Complete Guide to Wage and Hour Compliance

How to stay out of the headlines with an activist DOL

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Introduction 👥

Companies big and small grapple with different compliance challenges, from keeping up with changing regulations to making sure that those are applied in their policies and processes. With a lot of moving parts, it's crucial for companies to have the systems and resources to navigate the ins and outs of labor law and remain compliant to minimize financial and reputational damages

Many areas of compliance are "part compliance, part strategy," said Dorian Smith, national practice leader for Mercer's Law & Policy Group. "You can't do strategy without thinking about compliance."

Companies continue to recognize that compliance should be at the core of their processes, and one of the crucial areas is wage and hour law compliance. Compliance to these regulations stems from keeping track of these regulations and making sure they're applied in all areas of workforce management—setting policies, creating employee schedules, tracking time and attendance, and processing payroll. But as flexible working arrangements, hiring independent contractors, and remote work become more commonplace, companies need to be more diligent in ensuring that employees are classified correctly and the right wage and hour laws are applied.

The word "complex" does not even scratch the surface of how complicated labor tracking is given the various state and local labor laws that govern sick leave, overtime, minimum wage and more, according to Traci Fiatte, chief executive officer, professional & commercial staffing at Randstad US. "If you're not using an automated employee scheduling software and you have employees in multiple states, I'm not sure how you keep track of it all," she added.

This ebook will tackle the different issues surrounding labor compliance and how employers can ensure that all of these rules and regulations are applied in how they manage their workforce.

The Right Side of Compliance

Andrew Stirling

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Chapter 1:

The rundown on wage compliance: What employers need to know

Paying people properly is crucial to workforce management. But it goes beyond releasing pay on time. It's about compensating workers according to all the wage laws that apply and the the work they do — and there are many that organizations need to navigate. Andrew Stirling, head of product compliance at Workforce.com, sheds light on what companies need to know about complying with wage laws, the real cost of failure to comply and the different ways organizations can meet requirements under varying rules and regulations.

Wage Laws 101 :

Setting a compliance strategy

"To have a compliance strategy, you need to start by knowing what the rules are. That might sound trite, but you need a system for keeping current as the rules change," Andrew Stirling said.

Businesses are generally good at evolving their practices in the face of law and regulation changes. While there's a level of adjustment when new laws are implemented, companies tend to adapt efficiently, he explained.

Identifying the type of employment relationship a business has with its workers is crucial to getting the rules right. This has become more important as the types of work relationships have multiplied.

"With the gig economy growing, more and more workers are being engaged to work in nontraditional ways. Generally, a worker in your business will be either an employee or an independent contractor. Businesses need to be careful to assign workers to the right category, because getting this wrong means that they may not meet all the wage laws that apply," said Stirling.

Once the rules are known, it's time for the business to assess and implement solutions to comply with those rules. The solutions can be more than just the obvious.

For example, employee scheduling can play a key role in wage compliance. When creating schedules, managers need to be aware of when overtime will apply and how much the business must pay for those hours when it does. This becomes challenging for managers with a group of employees under different working arrangements. Without good solutions, things can fall through the cracks, resulting in underpayment or higher labor costs.

The real cost of noncompliance

Noncompliance can result in crippling financial repercussions, but it also can cause reputational damage.

"The financial costs of noncompliance are obvious," Stirling said. "For example, if employees have been underpaid, the business might have to make large amounts of back payments in one hit. You need to have the cash on hand for that." There are other financial costs, like penalties and legal costs to contest a court case.

But there's also the real potential for reputational damage. That's often a more significant motivation for employers to comply.

"An underpayment scandal can bring companies to their knees. Customers can decide to take their business elsewhere. People are less likely to visit a restaurant or shop that has been reported for underpaying their people," he said.

Aside from a less favorable customer perspective, companies with underpayment issues can risk losing in the labor market, he said. When looking for a job, people tend to sort out who the good and bad players are, and wage compliance can be a huge factor.

