HR compliance risks for small businesses

Expert advice on risks to watch out for today

unum

HR compliance gets harder every year

"Just knowing which laws apply to you is easier said than done."
— Suzanne King, Partner, Pierce Atwood

Employment law is a vast patchwork of federal, state and local legislation and regulation that gets more complex every single year. And with new laws in place through the end of 2020 to help employees deal with COVID-19, the legal landscape has become even more complicated. Still, compliance mistakes can be costly for businesses, both in dollars and reputation.

In this guide, our employment law and HR technology experts weigh in on the compliance risks HR professionals often misunderstand, and those to watch out for now, and in the months to come.

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COVID-19 leave law

A TEMPORARY LEAVE LAW CREATES NEW RESPONSIBILITIES FOR SMALLER EMPLOYERS.

The Families First Coronavirus Response Act (FFCRA) went into effect April 1, 2020. Included in this act were two new employee leave components: the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA). These are in effect through the end of 2020 and apply to all public agencies and private businesses with fewer than 500 employees.

WHAT THE LAWS REQUIRE

Briefly, **EPSLA** provides **two weeks of paid sick leave** for employees who:

- Have become ill with symptoms of COVID-19 and are seeking diagnosis
- Are quarantined either by a governmental order or direction of a doctor
- Are taking care of someone who is quarantined either by a governmental order or direction of a doctor
- Have to take care of a child whose school or childcare arrangements have become unavailable due to the COVID-19 pandemic ("school closure")

EFMLEA basically adds the "school closure" reason from the EPSLA as a new reason an employee can take leave under the Family and Medical Leave Act (FMLA). Like the FMLA, it provides **12 weeks of job-protected leave** for this reason (which comes out of the same 12-week entitlement as existing FMLA leave reasons); unlike the FMLA, it stipulates that **10 weeks of this leave must be paid**. Employees can use the two weeks of EPSLA leave concurrent with the first two weeks of EFMLEA leave, for a total of 12 paid weeks of leave. (See "Federal employment law thresholds and responsibilities: A quick guide," page 10, for more information on FMLA reasons).

POTENTIAL EXEMPTIONS FOR COMPANIES <50 EMPLOYEES

Businesses with fewer than 50 employees may be exempt from providing paid and job-protected leave for school closures. To be exempt, according to the Department of Labor, "an authorized officer of the business" must determine that the business satisfies at least one of these conditions[1]:

- Providing the leave would result in financial obligations exceeding available revenues, causing the business to close or operate at a minimal capacity
- The employee's presence is essential to the business's financial or operational health because of their specialized skills, knowledge of the business or responsibilities
- The employer cannot replace the needed employee because other qualified workers are not available

See our HR Trends page for podcasts, webinars and other employer resources related to COVID-19.

QUICK GUIDE TO COVID-19 LEAVE LAWS

For private employers with fewer than 500 employees and public agencies

LAW	ELIGIBLE REASONS	AMOUNT OF LEAVE	PAY CALCULATION
EPSL	**Employee:** 1. Is subject to a quarantine or isolation order related to COVID-19 2. Has been advised by a health care provider to self-quarantine because of COVID-19 3. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis 4. Is caring for a covered person who is subject to a federal, state or local quarantine or isolation order, or has been advised by a health care provider to self-quarantine due to COVID-19 concerns 5. Is caring for a child whose school or place of care is closed or whose care provider is unavailable due to the public health emergency	• Full-time employees: 80 hours • Part-time employees: Prorated number of hours based on normal hours for two-week period	• Reasons 1,2 & 3: 100% of regular rate of pay up to $511 per day • Reasons 4 & 5: 2/3 of regular rate of pay up to $200 per day
EFMLEA	Expands FMLA to include reason 5 above	• 12 weeks of job-protected leave • 10 weeks of paid leave (within the 12 weeks) • Must have worked for employer for 30 days to qualify	• 2/3 of the employee's regular rate for the number of hours the employee would otherwise be scheduled, up to a maximum of $200 per day • $10,000 total maximum

Source: U.S. Department of Labor, Families First Coronavirus Response Act: Employer Paid Leave Requirements, accessed Aug. 22, 2020.

Revised overtime regulations

WHEN 2020 BEGAN, SO DID THE NEW RULE ON OVERTIME PAY.

