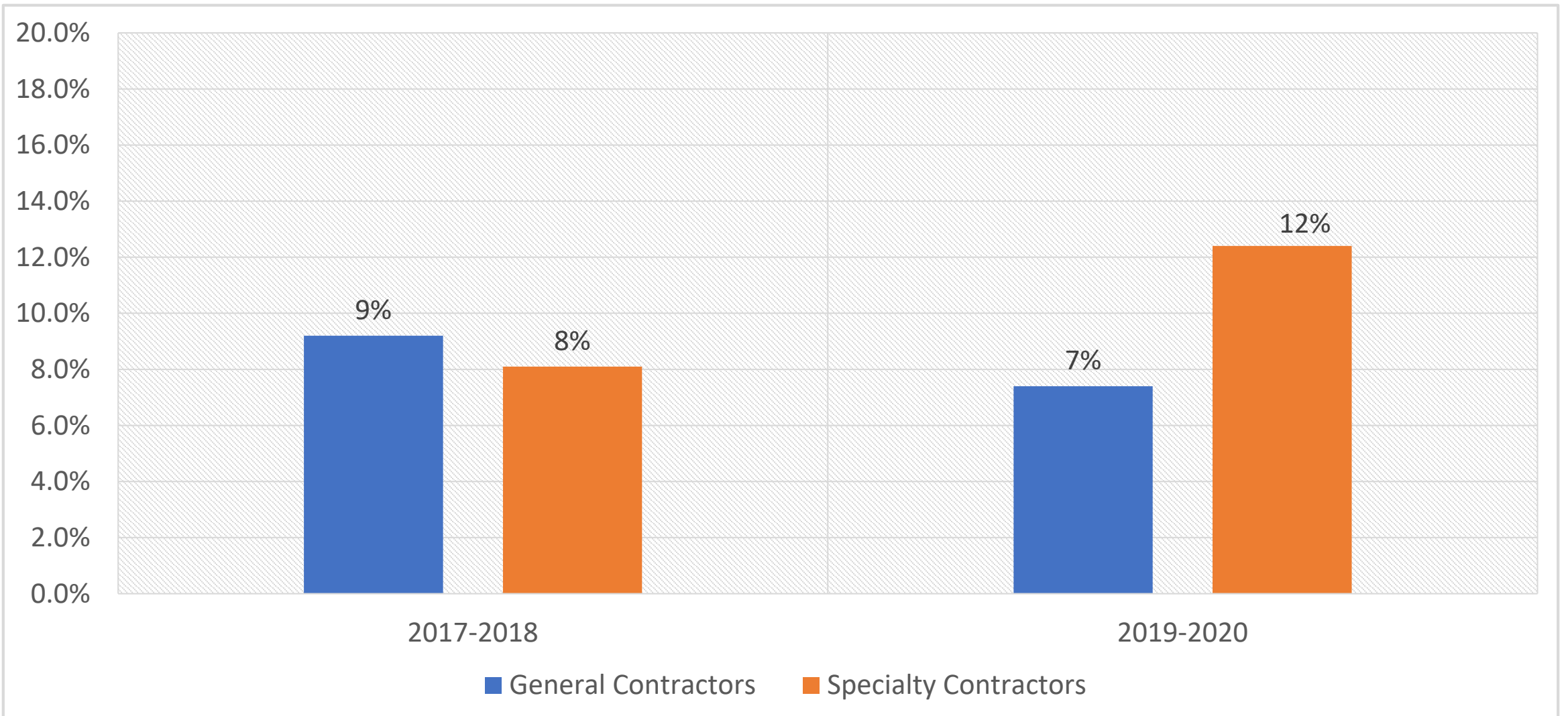
Companies Offering Profit Sharing and/or 401(k) Plans