Furthermore, the Department of Labor is pushing for stricter implementation of the law, especially with the end of the Payroll Audit Independent Determination (PAID) program, which allowed employers to self-report FLSA violations to the DOL without risk of litigation, enforcement proceedings, or liquidated damages.

The DOL said in a news release, "Workers are entitled to every penny they have earned," said Wage and Hour Division Principal Deputy Administrator Jessica Looman. "The Payroll Audit Independent Determination program deprived workers of their rights and put employers that play by the rules at a disadvantage. The U.S. Department of Labor will rigorously enforce the law, and we will use all the enforcement tools we have available."

Pay close attention to that last sentence: "The U.S. Department of Labor will rigorously enforce the law, and we will use all the enforcement tools we have available." The era of federal agencies playing nice with employers through education and outreach is over. With this, businesses should expect agency priorities to be enforcement, not education.

In the context of the FLSA, the question is not whether companies need to audit their wage and hour compliance, but whether they properly prioritize doing so before someone calls them on it.

It is immeasurably less expensive to get out in front of a potential problem and audit on the front-end instead of litigating or settling a claim on the back end. The time for companies to get their hands around these issues is now, and not when employees, their lawyers, or the DOL start asking the difficult questions about how employees are paid.

Ensuring compliance at all levels

While wage compliance may mostly be seen as a job for payroll teams, HR and managers also play a crucial role. Payroll teams would primarily be responsible for the final pay outcome.

"From a payroll perspective, I would be focused on two things. One is making sure that I understand the complex wage rules that apply. The second thing is making sure that I have the correct data. Am I getting the information that I need to properly calculate pay? Are we capturing time and attendance accurately? Yes, knowing the rules are important, but the inputs need to be correct, too," Stirling said.

HR has a leading role here. They need to have a good understanding of the business and the particular wage rules that apply. It's also their responsibility to ensure that the right systems are in place for wage compliance.

"In my experience, HR will often document the duties of a position and then help to assign those duties to a particular minimum wage," Stirling explained.

Managers, meanwhile, have a role in ensuring that all inputs are correct. They monitor that employees are recording time correctly and that there are no discrepancies.

"If rules in a particular jurisdiction require employees to be paid more for doing particular types of work, managers are the ones who will know," he said. The extra payments might include allowances, commissions, bonuses and tips to the extent that they are relevant in a jurisdiction.

Managers generally play less of a role in ensuring the amount on a paycheck is correct. Still, they follow processes and systems that ensure all the information passed on to payroll is accurate.

Wage compliance challenges with varying business hours

Different industries face varying compliance challenges, and they usually stem from distinct needs in terms of operation hours and number of shifts in a day.

If customer demand comes in after standard business hours and on weekends, that's when employees need to be at work. Working outside standard business hours often will entitle an employee to overtime or other financial obligations.

"If you're in retail or hospitality, you'd miss out on opportunities if you just open from 9 to 5. Efficient workforce management can meet these demands with cost-effective shifts without compromising service and wage law compliance," he said.

Similar issues arise in industries that make use of machines and equipment that are most efficiently run 24/7. Mining, oil and gas, and manufacturing companies often operate this way. Stirling said that this scenario also puts businesses in a space where they pay different penalties that come with varying shifts and work hours.

On the other hand, there are many industries where working standard office hours is still the norm. "Calculating pay for people who get to work at 9 in the morning and leave at 5 in the afternoon is usually relatively easy," Stirling said.

There are many moving parts involved with wage law compliance, and staying on pace is crucial. "Going to the source is always best. That's a good start," Stirling said. He advised signing up for government websites that explain what the law is. Businesses can often sign up for alerts to be updated should any of the laws change.

Having the right people, implementing the right systems, and investing in the right technology — Stirling believes that these things can help businesses comply with wage laws. Computers are binary and will give an output based on the input. Automated compliance is more efficient and effective than human-driven compliance. Companies must implement the right systems to make sure that both people and technology can function effectively.