As of January 1, 2020, employees earning less than $35,568 per year must generally be paid time-and-a-half for overtime when they work more than 40 hours in a week. The old threshold was $23,600 per year, meaning 1.3 million more[2] American workers became eligible for overtime pay in 2020, according to the Department of Labor.

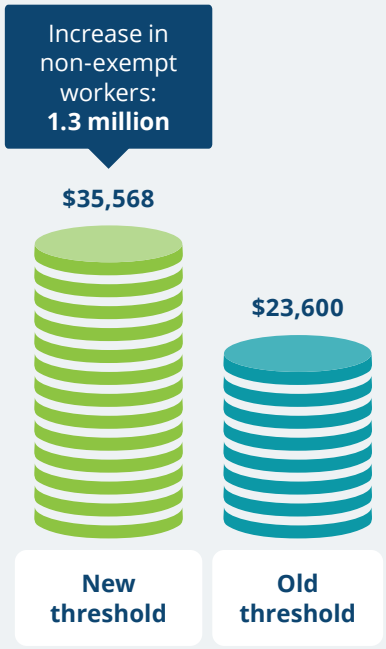
Legal wrangling over the pay threshold has been going on for years, so some employers may have missed the final decision. It's important to review your overtime practices for compliance, as willful or repeated non-compliance could cost employers over $2,000 per violation.[3]

WHAT TO WATCH OUT FOR

Many employers may need to check their HR record-keeping systems to make sure their employees have been properly classified as exempt or non-exempt from overtime pay. They should also be aware that salary is not the only factor determining whether an employee is exempt. Some entire professions are exempt and rules about employee duties also apply.

The Department of Labor publishes a small-entity compliance guide[4] (download the pdf here) that can help you understand when you must pay employees overtime.

2020 OVERTIME PAY THRESHOLD INCREASED NUMBER OF NON-EXEMPT EMPLOYEES



Source: U.S. Department of Labor, U.S. Department of Labor Issues Final Overtime Rule, 2019.

Pay equity

PAY EQUITY IS A DEVELOPING FRONT IN EMPLOYMENT LAW AND PRACTICE.

In March 2019, the U.S. Women's National Soccer Team (USWNT) sued the U.S. Soccer Federation (USSF) for gender discrimination.[5] In their suit, the players argued that the USSF provided inferior wages and working conditions compared to the men's national team, despite doing essentially the same job.

The team won the right to a class-action suit, but the judge hearing the suit dismissed the wage-discrimination claims. The working-conditions claims are scheduled to be heard in early 2021, after which the team plans to appeal the equal-pay decision.[6]

As the issue of gender pay equity gains wider awareness, it is expected that claims of pay inequity will increase across companies of all types and sizes.

WHAT THE FEDERAL LAW REQUIRES

The federal Equal Pay Act, enacted in 1963 and folded into Title VII of the Civil Rights Act in 1964, requires that men and women in the same workplace receive equal pay for jobs that require equal skill, effort, responsibility and working conditions. The law covers jobs that are substantially equal (not necessarily identical) as measured by job content (not job titles). It covers all forms of pay, including salary, bonuses, benefits, vacation pay, expense reimbursement and other forms of compensation.[7]

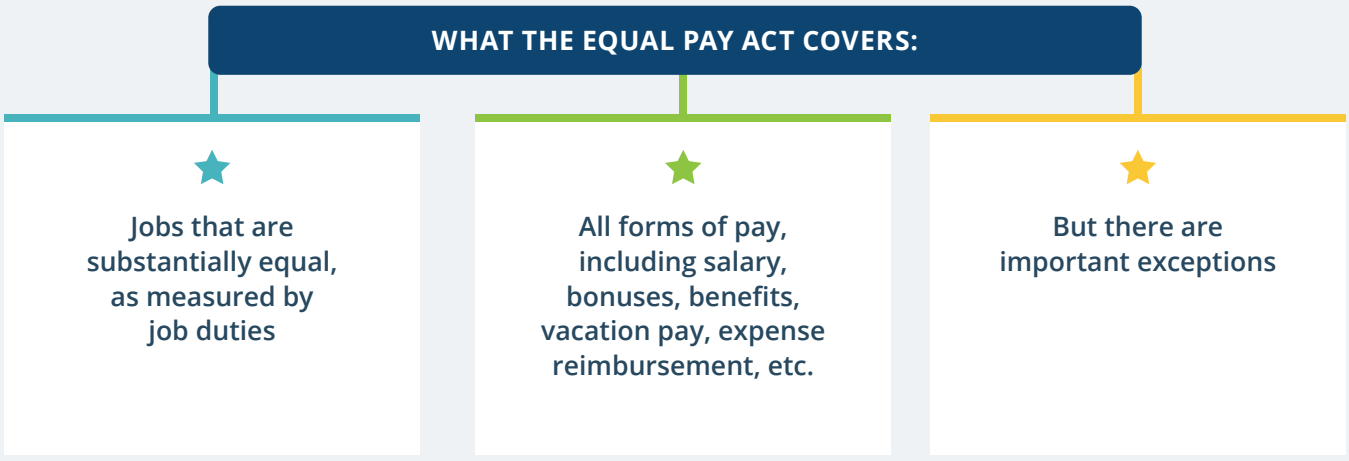
That seems clear enough, but the law lays out several exceptions. Pay disparity based on seniority systems, merit systems, and systems that measure earnings by quantity or quality of production are allowed. So are other disparities based on "any factor other than sex" (for example, market conditions and prior job experience).

