

**2017**

***HR* TRENDS**  
**TOOLKIT**

**For SMALL & MID-SIZE COMPANIES**

**COMPLIANCE**



# Chapter 3

## COMPLIANCE

Compliance is a major issue for all businesses, but especially time-consuming and difficult for small and mid-size companies because they usually do not have the staff or resources to handle business mandates like larger companies.

184 new major regulations were created during the Obama administration, significantly more than the Bush administration's 76. Fines and regulations grew dramatically, too: OSHA penalties grew 70% last year, as did penalties for FLSA, ERISA, and FMLA.

President Trump campaigned on reducing small business regulations; and, has already taken significant steps by signing two executive orders aimed at streamlining compliance for small business. He has also signed an executive order to re-examine the new fiduciary rule, and halted enforcement of the FLSA overtime rule. But, the reality is that this positive change will reduce regulatory burdens over time, and most business over-regulation remains in force in 2017.

At the same time, 2017 ushers in a new reporting mandate from OSHA, a disturbing increase in ADA and FLSA lawsuits, and increasing parental paid time off laws in several states, that will most probably end in new federal legislations.

ADA, FLSA, FMLA, IRCA, ERISA, FICA, USERRA, ADEA, HIPAA, and GINA, are just a few of the acronyms identifying mandates with which business owners must comply or face fines and penalties; but, four areas represent the most common lawsuits for small business.

### THE FOUR MOST COMMON LAWSUITS FOR SMALL AND MID-SIZE COMPANIES

According to a recent post in TLNT, four areas cause the most lawsuits for small and mid-size employers: Being too passive about risk management issues; misclassifying employees as independent contractors; asking illegal, discriminatory interview questions; and, placing discriminatory language in job ads.

## OSHA & Risk Management

OSHA fines and penalties have increased dramatically for 2017, and many companies are not aware of OSHA mandates. Managers need to be active about understanding basic OSHA guidelines and integrating those guidelines into the company. OSHA's Top 10 list for 2017 is a good place to start. We'll cover OSHA more in Chapter 4.

## Misclassification of Workers

Misclassifying employees as independent contractors is a major compliance problem for companies; and, it is growing due to increased numbers of freelance workers.

Companies are tempted to misclassify because they can avoid paying overtime, providing health insurance, unemployment and workers' compensation; however, the fines and penalties are very expensive and not worth the risk. The Department of Labor is keying on misclassification, and lawsuits in this area have increased 465% since 1996. In fact, lawyers now actively solicit employees for class-action suits, so be warned.

For those of you unsure about whether someone is an independent contractor or considered an employee by the government, 3 Tips for Avoiding Misclassification will prove helpful.

## Illegal Interview Questions

Asking illegal, discriminatory questions during an interview is another major source of lawsuits for small and mid-size business owners. Businesses are forbidden from asking questions about marital status, children, arrest or conviction records, veteran status, or whether you someone is pregnant or plans to have children. Asking any of these questions leaves you open to lawsuits.

As a general rule, keep interview questions focused strictly on job requirements, and avoid bringing up religion, age (other than to ensure the applicant is legally able to work), race, national origin, gender, sexual orientation, pregnancy or children, or marital status, and you can avoid suits in this area.

## Illegal Job Ads

The fourth most common cause of lawsuits involved asking illegal questions in job ads. According to the EEOC, "It is illegal for an employer to publish a job advertisement that shows a preference for or discourages someone from applying for a job because of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. The age discrimination part of the EEOC's guidelines

only applies to companies with 20 or more full-time employees, but it may be wise to make sure everyone involved with new hires is aware of all the rules.

Though the four areas outlined above result in the greatest number of lawsuits, there are many other compliance mandates trending upward in 2017.

## THE MAJOR COMPLIANCE ISSUES

### FLSA (Fair Labor Standards Act)

One of 2016's most significant new compliance mandates involved the Fair Labor Standards Act, and its focus on overtime. Basically, the act requires companies to pay overtime to any employee working in excess of 40 hours in a given week. Salaried employees were exempt from this rule, but the new FLSA mandate raised the minimum limit on what constitutes a salaried employee from \$455 per week (\$23,600) to \$913 per week (\$47,476 annual).

The rule was due to begin on December 1, 2016, but remains in limbo, suspended by order of a U.S. District Court in Texas. That order is now on appeal to the 5th Circuit Court of Appeals.

Expect to see DOL's FLSA overtime rule vanish with the Trump administration, though there is consensus that the \$23,600 overtime exemption is on the low side, and may soon be raised. Additionally, check for additional state laws mandating different overtime obligations.