"I'm a big believer in technology as a solution to a lot of these problems," he said. "That's where the future is. As technology becomes more powerful, the types of work that people are doing will change. They'll spend less time crunching numbers, for example, to make sure pays are right and spend more time checking that the inputs into the technology are right."
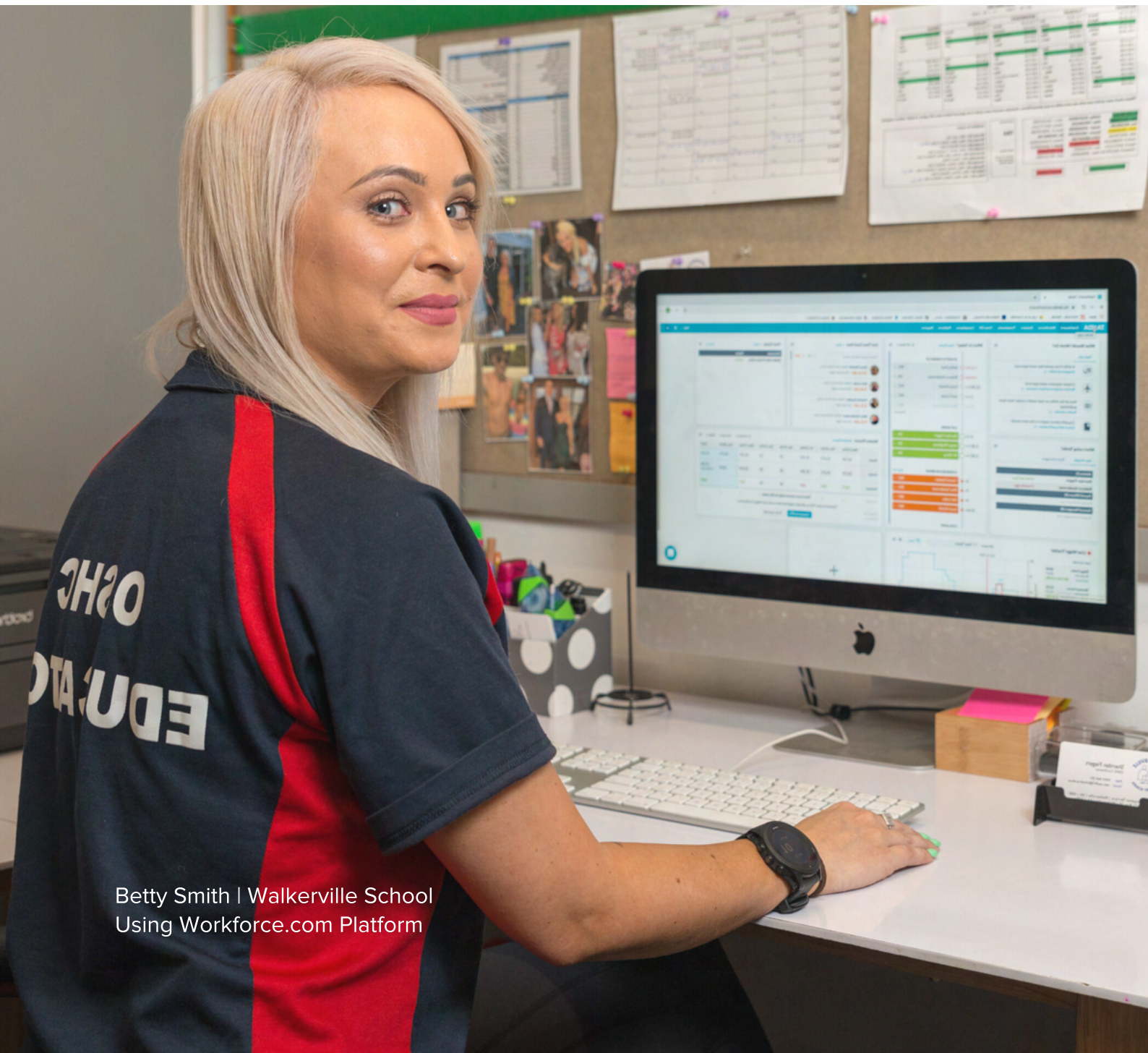
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Using Workforce.com Platform

Chapter 2:
Complying with work schedule laws

Predictive scheduling laws are meant to provide stability to individuals so that they can attend to their child care, health, education and, in many cases, second jobs. Early predictive scheduling laws only applied to retail establishments and restaurants, with limited penalties and no private right of action (i.e. employees could not sue for violations of the law).