WHAT ABOUT STATE LAWS?

To make it even more complex, some states have implemented equal pay laws with different provisions. For example, the Massachusetts law does not include exceptions for "any factor other than sex." And many states prohibit basing pay decisions on prior salary history (see HR Dive for a running list of these[8]).

WHAT TO WATCH OUT FOR

With lawsuits cropping up across the country,[9] employers should become familiar with what their state requires. According to Suzanne King, employment law expert and Partner at Pierce Atwood, "It is worth considering a pay-equity audit to better understand where you are in terms of compliance."



Compliance thresholds

THEY'RE NOT AS SIMPLE AS YOU MIGHT THINK.

Across the spectrum of federal employment laws, the thresholds for coverage vary greatly. This leads to a lot of confusion.

Generally, if you have 15 or more employees, you're required to comply with the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act (Title VII). If you have 20 employees, the Age Discrimination in Employment Act (ADEA) also applies to you.

At 50 employees, you have responsibilities under the Family and Medical Leave Act (FMLA) and the Affordable Care Act (ACA). When you get to 100 employees (50 if you're a federal contractor), you also have some Equal Employment Opportunity (EEO) reporting responsibilities.

But it's not as simple as looking around the office and counting how many people work for your business today. The definitions are complex. Under all of these laws, a covered employer is one who employs the requisite number of employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

"When it comes to FMLA, a lot of employers stop reading when they get to 50 employees,'" says Ellen McCann, Assistant Vice President and Legal Counsel in Unum's Employment Law Group. "And what they don't realize is that if you're covered for one year you are covered for two years, because we are looking at the current or preceding year."

STATE LAWS ADD TO THE COMPLEXITY

Making things even more confusing, state thresholds can differ from federal. "The reach of state laws goes further than the reach of federal laws, and this is particularly important if you are a multi-state employer," says King. As a few examples, the compliance threshold for anti-discrimination is six employees in Massachusetts and New Hampshire, five in California and four in New York.

So, imagine you are an employer with a large work force in your headquarters state, a few smaller regional

QUIZ: IS THIS EMPLOYER COVERED BY FMLA?

Jane owns a restaurant on the beach. Last year, she had 75 employees for more than 20 weeks from June through October. Now, in the off season, she has only 30 employees.

Q: Is Jane covered under FMLA?

A: Yes. Jane is covered under FMLA (and ADA, ADEA and ACA) for all of this year, because she had at least 50 employees for more than 20 weeks last year.

THE DIFFERENCE BETWEEN FMLA EMPLOYER COVERAGE AND EMPLOYEE ELIGIBILITY

"If we're covered under FMLA, then all of our employees are covered, right?"

Not necessarily.

A lot of employers are confused about the difference between FMLA **employer coverage** and **employee eligibility**. Your company might be large enough that it has to provide eligible employees with FMLA leave, but that doesn't mean that every employee is eligible.

Under the FMLA, an employee is eligible to take job-protected leave only if:

- **Their reason** for wanting leave is covered under the FMLA.
- **They have worked** for the company for at least a year, and for at least 1,250 hours in the 12 months preceding the leave request.
- **The employer has at least 50 employees working within a 75-mile radius** of the requesting employee's worksite.

  So, if you have 50 employees working anywhere in the U.S., according to the regulations, you're a covered employer. But you only have to grant leave if the particular employee is one of at least 50 employees working with a 75-mile radius of the employee's worksite.