401(k) Plan Structures of Area Contractors

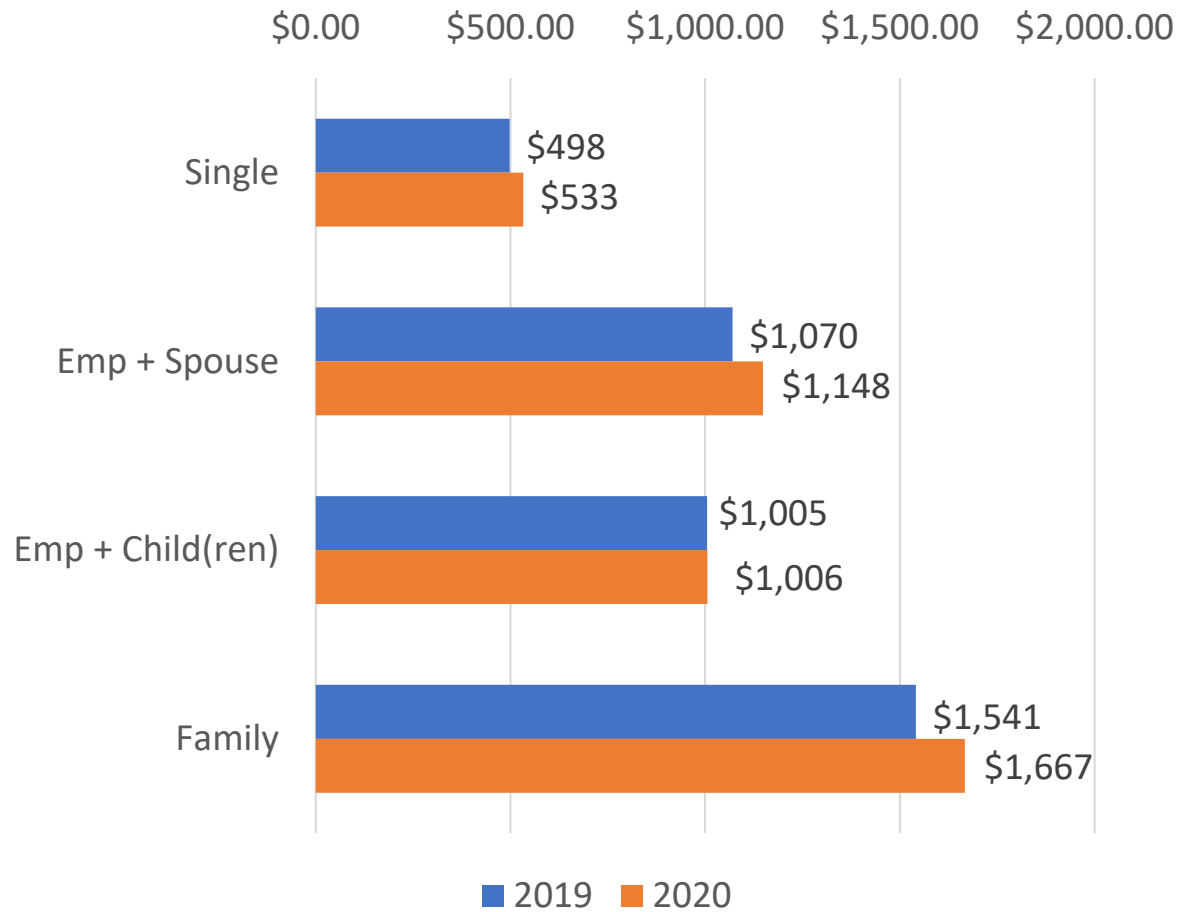


Health Insurance Gross Premium Increases

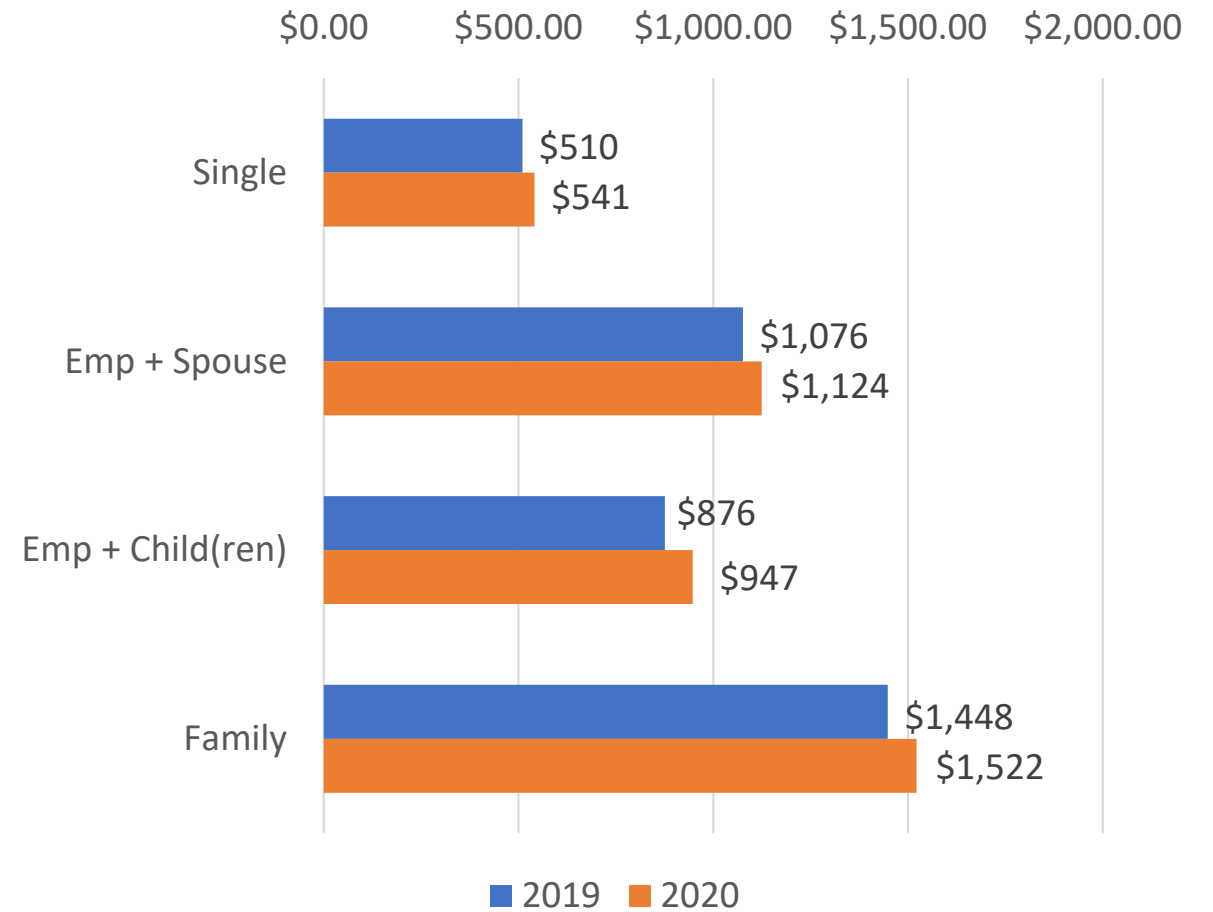