According to employment law attorneys Ari Hersher and Parnian Vafaeenia, more recent predictive scheduling laws cover a much broader array of industries, with far more draconian penalties, and allow for employee-initiated class action litigation. While these laws are well intended, they do present significant challenges for employers in terms of staffing, costs, document retention and general compliance.

What do these laws require?

According to Hersher and Vafeenia, while predictive scheduling laws from many of the jurisdictions contain several nuanced differences, there are general requirements that are common to many of them:

✓ Advanced notice of work schedule.

✓ A written estimate of each employee's anticipated work schedule (at the time of hire).

✓ Predictability pay in the absence of sufficient advanced notice of work schedule.

✓ Exceptions to eligibility for predictability pay.

✓ A right to rest requirement (i.e. a sufficient break between two shifts), as well as amplified pay for close-in-time work shifts.

✓ Offers of additional hours to current, part-time employees before hiring a new employee.

✓ Posting requirements.

✓ Stringent documentation and document retention requirements. This generally includes work schedules, written scheduling estimates, documents evidencing predictability pay, and documents related to offers of additional hours.

Though not common, some jurisdictions also encourage employers to engage in the "interactive process" with employees who request a modification to their work schedules. Notably, this idea of an "interactive scheduling process" is a new trend that may expand and present additional managerial burdens for employers.

What employers should be doing

Determine applicability.

Employers operating in a jurisdiction with a predictive scheduling law in place should first determine whether they qualify as a "covered employer" under the applicable law. While many laws only apply to certain employers in the restaurant and retail industries, other laws have a more expansive definition of "covered employer."

Create policies and forms.

Once an employer determines that it is covered, it should develop policies and forms tailored to each applicable law. Sample forms that would be helpful to have on hand include, but are not limited to, a notice of change in work schedule, a notice of offer of additional hours, an estimate of work schedule and hours, and a template work schedule. Additionally, employers should consider maintaining working checklists that managers can use to ensure compliance.

Train managers.

Once the policies and forms are prepared, employers should train their managers on the applicable laws, as they will largely be responsible for facilitating and documenting compliance.

Ensure proper data maintenance.

Because compliance with predictive scheduling laws requires retention of a high volume of documents, employers should ensure they have proper mechanisms in place for storing documents and data.

Audit for compliance.

In order to ensure compliance with any applicable predictive scheduling laws, employers should periodically conduct internal audits to ensure policies are being followed and documents retained.

Use technology to predict staffing needs.

In order to avoid predictability pay, employers may want to utilize technology and data analytics to anticipate future staffing needs. Setting schedules based on reliable data may decrease the need for unanticipated scheduling changes and thus reduce the likelihood of predictability pay.

Marta Moakley, legal editor at XpertHR, says she is seeing more dialogue between employers and employees now with the consequences of the pandemic. The more forward-thinking employers are doing what they can to expand leave and allow more intermittent or flexible leave for employees.

"Having an open avenue of communication with employees, relating to them and trying to work together works wonders for everybody's benefit," Moakley said.

She also suggested that organizations document what they are doing to support employees and offer flexibility to them, even if it is not required by law. Some employers may be genuinely trying to give employees flexible schedules whenever possible or to offer them shifts they wouldn't otherwise have access to if they need extra hours, rather than seeking out outside workers. In any case, it's still possible that an employee may file a lawsuit against this employer.

"Do yourself a favor and document, even if you're not required to. Show that you are following the rules, that you're a good employer, [and] that you're doing right by your employees. And then in the event that somebody comes to check on you, you have the records to back you up," Moakley said.