The regulations are clear that employers should not grant FMLA leave if employees don't meet these requirements. While it may seem like the generous thing to do, it may cause trouble if the employee later becomes eligible for FMLA, but has exhausted their 12 weeks according to the employer's records.

offices in different states, and a handful of remote workers in still other states. You would need to figure out which thresholds apply to you in which states and understand when you had hit the magic number to trigger additional requirements.

AND THEN THERE ARE PAID LEAVE LAWS…

Paid leave laws are complicating the leave landscape for employers, with an ever-growing number of state and local paid leave requirements evolving and coming online. The threshold requirements for coverage vary from state to state, as do the employer's responsibilities for accommodating leave.

In some cases, the law only counts those employees in the state for purposes of determining whether the threshold is met. And in other cases, the law requires the employer to count all people employed across the country.

"One thing companies really need to be concerned about here is that many of these laws apply to employers that have just one employee in the jurisdiction," says McCann.

Some employers are coping with the complexity by offering leave programs that are equal to or more generous than their state or local requirements. However, employers should be aware that in states where employers are permitted to use their own plan rather than the state/local plan, the employer's plan must be equivalent across all provisions of the state/local plan, not just the amount of leave or the amount of pay — for example, rights to appeal, protection against retaliation, and presumption in favor of granting the leave.

COVID-19 AND FMLA

FMLA entitlements were amended to cover some COVID-19-related leave reasons, to help employees cope with the economic disruptions caused by the pandemic.

Please see the first chapter of this report for more information.

STAY UP TO DATE ON STATE PAID LEAVE LAWS

Visit our state leave law website.

UNDERSTANDING FMLA LEAVE PERIODS

"Employees can take FMLA leave once, and that's it. Right?"

Wrong.

Eligible employees can take FMLA leave for covered reasons for up to 12 weeks in a 12-month period. This means that an employee with a chronic medical condition could be away from work for **12 weeks every 12 months**, and their job would have to be protected.

"That's a significant amount of leave and it can create a significant challenge for employers to manage," according to King.

Employers also need to understand that the FMLA may require them to provide leave that is **intermittent** as well as continuous. "So, if an employee needs every Tuesday off to attend treatment or has a migraine condition and is out unpredictably several times a month, that may very well be covered under FMLA," says King.

The rules around intermittent absences are also complicated, presenting another level of challenge for employers to manage.

ACA UNCERTAINTY

The state of the Affordable Care Act, also known as Obamacare, is in serious flux, with court challenges yet to be fully decided and much uncertainty about the future for the law.

As of this writing, however, employers with at least 50 employees must still offer full-time employees affordable, adequate health insurance or be subject to significant penalties.

Keep up with your responsibilities at irs.gov/affordable-care-act/employers.

FEDERAL EMPLOYMENT LAW THRESHOLDS AND RESPONSIBILITIES: A QUICK GUIDE

LAW	BASIC EMPLOYER RESPONSIBILITIES	EMPLOYEE COVERAGE THRESHOLD	HOW NUMBER OF EMPLOYEES IS CALCULATED
ADA	Not to discriminate in employment on the basis of physical or mental disability. To accommodate disabled employees in the workplace, as long as it does not cause undue hardship.	**15**	You are covered if you had the minimum number of employees during 20 weeks in the current OR preceding year. The weeks don't have to be consecutive.
Title VII	Not to discriminate in employment on the basis of race, color, religion, sex (including sexual orientation and gender identity) or national origin.	**15**	
ADEA	Not to discriminate in employment on the basis of age for people 40 and older.	**20**	
FMLA	Provide up to 12 weeks of job-protected leave in a 12-month period to eligible employees who need to care for themselves or certain family members after a new child joins the family, a serious illness occurs or a military service member is deployed (up to 26 weeks in some cases).	**50**	

Sources: U.S. Equal Employment Opportunity Commission, Who is an "Employee" Under Federal Employment Discrimination Laws?, accessed Aug. 26, 2020. U.S. Department of Labor, Fact Sheet #28: The Family and Medical Leave Act, 2012.

Anti-discrimination laws

EMPLOYERS OFTEN HAVE MORE RESPONSIBILITIES THAN THEY REALIZE.

Federal law prohibits covered employers from discriminating in employment based on race, color, religion, sex, national origin, age or disability. Some employers think that once they've made a hiring decision, their responsibilities stop. But that's not the case.