Total Gross Premium Per Month

General Contractors

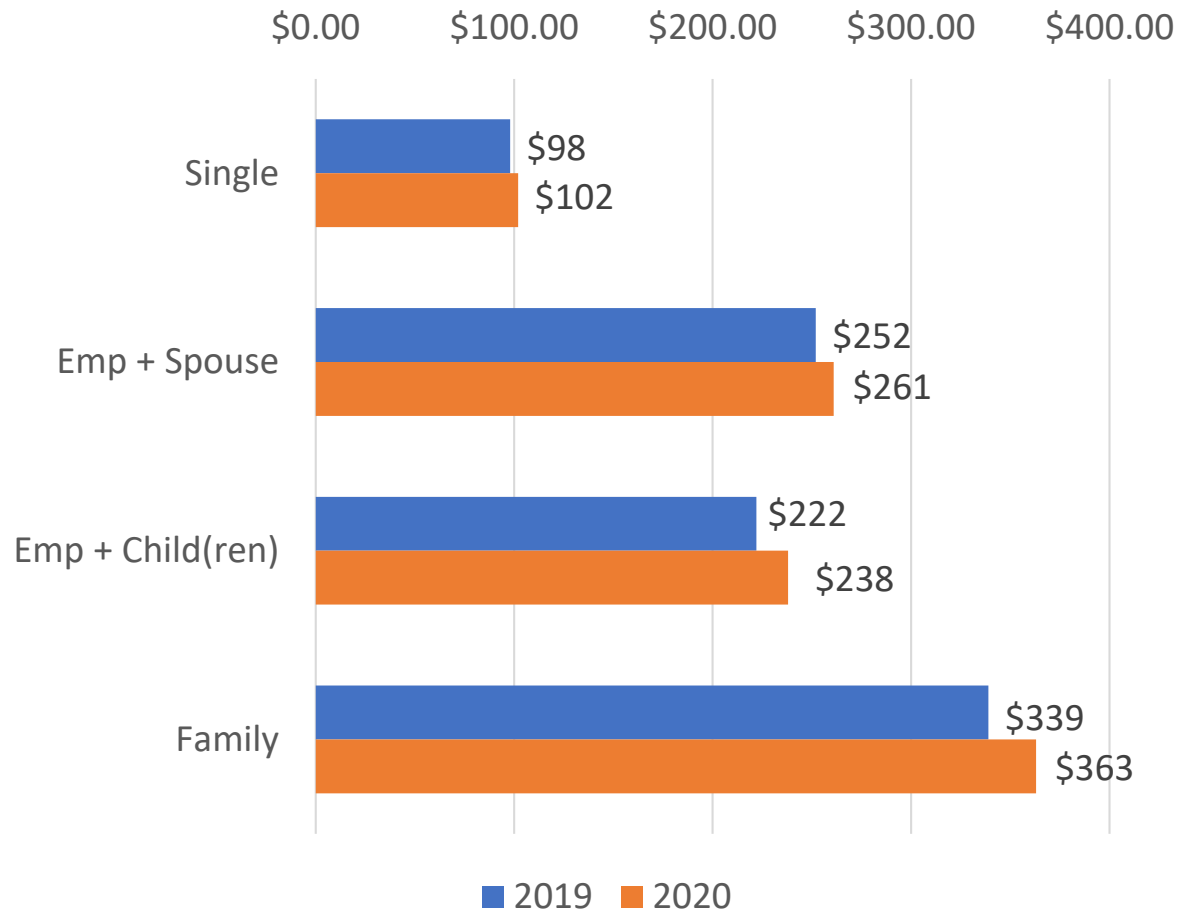


Specialty Contractors

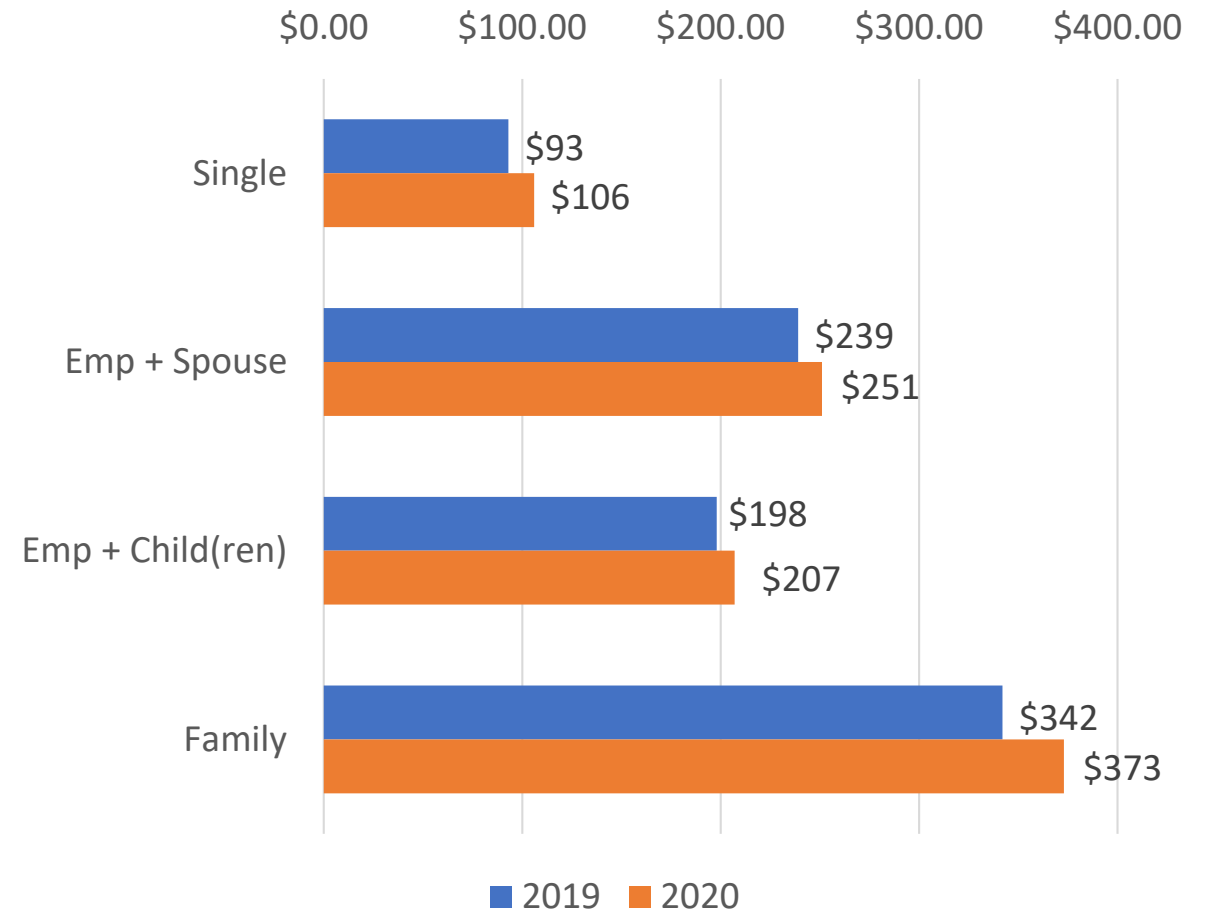


Employee Contribution Per Month