Chapter 3:
Dealing with enhanced enforcement of wage and hour and overtime laws

Recently confirmed Labor Secretary Martin Walsh will be the first union member to head the U.S. Department of Labor in half a century.

Given Walsh's extensive union background, it's expected that his leadership of the agency will prompt a crackdown in the enforcement of wage and hour laws

Enforcing wage and hour and overtime violations

Nowhere will the shift in Labor Department enforcement priorities and positions be felt more by employers than enforcement of the Fair Labor Standards Act's overtime and minimum wage requirements, said Christopher D. Durham, partner in Duane Morris' Employment, Labor, Benefits, and Immigration Practice in Philadelphia.

"I expect the number and scope of audits conducted by the DOL's Wage & Hour Division to increase substantially, and that the DOL will not be as willing to settle violations for less than 'make-whole' relief for affected employees," he said. "In addition to back wages, the DOL is more likely to insist that employers pay liquidated damages when settling a wage-and-hour investigation, and the DOL likely will increase the use of civil monetary penalties as a potent deterrent to send a message to employers."

Employers should expect a return of the enforcement tools of the past, liquidated damages being almost automatic as penalties in wage and hour investigations, added Jason E. Reisman, co-chair, Labor and Employment Practice Group, for Blank Rome in Philadelphia. "We expect more willfulness assertions by the DOL, which allow a back wage look-back period of three years, rather than two. And, yes, the use of civil money penalties will be used more broadly as a tool than in the last four years."

Minimum wage and the tip credit

The Biden administration clearly supports increasing the federal minimum wage, said Kevin Young, a partner in labor and employment in Seyfarth's Atlanta office. And there's also little doubt that the benefit of any increase will apply for tipped workers.

"The question here is whether the FLSA will continue to allow a portion of a tipped employee's minimum wage to come in the form of tips," he said. "A recent federal legislative proposal would remove this so-called tip credit, requiring restaurants to directly pay the full minimum wage to each tipped employee, without credit or concern for the amount of tips they earn on the job. If passed, this could have a seismic impact on a restaurant industry that operates on thin margins and has spent most of the last year on life support."

Supporting fair workweek and predictive scheduling

Fair workweek laws have swept the nation and in particular the retail, fast food and hospitality industries over the past decade or so, Young said. These laws are likely on the radar of Biden and Walsh.

One recently took effect in the president's backyard (Philadelphia), and another has been the focus of lobbying efforts in Walsh's home state of Massachusetts, Young noted.

"Instituting this sort of reform at the federal level would require an act of Congress," Young said. "After all, the DOL can't make new law, only interpret and enforce what's on the books, and I don't get the sense that this sort of measure is among Democratic lawmakers' core labor priorities."

In the past couple of years multiple local jurisdictions including Chicago, Seattle and San Francisco passed predictive scheduling laws, with more such laws likely to hit the books in the coming years, Durham said. Absent new legislation at the federal level, it is highly unlikely the Labor Department will impose requirements similar to these laws because the FLSA generally does not impose requirements on employers related to scheduling employees, he added.

"However, one way in which the DOL could enhance the financial benefit to employees of such laws would be to take the position that certain penalties under predictive scheduling laws, such as penalties for shift cancellations or other scheduling changes with insufficient notice to employees, need to be included in the regular rate of pay for purposes of calculating overtime under the FLSA," Durham said. "The DOL's current position, set forth in a Fact Sheet published in December 2019, is that most such penalty payments do not need to be included in the regular rate of pay."

This is just one of the many examples of how labor law enforcement can change. But when an organization has the right compliance processes and systems in place, it's highly unlikely that they will be fazed with such changes. Staying abreast of labor law changes and the factors that affect how they are enforced is the first step. Another crucial step is to build a compliance strategy, and technology plays a huge role in that. Manually tracking and implementing these rules is prone to error and can easily result in violations and penalties. Technology automates compliance to federal, state, and local labor regulations.