Commonly overlooked provisions include:

- **ADA accommodations.** In addition to not discriminating in hiring, employers have an **affirmative obligation** to provide workplace accommodations that make it possible for disabled employees to perform the essential functions of their jobs, unless they can show that this will create an undue hardship for the company.

  It's also important to remember that leave can be an accommodation. So even if an employee doesn't quality for FMLA (e.g., because they haven't been employed at the company long enough), an employer may still need to provide job-protected leave to accommodate a disability (e.g., to allow time for a treatment or surgery). "The junction of ADA and FMLA is confusing for a lot of employers," says King.
- **EEOC.** Private employers with at least 100 employees must submit an annual report (called the EE0-1) categorizing employment data by race/ethnicity, gender and job category, which helps in national enforcement of Title VII.
- **ADEA provisions.** Several protections are built into the ADEA beyond not hiring or firing based on age. For example, if an employer offers an employee who's 40 or older a severance agreement that includes a release of age claim, they must offer certain protections regarding the review period and a revocation right. Review the ADEA protections here.[10]
- **Variance in protected employee characteristics.** All covered employers must abide by the non-discrimination provisions set forth under Title VII, the ADEA and the ADA, but some states also have their own specific list of protected characteristics.

  For example, age discrimination is handled differently depending on the state. In New Hampshire, age discrimination is prohibited for all ages, not just employees who are 40 or over. In New York, discrimination based on age is prohibited for employees 18 or older.

In June 2020, the Supreme Court ruled that Title VII protects employees nationwide against discrimination on their sexual orientation and gender identity.[11]

Lawsuits challenging termination decisions

DOCUMENTATION AND HONEST PERFORMANCE APPRAISALS ARE KEY.

"One of the biggest legal risks in managing people is termination decisions that are not well supported," says King. Many employers open themselves up to lawsuits by not sufficiently documenting and enforcing performance requirements. These best practices can go a long way toward protecting companies from legal action:

- **Define and document job descriptions.** For legal and business reasons, it's critically important that employees know what is expected of them. One of the best ways to convey that, and document it, is through a job description.
- **Include soft skills.** Job descriptions should include skills that influence fit, such as communication skills. If these aren't documented, it will be riskier to terminate someone based on personality characteristics that interfere with office harmony — especially if other performance requirements are being met.
- **Require and document honest performance feedback/reviews.** Managers should read and know their employees' job descriptions and hold employees accountable to job requirements. Risk will be reduced in a culture that supports fair and constructive criticism, instead of allowing managers to write unduly positive reviews just to avoid conflict.
  It is also important to document all performance reviews and all efforts to help an employee meet requirements before termination. A digital HR information system can be particularly valuable for storing reviews and keeping them accessible even after an employee leaves your company.
- **Document termination process and responsibilities.** Who makes termination decisions in your company? How are they evaluated for legal risk? Does a manager have the ability to make a termination decision without involving HR? Does legal review come into play?

  Employers should make sure they have thought through each of these questions from the standpoint of minimizing risk, document the process and then ensure everyone is following it.

> One of the biggest legal risks in managing people is **termination decisions** that are not well supported.
>
> **Suzanne King**
> Partner, Pierce Atwood

QUIZ: WOULD THIS EMPLOYEE HAVE A CASE?

Could these employees sue their employers for wrongful termination? Suzanne King of Pierce Atwood offers guidance and best practices.

PHIL:

Phil, 55, was let go for "performance issues" even though his last review showed three "exceeds" and three "meets" on performance standards. He was replaced by a 30-year-old woman fresh out of business school.

Would Phil have a case?

Probably.

Phil could sue for wrongful termination based on age and/or sex discrimination. If his performance was inadequate, his performance appraisals should have documented it.

AMIN:

Amin was out for four weeks to care for a dying family member overseas. Although he had been a great employee for eight years, he was terminated for attendance problems.

Would Amin have a case?

Maybe.

If the employer was covered by FMLA, Amin could have had job-protection rights. It's the employer's duty to determine whether an employee's leave request is eligible for FMLA protection, even if the employee doesn't specifically ask for FMLA leave.

SUSAN:

Susan's team members found her challenging to work with. Some found her demeanor unpleasant and others said she was hard to talk to. Despite adequate performance reviews, Susan was let go.

Would Susan have a case?

Possibly.

Susan's lack of "fit" could have been due to cultural differences based on national origin (protected by Title VII), a disability affecting communication (protected by the ADA), or even a simple difference in age from most of her team members (protected by the ADEA).