General Contractors

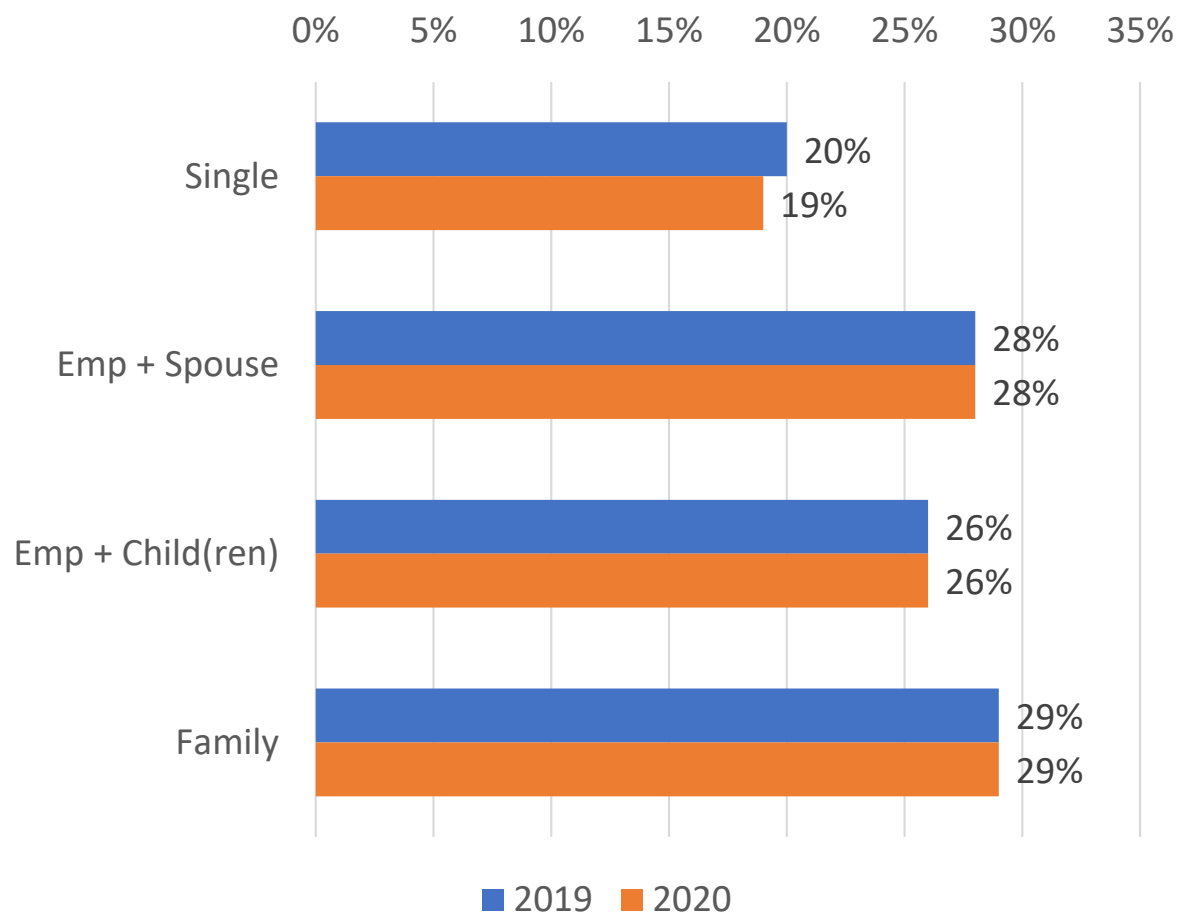


Specialty Contractors

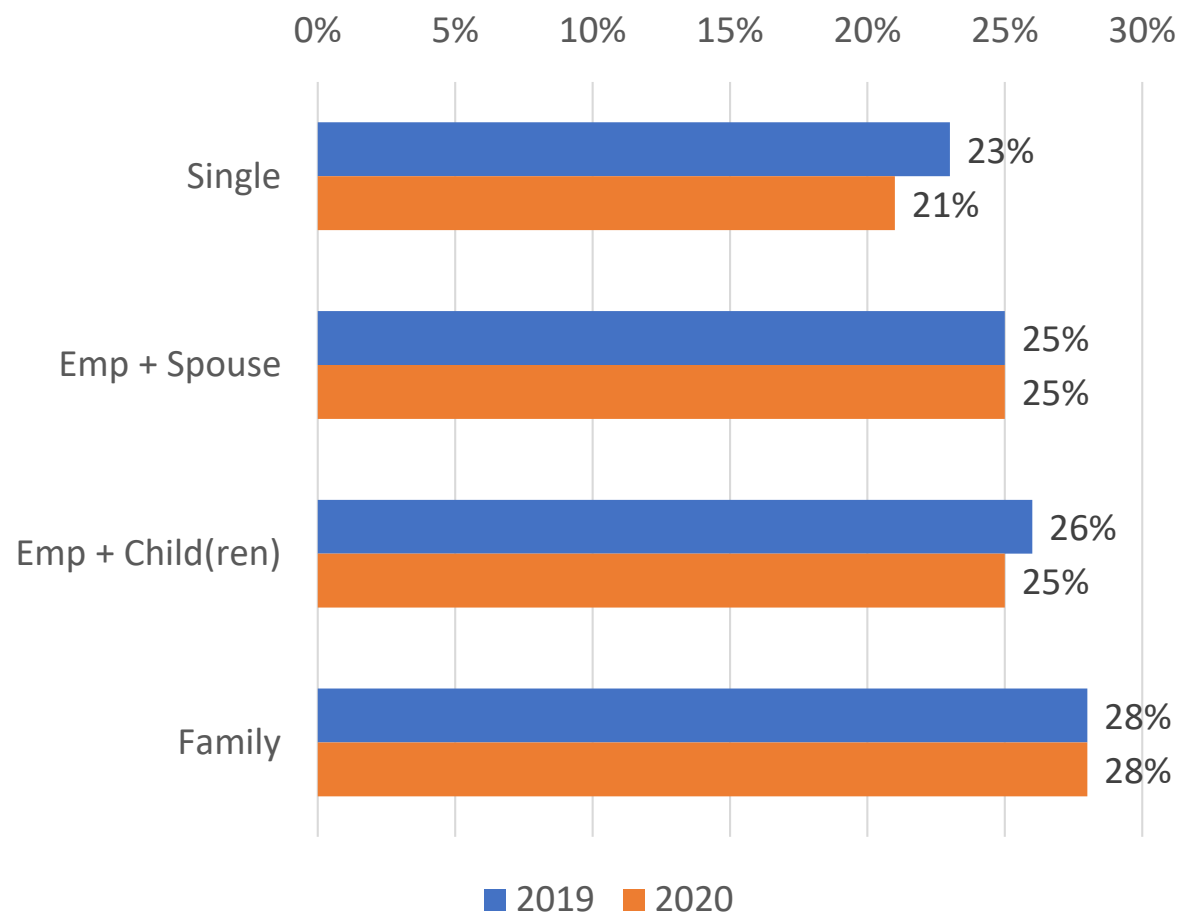


Percentage of Premium Paid by Employee