Chapter 4:
Meeting SEC requirements for disclosing human capital data

Due to the U.S. Securities and Exchange Commission rules that went into effect in November 2020, publicly traded companies are required to disclose human capital information such as workforce cost, human capital ROI and turnover rate, among others.

What this means for publicly traded companies is: They must be prepared with the right data for their public financial release. The SEC does not require specific metrics but wants appropriate information for employee attraction, development and retention at minimum.

The idea behind this is so that potential investors or stakeholders have all the information they need about a company before they make their investment or voting decision. A PwC report clarified that specific metrics aren't required so that these human capital disclosures "will be tailored to a company's own business or industry using management's judgment and that they may evolve over time."

Human capital disclosure has been gaining traction the past few years, with the International Organization for Standardization passing the first-ever standard for human capital reporting in November 2018. The decision prompted HR analytics expert Jac Fitz-enz to explain what this means for the field of HR. "An ethical code, a body of research, specialized education and performance standards are the basis of a profession. The adoption of ISO standards supports human resources' claim to be a profession," he said.

Even as far back as 2015, Deloitte Consulting managing director and workforce management expert Lisa Disselkamp said, "To say workforce management outcomes affect shareholder value and business strategy is no understatement."

Collecting human capital data

The right workforce management software can help organizations collect appropriate metrics for SEC disclosure. Workforce.com allows organizations to easily compile metrics including:

- ✓ Level of compliance with wage and hour laws.
- ✓ Employee feedback scores.
- ✓ Employee star ratings and performance scores.
- ✓ Data security for employees.
- ✓ Employee retention rates.
- ✓ Absence management and absence rate (i.e., rate of not showing up).
- ✓ Schedule flexibility.
- ✓ Payroll error rate and amounts.

Data on employee feedback scores or schedule flexibility can give employers insight on employee engagement or satisfaction. Plus, employers can easily keep track of how many hourly employees they have in the system versus contract or contingent workers. Rates of employee absenteeism can inform organizations on how engaged employees are and how to help predict turnover.

Chapter 5:
Technology and your employment law compliance

Labor compliance software is an innovative way to manage the myriad of regulations and laws that govern wage and hour practices workplace.

Business owners, HR, and workforce practitioners must recognize the regulatory distinctions of the FMLA and FLSA and navigate the nuances between the ADA and ADAAA. What are the latest regulations surrounding the ACA? Can a misstep with COBRA come back to bite them?

Labor compliance is an overwhelming alphabet soup of laws, regulations and agencies that govern the workplace, making it C - Complicated. But an innovative and compliant software simplifies the process and makes all those labor acronyms easier to manage.

The value of labor compliance software

Maintaining wage and hour compliance with government regulations isn't easy. Besides knowing what agencies actually do and how regulations affect employers, labor laws are dense, complex and confusing. A single unintentional compliance misstep by an organization can lead to a costly and time-consuming lawsuit with the potential to disrupt or even bankrupt a small, growing organization.

Compliance solutions allow organizations to avoid a trip to court and more easily comprehend constantly changing federal, state and local legislation. Employers can disseminate policies to employees, provide guidelines for regulatory enforcement and manage confidential documents all while saving money by easing time-consuming, onerous reporting rules.

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Timesheet Export Summary

Pay Rate		Total Hours	Ordinary
🔴 California - OT - After 8 hours in a day		1.9	Non-ord
🟡 California - OT - After 40 hours in a week		6.8	Ordinary
🔵 California Regular Rate		40	Ordinary
Pay Rate Totals		$48.7	
Tips and Extras		**Total Units**	
California Regular Rate		179.8	
Tip and Extras Totals		179.8	
Total Cost			

Timesheet Earnings Chart

Wednesday, Sep22	Ord x 1.0
Thursday, Sep24	Ord x 1.0
Friday, Sep25	Ord x 1.0
Saturday, Sep26	Ord x 1.0
Sunday, Sep27	Ord x 1.0 Ord x 1