Regardless of what happens with the FLSA overtime rule, the number of lawsuits in this area has increased 465% in the past 10-year period, and will continue to grow in 2017 because the Department of Labor intends to pursue overtime violations with greater intensity; and, because lawyers actively solicit employees for class-action lawsuits.

In 2016, the Department of Labor forced a Deer Park, Texas construction company to pay \$682,000 in overtime wages and fines to 160 workers as part of its renewed focus on overtime.

The number of overtime suits is expected to grow in 2017.

### FMLA (Family Medical Leave Act)

The Family and Medical Leave Act of 1993 (FMLA) guarantees up to 12 work weeks of unpaid leave each leave year to qualifying employees for specified family and medical leave reasons and, pursuant to amendments to the law, up to 26 work weeks of leave in a single 12-month period to care for a seriously ill or injured covered service member.

The number of lawsuits regarding FMLA increased 26.3% over a 12-month period from 2014-2015. In 2017, FMLA continues to be a significant concern for business owners.

An article by SHRM's legal analyst, Dr. Allen Smith, outlines the top mistakes employers make that expose them to FMLA suits. It is an area companies neglect with unfortunate consequence.

Legal experts say the law is full of traps that can snag employers that let their guard down, and they recommend that employers shore up FMLA compliance efforts by avoiding the following common missteps.

Though the article mentions a dozen problems, and it is suggested the appropriate people at your company read them, they can be summarized this way: Make sure you take FMLA seriously; file the required notices on time with employees and don't delay.

- Make sure managers notify HR immediately when someone takes leave
- Make sure the required certifications are complete and consistent, and that they state the frequency and duration of intermittent leave.
- NEVER retaliate against an employee requiring FMLA leave
- Keep accurate records of the amount of time taken
- Understand the ADA (Americans with Disability Act) provisions of FMLA, and how they affect FMLA (they do!) And, make sure to provide reasonable accommodations.

If you believe an employee with a disability is abusing FMLA, the SHRM article advises: Document any adverse effects on productivity, ability to timely meet client demands and extra workload on co-workers resulting from an employee on extended FMLA leave ... While the FMLA doesn't have an undue hardship provision, "The information will be necessary for a proper analysis of whether any request by an employee for further leave as an ADA accommodation is reasonable or is an undue hardship.

## ADA (Americans with Disabilities Act)

The Americans with Disabilities Act (ADA) became law in 1990, and applies to companies with 15 or more employees. The ADA is a civil rights law that prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public.

The purpose of the law is to make sure that people with disabilities have the same rights and opportunities as everyone else, and on January 1, 2009, the Americans with

Disabilities Act Amendments Act (ADAAA) became effective, broadening the definition of “disability.” You can read details about ADA here.

## The Rise of the ADA Lawsuits

An act that was intended to help disabled Americans, is also being abused by unscrupulous attorneys and their clients, and costing small and mid-size business owners.

Thousands of ‘drive by’ lawsuits - where attorneys and clients look for establishments in violation of some part of the law, and sue in hopes of reaching settlement – have cluttered the courts.

“Thousands of lawsuits have been filed in the U.S. for violations of the Americans with Disabilities Act, but many business owners say they’re nothing more than a shakedown,” starts a CNN special report. One husband and wife team filed more than a thousand lawsuits in this manner, receiving more than 3 million dollars in settlements.

The ‘drive by’ suit is now being joined by ‘Google lawsuits,’ which require even less time on the part of the attorney and his accomplice. According to the report, “A Google lawsuit is where the suspicion, at least, is that the property was spotted on Google, Google Earth, Google Maps, whatever the case may be, and you could see certain things from Google. You could see if there’s a pool lift or not. A Florida attorney and his client filed more than 600 lawsuits against Florida businesses due to pool lift violations, yet had virtually no contact with the establishment.

*Every private business in America that’s open to the public, millions of shops, restaurants, movie theatres, grocery stores, laundromats, nail salons, and more, have to be compliant with the Americans with Disabilities Act. But it is nearly impossible to comply with because the requirements are very specific – and there are thousands of them in a 275-page manual that details everything from the exact height of a mirror in a bathroom, to the maximum thickness of carpeting, to the angle at which water can come out of a drinking fountain. Every doorway, every door handle, every surface you walk on, every light switch, outlet, counter – you name it – are all covered by the Americans with Disabilities Act, which was first passed in 1990. In theory, businesses only need to comply if it’s readily achievable to do so, but in reality, if you’re not meeting every single requirement, you can be sued without warning.*

## ADA Website Accommodation Lawsuits

In 2016, a new twist emerged – ADA website accommodation lawsuits. In these suits, attorneys and clients scour retail, hospitality, and financial services industry websites alleging ADA violations related to website accessibility. More than 240 lawsuits have already been filed.