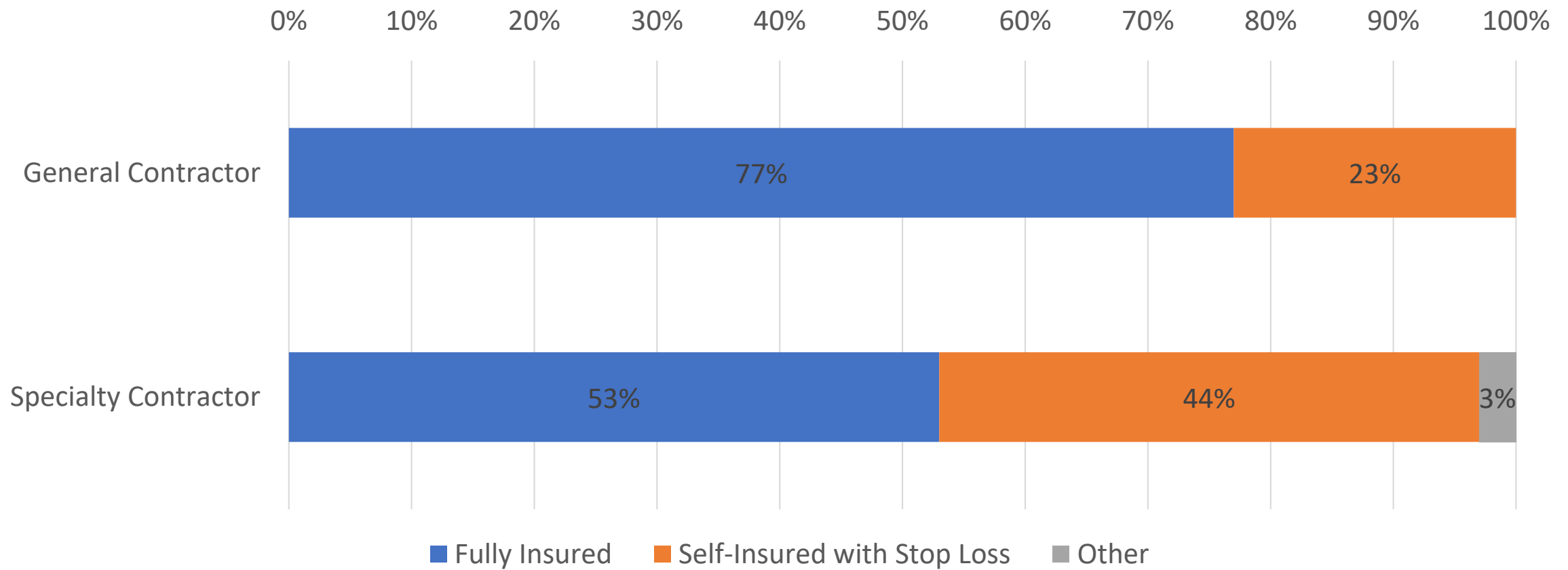
General Contractors



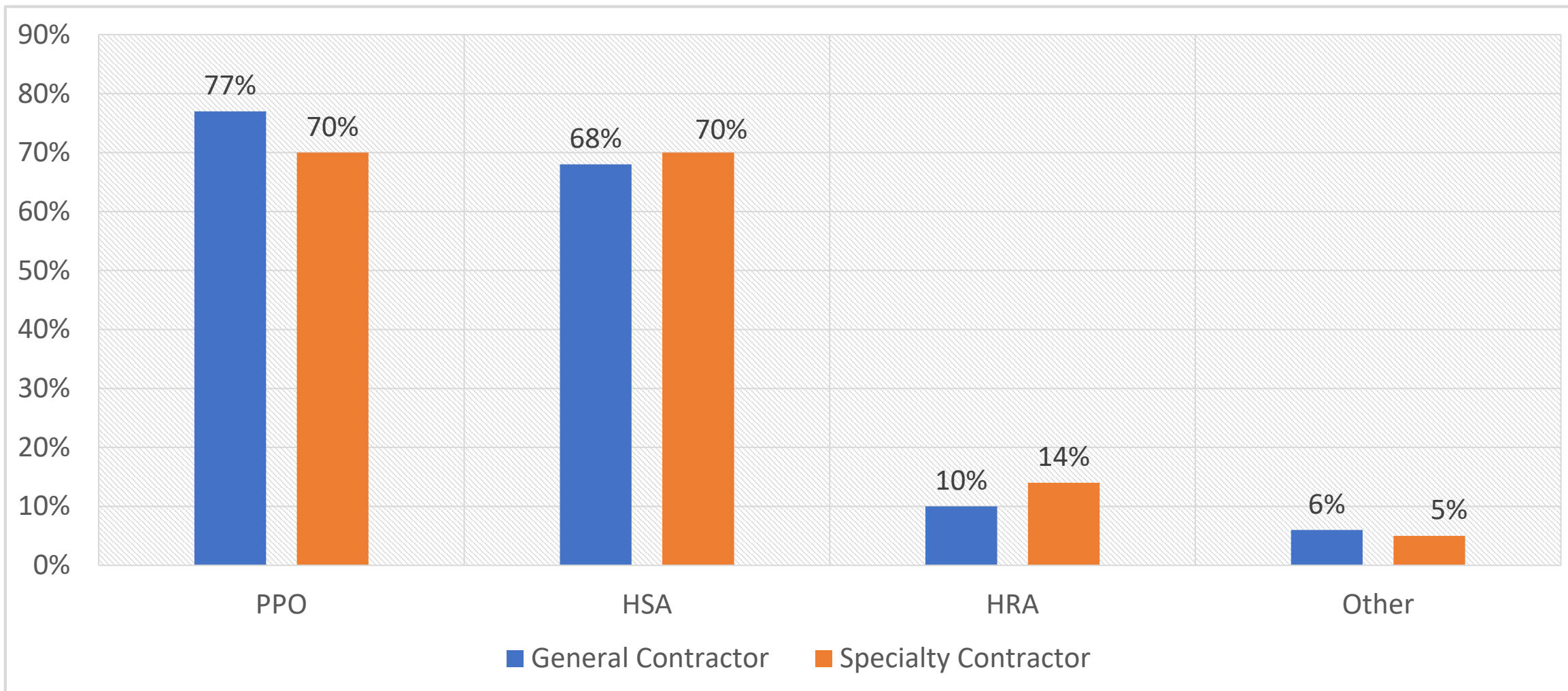
Specialty Contractors



Funding a Health Insurance Plan

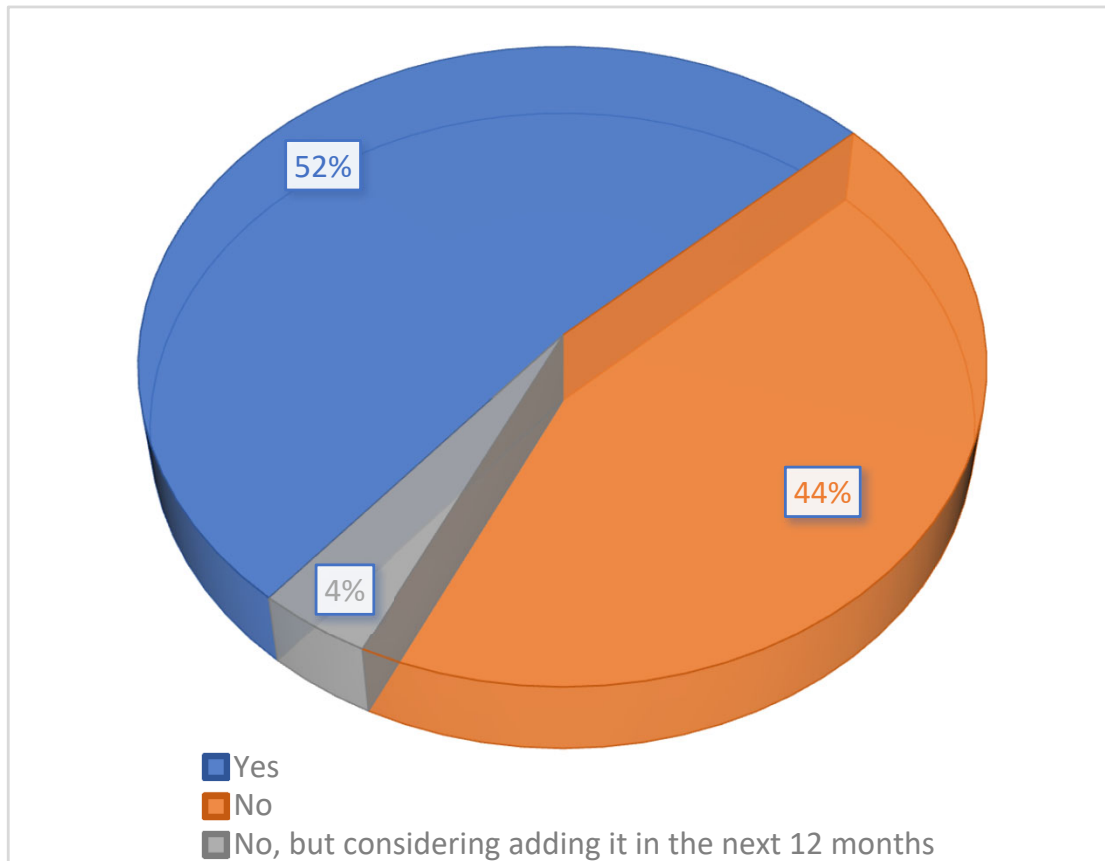