Workforce management systems typically assist with traditional compliance issues while a specialized compliance solution takes employers beyond the basics and provides expert guidance on critical regulations. It can be like having a team of legal experts at your fingertips with minimal expense. Labor compliance software also allows businesses to communicate company and legislative policies to their employees.
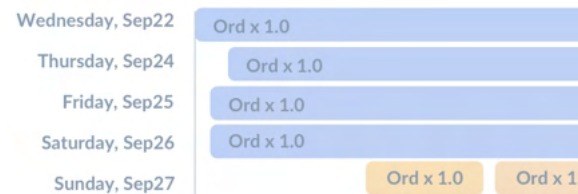
Key areas for compliance software

Regulatory software helps an HR department remain in compliance across all organizational departments. According to peer-to-peer software review site G2, there are business functions and the germane laws that can be undertaken by labor compliance software:

Benefits

Affordable Care Act (ACA); Consolidated Omnibus Budget Reconciliation Act (COBRA); Health Insurance Portability and Accountability Act (HIPAA); Genetic Information Nondiscrimination Act (GINA); Fair Labor Standards Act (FLSA); Family and Medical Leave Act (FMLA).

COVID-19-related policies

Coronavirus Aid, Relief, and Economic Security Act (CARES Act); Families First Coronavirus Response Act (FFCRA); and Payment Protection Program (PPP).

Labor and employment relations

Labor union updates (AFL-CIO, AFGE, SEIU, etc.); Department of Labor (DOL); Equal Employment Opportunity Commission (EEOC); National Labor Relations Board (NLRB); Office of Federal Contract Compliance Programs (OFCCP).

Payroll

Fair Labor Standards Act (FLSA); Federal Insurance Contributions Act (FICA); Federal Unemployment Tax Act (FUTA); Sarbanes-Oxley Act (SOX).

Risk

Employee safety is a top priority for all organizations. Compliance software can manage and track guidance and enforcement by the Occupational Safety and Health Administration (OSHA).

Companies needing compliance software

No organization is immune from U.S., state and local labor laws. True, regulations often vary depending on factors including employee count. A four-person mom-and-pop shop does not face the same labor compliance regulations as a multinational company.

Yet it is crucial that company policies remain up to date and comply with changes in legislation. Despite the expense a lawsuit can present, many smaller organizations are hesitant to call on legal resources simply based on costs. Those concerns can be streamlined by compliance software.

Small companies have difficulty keeping up with changes in compliance because they lack the manpower, and HR departments are already stretched thin or responsibilities are divided among employees as collateral duty. There is no point person to track and update compliance regulations.

Compliance is particularly crucial to navigating the maze of workplace issues. Municipalities and some states have instituted fair workweek policies in the past few years with more on the horizon. Compliance training, employee handbooks and more can be structured and simplified with a compliance solution.

Small and midsize organizations in particular have difficulty keeping up with HR compliance regulations as new legislation is continually introduced. When the HR team is small (or even just one person), their bandwidth quickly becomes strained leading to additional risks. Large businesses may be the resources but due to increase public expectation cannot afford the reputational risk

Sorting through labor regulations can be an eye-glazing exercise for employers. Labor compliance software helps them to spell out attractive cost-savings, easy-to-use solutions and avoid unintentional noncompliance.

Solving compliance challenges with technology

Compliance is complicated and time-consuming, and employers don't have the time to become experts in every rule or regulation that impacts their business. For any organization, addressing how to reduce compliance risk requires the right external and internal resources.

Technology can help automate compliance in different areas of workforce management—from assigning schedules, tracking break times, to ensuring all applicable rules are applied during payroll. Regardless of business size, technology plays a crucial role in helping employers stay on top of labor compliance.

Workforce.com's labor compliance solution automates compliance to federal state, and local labor regulations. It takes into account different regulations that are applicable to your business so that compliance is guaranteed in every step of workforce management and nothing falls through the cracks. Most importantly, it boosts employee trust when they know that they are treated fairly and according to labor laws.

Discover how Workforce.com's compliance tool can help strengthen your strategy. Book a demo or start a free trial.