What Every Employer Must Know to Avoid Costly Lawsuits

Tips for Preventing High-Priced Compliance Violations

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Introduction: Managing Legislative Compliance Risks Can Save Your Business from Costly Fines

Protecting your company from legislative compliance risks is a high priority for any CEO or CFO. Ignorance and violation of workplace regulations cost U.S. organizations millions of dollars each year. And, with the trend of an increasingly litigious society, legislative compliance poses a greater risk than ever. More and more often, state and federal courts now rule in favor of employees who feel wronged, and court rulings and settlements can cost your business hundreds of thousands of dollars.

Did you know that:

• there are more than 450 employment lawsuits filed in the U.S. every day;  

• employment lawsuits have risen 400% in the past 20 years;  

• when an employment case goes to a jury, the employer loses in about 60% of those cases;  

• jury awards in favor of employees average about $400,000; and  

• 53% of companies have been named as defendants in at least one employment-related lawsuit, with 90% of those cases brought by former employees?

What are the first steps toward avoiding costly compliance violations and lawsuits? Understanding workplace regulatory requirements and having a human resources/payroll system in place enable you to keep accurate records and produce required compliance reports quickly and easily.

This report reviews five of the most common, problematic workplace regulations, discusses the violations that can be costly for your business, and explains how UltiPro can help you stay in compliance to avoid expensive fines and lawsuits.
The Dangers in Violating FLSA

The main intent of the Fair Labor Standards Act (FLSA) is to protect unskilled laborers and minors who work by the hour, often in low-paying jobs. It excludes professional, administrative, and executive employees who are paid a fixed salary rather than an hourly wage (plus volunteers, independent contractors, and some other types of workers). Violating FLSA regulations can be quite costly to employers, as evidenced by the following figures:

Did you know that:

- In 2003, the Employment Standards Administration’s Wage and Hour Division (WHD) recovered more than $182 million in back wages for violations to FLSA — a 27% increase over the previous year.
- The WHD collected almost $40 million in back wages in 2003 for workers in selected low-wage industries, including health care, hospitality, garment manufacturing, agriculture, and temporary services.
- In 2003, employers were assessed more than $3 million in FLSA civil money penalties.

The number of workers who received back wages increased 30% from 2002 to 2003, with 314,660 employees collecting monetary awards. FLSA cases represent about 83% of all cases handled by the Department of Labor in a fiscal year.

Employers who willfully or repeatedly violate minimum wage or overtime pay requirements are subject to a civil monetary penalty of up to $1,000 for each violation. Violators of the child labor provisions are subject to a civil monetary penalty of up to $10,000 for each young worker who was employed in violation. Willful violations of the FLSA may result in criminal prosecution and the violator fined up to $10,000. A second conviction may result in imprisonment. There is also the possibility of violation of state wage payment laws, which usually carry their own penalties, fines, and attorney’s fee awards.

Audits of a company’s payroll and timekeeping records, as well as substantial back pay awards, fines, and penalties, will “look back” two to three years. Thus, to be in compliance with FLSA, employers must retain records of employees’ earnings for three years. Records should include each employee’s information, such as name, address, job title, hours and days worked, amounts earned each day or week, regular hourly pay rate, total overtime pay for the week, deductions or additions, total wages paid for the pay period, and dates wages are paid.

If a company’s actions are deemed willful, any back pay owed will be doubled as “liquidated damages.” Individual employees also have the right to recover attorney’s fees and the costs of bringing the action.
An Overview of FLSA’s Rules and Regulations

The Fair Labor Standards Act of 1938 (FLSA) provides for minimum standards for both wages and overtime entitlement, and spells out administrative procedures by which workers must be compensated for work time. Provisions related to child labor, equal pay, and portal-to-portal activities are included in the act.14

Currently, workers covered by the FLSA are entitled to minimum wage and overtime pay at a rate of one and a half times their regular rate of pay after 40 hours of work in a workweek (overtime is paid by the week, not the day). Exceptions apply under specific circumstances to various groups, such as disabled workers, full-time students, youth under age 20 in their first 90 days of employment, and tipped employees. Special rules apply to state and local government employment involving fire protection and law enforcement activities, volunteer services, and compensatory time off (instead of cash overtime pay).15