Types of Health Plans Offered

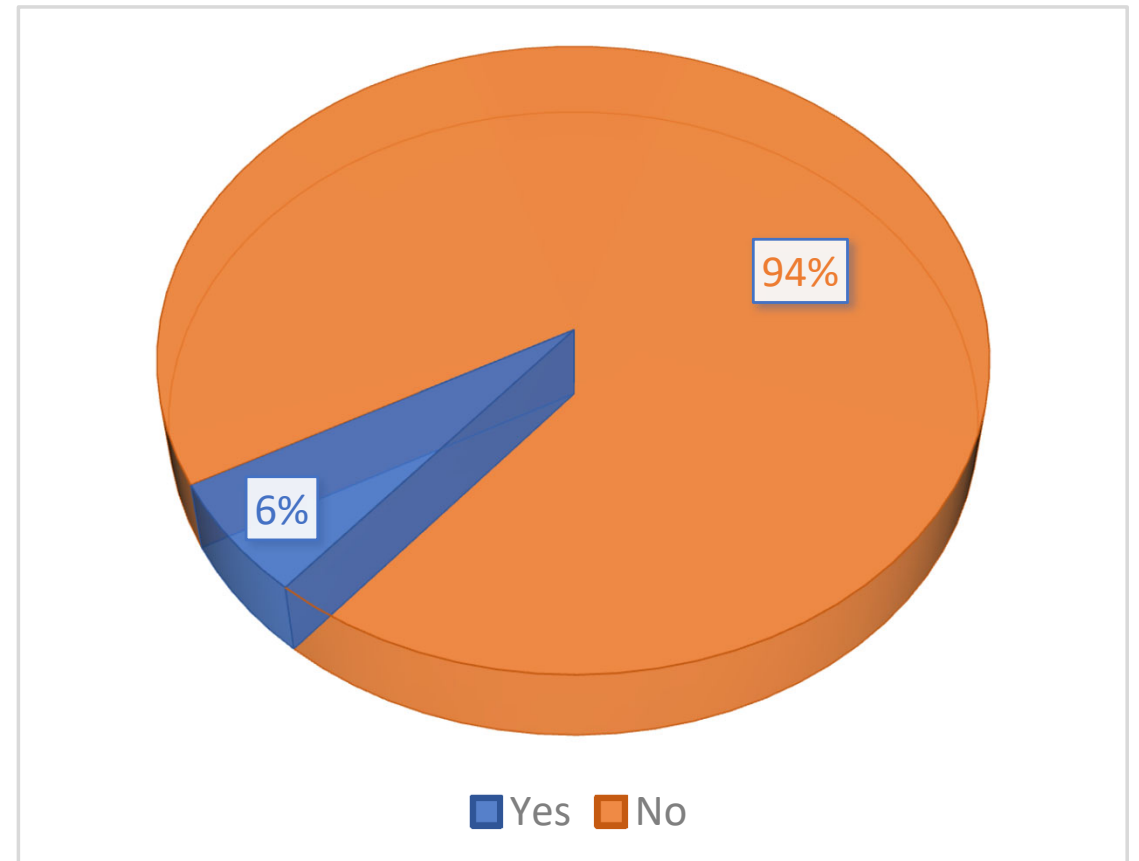


Wellness Programs

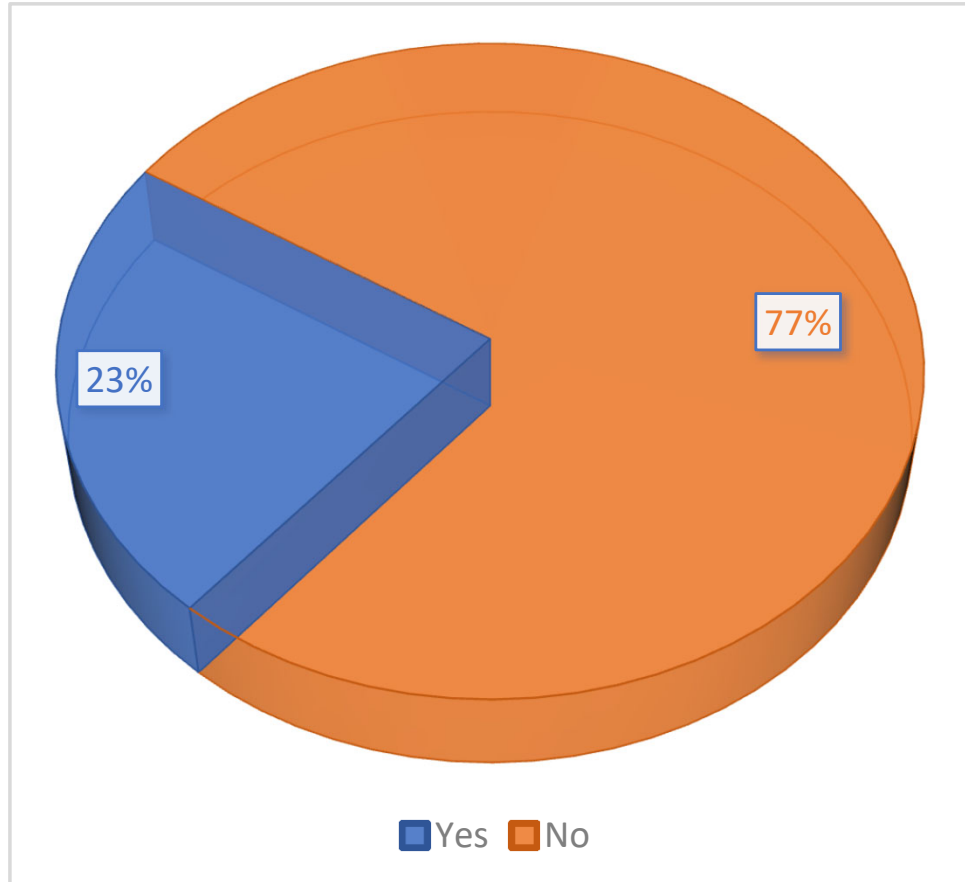
Do you offer a wellness program?