Given the increasing number of website accessibility suits, it is important for any company that maintains a web presence that constitutes a "place of public accommodation" to understand the requirements of the ADA.

## EEOC (Equal Employment Opportunity Commission)

Under the laws enforced by EEOC, it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. EEOC rules cover a number of areas, including all of the following:

- Recruiting
- Job Applications & Hiring
- Referrals
- Background Checks
- Job Assignments & Promotions
- Pay & Benefits
- Discipline & Discharge
- Employment References
- Reasonable Accommodation & Disability
- Reasonable Accommodation & Religion
- Harassment
- Training & Apprenticeship Programs
- Pre-Employment Inquiries
- Dress Code

You can read about the details of each area by visiting the EEOC landing page [here](#).

EEOC rules and penalties had grown in recent years. In 2016, for example, they levied fines of \$56,000 and \$108,000 against two individual McDonald's stores for disability

discrimination practices in hiring. But President Trump has promised a renewed focus on job growth and creation, and experts believe that signals an end to the heavy-handedness of the EEOC.

President Trump's new EEOC cabinet appointee, Victoria Lipnic, has promised to fulfill that pledge. She has stated her focus will be on employer responsibilities in joint employment, the use of staffing agencies, and the 'gig' economy (misclassifications).

The Trump administration has already signaled it will not enforce new transgender bathroom usage provisions implemented during the Obama administration, though all other equal protection provisions remain.

However, Ms. Lipnic mentioned that the EEOC will focus more attention on equal pay and age discrimination in 2017. Age discrimination rules apply to companies with 20 or more employees.

In summary, expect to see a pullback in the number of EEOC rules enforced, and fines levied against employers in 2017; but, an increase in equal pay and age discrimination cases.

## I-9 Reporting

Immigration is an important issue with the new administration, and you can expect that I-9 compliance issues will be enforced, though it is unknown how that will affect penalties.

The I-9 form is used for verifying the identity and employment authorization of individuals hired for employment in the United States. All U.S. employers must ensure proper completion of Form I-9 for each individual they hire for employment in the United States. This includes citizens and noncitizens. Both employees and employers (or authorized representatives of the employer) must complete the form.

Section 274A(b) of the Immigration and Nationality Act requires employers to verify that their employees are legally authorized to work in the United States. Employers must prepare the Employment Eligibility Verification Form (known as the I-9 form) within three days of hire.

Here is an example of how I-9 compliance violations work: the U.S. Department of Homeland Security's Immigration and Customs Enforcement (ICE) imposed substantial fines on a small transportation employer for I-9 form violations. ICE audited the I-9 forms of Buffalo Transportation Inc. (BTI), a small travel company with 138 employees. ICE found six technical or procedural errors, and 138 substantive I-9 violations for either failing to prepare or present Forms I-9 for employees, or failing to prepare I-9s on a timely basis (within three days of hiring).

As a result of these violations, ICE levied a fine of \$935 for each violation, totaling \$106,795. The majority of the fines were upheld by the 2nd U.S. Circuit Court of Appeals.

In November, 2016, a new I-9 form was issued with a January 22, 2017 start date. You can find the new form here. All companies are required to file and retain I-9 forms for their employees, with a few exceptions.

## Wellness Plan Rules

New Wellness plan rules went into effect in January, 2017. Here is a brief summary.

- The maximum incentive is 30% of the total costs of employee-only health coverage.
- No children allowed, but spouses can receive the same benefit
- Plans cannot be mandatory
- Health Information Must be Safeguarded

## Posting Requirements

Most companies have federal, state and local posting requirements.

There are about 10 federally required posters for companies with 50 employees or more. You'll find a list of the federal requirements here. Not all companies are affected by all federal poster requirements; for example, FMLA does not affect companies with fewer than 20 employees, so a poster is not required.

Generally, posting fines start off small, and are only issued after at least one notice. But the EEOC announced an increase to the maximum penalty for employers that fail to comply with federal notice-posting requirements. The maximum penalty increased from \$210 to \$525.

Employers with 15 or more employees are covered under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA), and must comply with the posting requirements under these acts to avoid penalties. Posting requirements can help protect you from issues that arise with employees where the posters were not properly in view, so it is important to know what posters are required, and to make sure they are current.