To determine an employee’s regular hourly pay, the employer should add up wages, benefits, vacation pay, sick pay, travel expenses, and profit-sharing plans, and then divide by the number of hours in the workweek. The employer must then pay 1.5 times this rate for overtime hours.16

The FLSA child labor provisions protect the educational opportunities for youth and prohibit their employment in jobs that are detrimental to their health or safety. These provisions include some restrictions on the working hours for youth under the age of 16 and list hazardous occupations that are too dangerous for young workers to perform.17

Wages required by the FLSA must be paid on the regular payday for the pay period covered. Deductions cannot be taken from wages for such items as cash or merchandise shortages, employer-required uniforms, and tools of the trade if they reduce an employee’s wages below the minimum wage or reduce the amount of overtime pay due under the FLSA.18

New regulations went into effect August 23, 2004, that changed the definition of “professional employee” to exclude from overtime employees in any field in which specialized knowledge is acquired, whether it be through on-the-job training, schooling in a community college or technical school, or military experience. The regulations define the term “advanced knowledge” to mean any knowledge that cannot be attained at the high school level, and the employee must perform office or nonmanual work. Administrative employees can be exempted from overtime pay if they hold “a position of responsibility.”

The new regulations also establish a “super-exemption” for employees who earn $65,000 per year or more. With this exemption, an employee who makes $55,000 a year, for example, can be nonexempt for part of the year, and then if the employee earns enough overtime or receives bonuses so that his or her pay equals $65,000, the employee would be exempt from earning overtime for the remainder of the year. Under the new regulations workers who earn less than $22,000 per year would be entitled to overtime pay regardless of their job responsibilities.
In September 2004, a U.S. Senate committee approved a measure blocking implementation of the new rules. The provision, which was offered by Senator Tom Harkin, was approved by a 16-13 vote. Harkin said the new rules are “antiworker, anti-job growth, and anything but family friendly.”

The overtime provision was attached to a $145.9 billion spending bill financing labor, health, and education programs, but in October, the House-Senate Conference committee stripped the Harkin provision from the 2005 Omnibus Appropriations Bill upon a veto threat by President Bush.

On January 24, 2005, Senator Harkin announced that he will introduce the Overtime Rights Protection Act to roll back the new FLSA regulations to restore the right to overtime pay to any worker who was eligible for overtime before the regulations and would also increase the number of workers covered by overtime protections by raising the minimum annual salary threshold to $30,712. That figure corresponds to the increase in workers’ wages since 1975.

In 2002, Dollar Tree Store paid $582,000 in back wages and interest to 3,650 current and former employees for FLSA overtime violations that occurred from May 12, 2000 through May 11, 2002. The Wage and Hour Division determined that Dollar Tree Stores had not included employees’ night premium pay and incentive bonuses when computing their overtime pay rate. Additionally, managers in training and merchandise managers were not paid overtime. In agreeing to the settlement, Dollar Tree Stores admitted no wrongdoing.

On December 19, 2003, the U.S. Department of Labor reached an agreement with T-Mobile USA, Inc., to pay 20,546 workers $4,779,985 in back wages as a result of alleged violations of FLSA’s overtime provisions. Customer care representatives at three of the firm’s call centers were not paid for preparatory work performed prior to the start of their shift because they were not recording that activity. Those functions are considered work time that must be compensated.

Once T-Mobile was made aware of the violations, it worked with the DOL to compute the back wages at all of its call centers for the last three years and to come into compliance.

Almost 400 former employees of Agency Rent-A-Car (now named National Auto Credit) will share a $5,560,000 settlement stemming from a class action lawsuit that was prosecuted in a San Francisco U.S. District Court, which is a federal court. The settlement also provided $2.3 million to cover the workers’ legal expenses and attorneys’ fees, making the total settlement close to $8 million. The lawsuit, filed in 1992, contended that the employer wrongly classified plaintiffs as “managers” when in fact they were not managers and therefore were entitled to overtime wages for extra work. This illegal misclassification, plaintiffs further contended, resulted in the employer’s wrongful failure to pay overtime wages earned. The case is one of an increasing number of cases against out-of-state companies that have allegedly refused to follow California’s strict rules paying overtime, said a lawyer representing the employees.
UltiPro Can Help Your Company Comply with FLSA Regulations

UltiPro helps companies comply with the Fair Labor Standards Act by tracking jobs through the payroll system, tracking hours, tips, overtime, employee type, pay groups, seasonal workers, and any retroactive pay due. With UltiPro, employers can calculate overtime pay, and then display the results of system calculations through its payroll reports. On the Pay Data Entry window, employees’ work hours are entered for the type of pay earned. Payroll staff do not have to enter the overtime computed pay rate or the fully computed overtime pay figure because UltiPro calculates the pay rate and the pay amount based on the overtime calculation rule, whether that be time and a half, double time, or a fully separate premium amount of overtime.