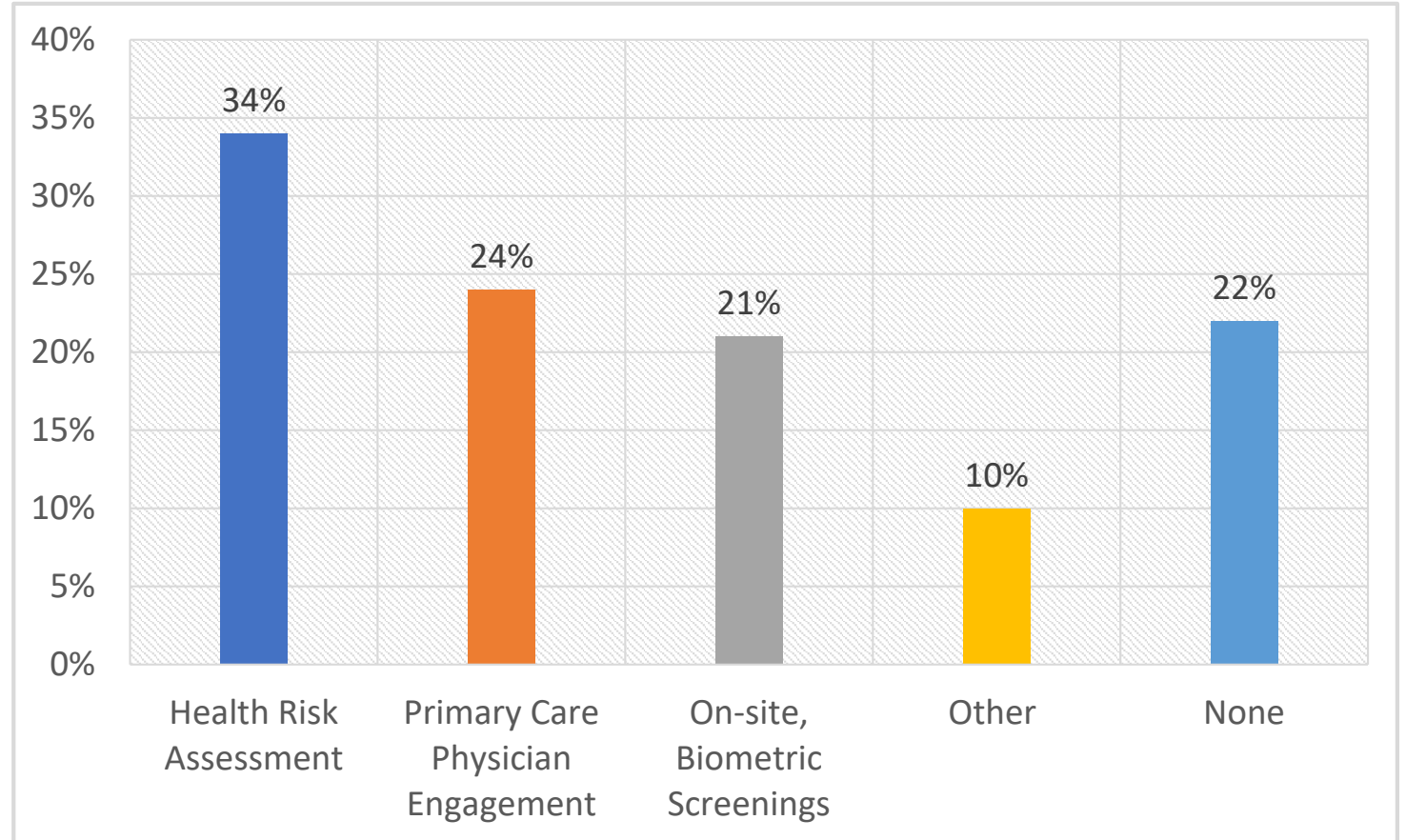
Do you integrate your Safety and Wellness Programs?



Wellness Programs



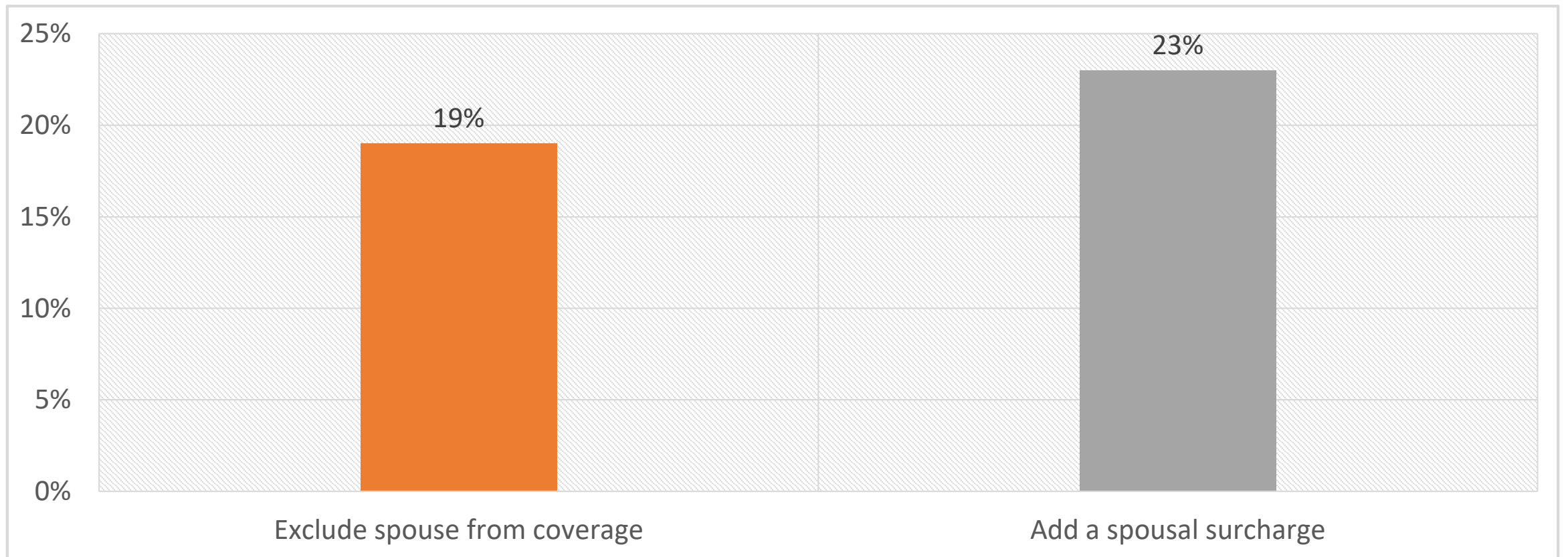
Employees charged a surcharge for not participating in Wellness Program?