Experts recommend working with posting companies with excellent reputations, and to avoid those with cheap prices, but poor reputations that may not update posters properly. Check with the BBB on potential vendors. You can also get free printed copies of federal posters here.

## Summer Hiring

Many companies hire young people for the summer. These arrangements have their own unique requirements and restrictions. Minors are generally not able to legally provide consent, as parents and legal guardians have legal authority over persons under the age of 18 (lower in some states). Therefore, parents must give consent to job screenings, which will be legally binding. When the minor is not able to provide parental consent, employers should consult with their attorney for a recommended practice.

Even when parental consent is obtained, however, not all records an employer usually requests in these screenings will be available on minors. For example, the majority of criminal records for minors are sealed, making them unattainable. Past employment and educational records, however, should be available, and personal references can also be obtained. Therefore, when using pre-employment screening information in hiring minors, employers may need to adjust their policies and practices in terms of what information they will have available to use.

## SMALL BUSINESS COMPLIANCE ISSUES, BY NUMBER OF EMPLOYEES

1 +

**Fair Labor Standards Act (FLSA)** - must classify employees or independent contractors properly, and pay minimum wage and OT according to DOL guidelines.

**Immigration Reform & Control Act (IRCA)** - Employers may only hire those who can legally work in the United States and must maintain up-to-date I-9 forms for all employees and submit within 3 days of a new hire.

**Employment Retirement Income Security Act (ERISA)** - Employers' private pension and health plans must give participants information about plan features, funding, responsibilities, and disclose fees.

**Federal Income Tax Withholding** - Employers must withhold and pay the federal government a set percentage of employee wages.

**Federal Insurance Contribution Act (FICA)** - Employers must withhold and pay the federal government a set percentage of employee wages for Social Security and Medicare.

**Equal Pay Act (EPA)** - Employers must pay male and female employees the same wage for the same job.

**Uniformed Services Employment & Reemployment Rights Act (USERRA)** - Employers must permit employees to be absent from work for military duty and retain reemployment rights for up to five years, as well as make reasonable efforts to accommodate veterans' disabilities.

**National Labor Relations Act (NLRA)** - Employers cannot prohibit employees from organizing or joining unions.

**Uniform Guidelines for Employment Selection Procedures** - Employers may not discriminate against employees or applicants on the basis of race, color, religion, sex, or national origin.

**Employee Polygraph Protection Act (EPPA)** - Employers cannot use lie detector tests in pre-employment screening or during employment (with some exceptions).

**Fair and Accurate Credit Transactions Act (FACT)** - Employers must protect consumer credit information.

**Health Insurance Portability and Accountability Act (HIPAA)** - Employers cannot receive health care information about employees from health care providers.

**Occupational Safety and Health Act (OSHA)** - Employers must follow federally-set standards providing safe employment conditions, hazard communication, and personal protective equipment.

11+

**Recordkeeping, the Occupational Safety and Health Act (OSHA)** - Employers must maintain and submit records about accidents in compliance with OSHA regulations. Beginning January 1, 2017 companies with 20 or more employees in 64 'high risk' industries, and companies with 250 or more employees must submit OSHA accident reports electronically.

15+

**American with Disabilities Act (ADA)** - Employers may not discriminate against people with disabilities

**Genetic Information Nondiscrimination Act (GINA)** - Employers may not discriminate against employees or applicants based on genetic information

**Title VII, Civil Rights Act of 1964** - prohibits sexual harassment and other forms of sex discrimination.

20+

**Age Discrimination in Employment Act (ADEA)** - Employers may not discriminate in hiring practices against workers age 40 and older.

**Consolidated Omnibus Budget Reconciliation Act (COBRA)** - Employers must offer covered employees and their families the option to continue health insurance for 18-36 months after ceasing employment, though employees may be required to pay full insurance premiums.

**Affordable Care Act (ACA)** - Employers must offer affordable health insurance options with strict recordkeeping requirements.

50+

**Family and Medical Leave Act (FMLA)**, - Employers must offer up to 12 weeks of unpaid, job-protected leave to eligible employees following the birth, adoption, or foster placement of an employee's child or serious family illness.

**Affirmative Action Program (AAP)** - Employers must create programs to actively recruit and train minorities, women, disabled persons and covered veterans, with accompanying recordkeeping requirements.

100+

**Worker Adjustment Retraining Notification Act (WARN)** - Employers must notify employees at least 60 calendar days in advance of workplace closings and mass layoffs.

**EEO-1 Survey Filing (Title VII, Civil Rights Act of 1964)** - Employers must maintain diversity records for workplaces and individual employees.