Her employer could have avoided a potential lawsuit by including soft skills in her job description, documenting her performance evaluations, and, if Susan is disabled, offering accommodations (e.g., allowing her to communicate through email instead of face-to-face meetings).

Illustrative examples. Not real cases.

Technology and compliance

YOU NEED A DIGITAL RECORD-KEEPING SYSTEM. MAKE SURE IT'S COMPREHENSIVE — AND SECURE.

HR technology can be an enormous help in meeting compliance challenges, by making it easier to keep and find records like job descriptions, performance reviews, pay data, leave dates and more.

But you need a system that's up to the job. Make sure yours is capable of capturing and storing a comprehensive set of employee information, and then make sure that information is protected against unauthorized access.

CHOOSE A ROBUST SYSTEM

Many companies think that just because they have an HR information system, they're protected. But some may be operating under a false sense of security. To protect your company, your HR system needs to capture and store all the documents needed to demonstrate compliance with all the applicable federal, state and local laws and regulations.

Your system should also help you keep employee information up to date. The consequences for not having the correct benefits beneficiary or employee emergency contact on file can be serious, and tax withholding choices also need to be reviewed periodically.

A self-service portal where employees can make these changes themselves helps to ensure that changes are made promptly and information is correct. Ensure that your employees have access to their own information, from their desktop or phone. The system should also be able to document that employees have received and accepted company policies.

"Many small businesses are using an estimated six to ten disparate systems to manage employees and compliance — and that's a lot," says Wendra Johnson, SHRM-SCP, SPHR, Vice President of HCM Market Development at Unum. "If those systems don't integrate or talk well, that's inefficient and can be frustrating for the HR professional managing compliance."

Comprehensive systems, with tightly integrated components, can help ensure you have no gaps in your record keeping, while providing the consistent, repeatable processes you need to ensure that all your records are complete and up to date.

MAKE SURE SECURITY IS IRONCLAD

You collect a lot of personal data on your employees: social security numbers, health information, salary data and much more. “Eliminating paper is the one of the first steps in helping make sure this highly sensitive data stays secure,” says Johnson.

While a digital system is clearly more secure than a pile of papers sitting on your desk, that system must have built-in characteristics to protect it from unauthorized access.

“Know what security protocols are available in the system to help you protect your data,” adds Johnson. “For example, payroll providers should have completed SSAE-16 SOC Type 2 compliance reporting that describes how they handle data security, system privacy, data confidentiality and data processing processes.”

Part of securing your system is paying careful attention to access and permissions. Ensure that permissions are awarded thoughtfully and that you know who has access to what information on your systems. A designated professional in HR should have full access and control over individuals’ authorization or deauthorization. “You should be able to immediately terminate someone’s access to the data when necessary,” Johnson says.

RETHINK YOUR TECHNOLOGY FREQUENTLY

With HR systems so critical to compliance, and with technology always undergoing rapid change, it’s a good idea to review your systems and technology needs annually. Is your technology helping or hurting your compliance management and risk exposure? Spend time learning about the functionality your systems plan to add. Is it time to find a new solution that may better support your business goals and processes? Maybe you decide you want more bells and whistles, or maybe you just want a simpler solution that’s easier to use.

You have many choices in the marketplace. Take time to evaluate which one(s) will help you mitigate risk while also making your job easier.

If systems don't integrate or talk well, that's **inefficient and frustrating** for managing compliance.

Wendra Johnson

SHRM-SCP, SPHR,
Vice President of HCM Market Development, Unum

YOU'RE NOT ALONE

If you're a small HR team and you're daunted by your compliance responsibilities, you're not alone. Many smaller teams feel challenged and overwhelmed by the number of compliance issues they face. It can be helpful to stay close to industry leaders for ongoing information about how employment laws change and may impact your business.

Unum's HR Trends resource site provides a wealth of podcasts, webinars, reports and articles featuring insights from industry experts that can help you stay up to date. Visit unum.com/employers/resources/hr-trends and subscribe to our monthly newsletter. Compliance will not be getting simpler next year, or any other year, so take steps now to stay on top of changes and reduce your compliance burden.

ABOUT UNUM

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The information in this document does not constitute legal guidance and should not be relied upon when making decisions. Please consult with your legal counsel or employment law advisor about your responsibilities under the employment laws of your jurisdiction.

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