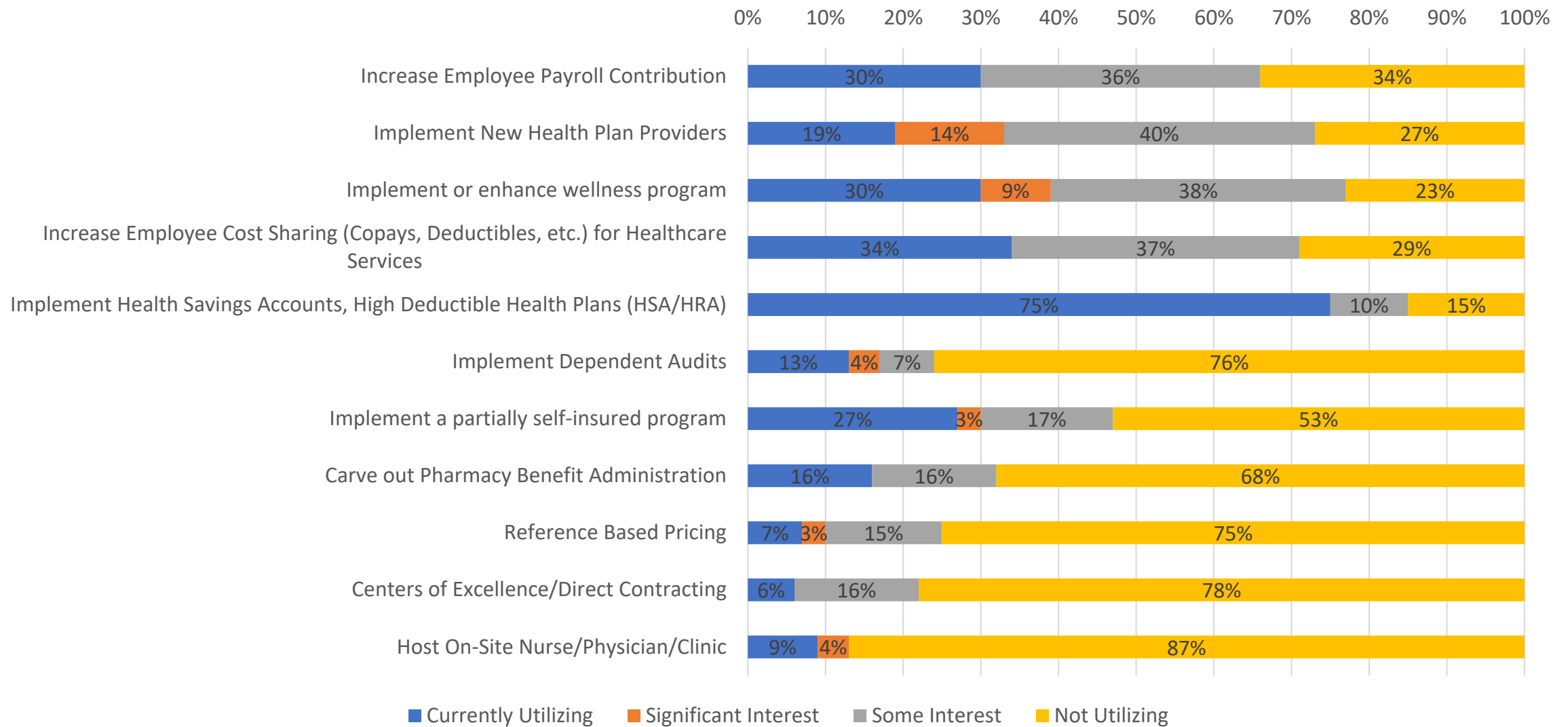
Benefits Offered to Employees through Wellness Program

Spousal Coverage

**All Participating Companies:
Policies for Addressing a Spouse Eligible for Coverage on Their Own Employers Plan**



Cost Control Strategies





Legal Impacts of the COVID-19 World

Chris Drewry & Dan Drewry
September 29, 2020



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Subjects for Today

- Employment Law
 - Overview of Ongoing Legal Issues and Impacts on Businesses
 - Work From Home (WFH) considerations and ongoing in-person operations
 - Return to Work Considerations
 - Federal FFCRA Impacts
- Construction Law
 - Managing contractual risks
 - Payment
 - Performance

The background of the top section of the slide is a detailed architectural blueprint. It features a complex network of lines representing walls, doors, and structural elements. Various dimensions and labels are visible, such as '15m', '2500', and '1100'. The drawing is rendered in a light blue color on a white background.

COVID-19 in the Workplace

- General Guidance for Employers
- Steps ALL Employers Should Take

The background of the slide is a detailed architectural blueprint in blue ink on a white background. It shows various structural lines, dimensions, and annotations, typical of a technical drawing. The text 'Work From Home Considerations' is overlaid on this background in a large, bold, black font.

Work From Home Considerations

- Developing/Maintaining WFH infrastructure
- Effective WFH Policies
- Practical considerations
- Alternative to Furlough/Layoff



Ongoing In-Person Operations

- Workplace safety issues
 - OSHA Guidance
- Testing
- Communications to employees



Return to Work Considerations

- Resuming operations
- Coming back safely
 - Testing and other health considerations
- Hiring and HR issues



Federal FFCRA

- Emergency Paid Sick Leave
 - Covered Employer-Covered Employee
 - Six reasons for Leave
 - Time and Pay Limits
 - Mechanics of taking



Federal FFCRA

- Emergency extension of FMLA
 - Single Purpose-Child Care
 - Limited Pay
 - Documentation
 - Special Considerations

A close-up photograph of architectural blueprints. The drawing shows various geometric shapes, lines, and dimensions in black and red ink. A blue drafting pen with a black grip and a yellow eraser is positioned diagonally across the top left. A metal set square is placed on the drawing, and a portion of a white ruler is visible at the top. The overall scene is brightly lit, with a blueish tint to the image.

Managing Performance & Payment Risk in a Pandemic



Force Majeure/Excusable Delay Clauses

- Definition
- Purpose
- Keys to Enforceability
- Standard Form Approach



Alternative Theories

- What if there is no Force Majeure Clause?
- Common Law Doctrines may afford relief:
 - Impossibility of performance
 - Impracticability of performance
 - Frustration of Purpose



Is COVID-19 An Excusable Delay?

- MUST look at the Contract!
- What are the potential delays?
- Pandemic itself versus specific impacts/delays caused by pandemic



Proving Your COVID-19 Delay Claim

What do you need?

1. Schedule Analysis (CPM Schedule/As Built)
2. Claim Notices
3. Causation Documentation in the Field
4. Cost Elements
5. Cost and Damages Documentation
6. Claim Methodologies
7. Issue of Concurrent Delay



Notice and Claim Requirements

CONTRACTUAL CLAIM NOTICE REQUIREMENTS

- VERY CRITICAL
- INDIANA COURTS ENFORCE NOTICE REQUIREMENTS
- Provides for the form and content of claim notice, and timing
- Must understand and adhere to requirements
- Notice is imperative relative to COVID-19 impacts, particularly is if its grounds for excusable delay



Acceleration

- What if Owner refuses time extension?
- Can acceleration costs be recovered?
 1. An excusable delay occurs
 2. Notice given and request for more time
 3. Owner refuses and directs work to proceed
 4. Notice given that viewed as constructive change
 5. Increased contractor costs are incurred as a result of the acceleration



Other Key Delay Clauses Still in Play

- No Damages for Delay (NDD)
- Liquidated Damages
- Scheduling and Coordination Duties
- Waiver of Consequential Damages
- Changes Clause
- Safety and Insurance
- Default/Termination/Suspension of the Work



Covid-19 Drafting Tips

- Defining the force majeure event
 - Disease, Epidemics, Pandemics, Quarantine, Government restrictions
- Define the standard for relief
 - Preventing vs. hindering performance
- Define the relief (i.e. time *and* money?)
- Consider setting parameters on mitigation efforts
- Notice Requirements
- Consider termination (without cause) rights



PANDEMIC CHECKLIST

- Safety is No. 1 Priority
- Understand Your Contract – Adjust Moving Forward
- Develop Internal and External Protocols
- Communication with Owners and Subcontractors is Critical
- Promote Team Approach v. Claim Mode
- Identify and Address Long Lead Materials
- Notices are critical
- DOCUMENT!
- Define, Preserve and Pursue Statutory Payment Rights



THANK YOU

Questions?



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