Users can set up earnings with the FLSA average pay rate (hours) option to flag the earning to calculate the FLSA average pay rate. When you enter hours for the employee’s pay, the system will include the earning in the calculation to determine the employee’s average pay rate for coefficient overtime.

Earning codes set with either of the FLSA average rate options (hours or dollars) are included in the calculations regardless of the earning calculation rule selected.

UltiPro allows employers to set up several earning codes to be used in conjunction with one another, depending on the type of compensation an employee earns. For an employee who works in several different capacities during one payroll period and is paid at different rates, his or her regular (or average) hourly pay rate can be used to calculate coefficient overtime compensation.

Coefficient overtime can also be used for hourly-based compensation where the hours worked are excluded from calculations, such as on-call time. Based on the Fair Labor Standards Act (FLSA), payments received by an employee for on-call time must be included in the determination of the regular pay rate for computing overtime. Payments for on-call time are generally computed on an hourly basis for time that is not actually worked.

Payroll administrators who want UltiPro to compute the regular pay rate that is then used to calculate the compensation for coefficient overtime can assign the coefficient overtime earnings calculation rule to an earning code. When this earning code is entered during pay data entry, the system calculates the employee’s regular hourly pay rate (based on all other earnings) and then applies that calculated rate to all instances of the coefficient overtime earnings for that pay period.

The coefficient overtime pay rate can be allocated to multiple cost centers by including multiple entries of the same earning code during pay data entry and, for each earning code entry, assigning the cost center (organization level or location) where the overtime was earned.

UltiPro also makes it easy to review and run reports on detailed employee payroll history records on demand for the required three years. This information will remain within the system until it is archived and purged by the customer.
The Equal Employment Opportunity (EEO) act was passed to ensure that businesses comply with the laws, regulations, and policies that prohibit discrimination in the federal workplace based on race, color, national origin, religion, gender, age, disability, or reprisal.\textsuperscript{24}

Violating the EEO act can cost a company monetarily. Under the laws enforced by the EEOC:

- a worker can collect lost wages and prejudgment interest, liquidated/double damages, compensatory damages, and punitive damages.
- fines can run, per person, from $50,000 for employers with 15 to 100 employees to $300,000 for employers with more than 500 employees.
- U.S. companies paid $310.5 million for EEO violations in 2002.\textsuperscript{25}

If the EEOC decides that there is reasonable cause to believe that discrimination occurred, the parties are asked to enter into conciliation discussions. If those efforts are unsuccessful, the EEOC and/or the charging party may file suit. The EEOC can order a corporation in violation of the Equal Employment Opportunity act to eliminate discriminatory practices, and then hire, adjust wages, promote, or reinstate an employee, depending upon the nature of the action taken against the individual.

The Equal Employment Opportunity Commission was created by Title VII of the Civil Rights Act of 1964, but its intent began many years before. In June 1941, President Franklin D. Roosevelt signed Executive Order 8802 prohibiting government contractors from engaging in employment discrimination based on race, color, or national origin. This order was the first presidential action ever taken to prevent employment discrimination by private employers holding government contracts. It applied to all defense contractors, but contained no enforcement authority. President Roosevelt signed the Executive Order primarily to ensure that there would not be any strikes or demonstrations disrupting the manufacture of military supplies as the country prepared for World War II.

Over the years, the law was amended several times to include:

- Executive Order 9981: This brought about the desegregation of the Armed Forces, although America’s fighting forces were not actually integrated until the Korean War began in 1952.
- Executive Order 10925: President John F. Kennedy signed this law prohibiting federal government contractors from discriminating on the basis of race and establishing the President’s Committee on Equal Employment Opportunity (EEOC).
- Equal Pay Act of 1963: Passed by Congress in June 1963, this decreed that men and women who perform equal work in the same establishment must be paid equal wages.
- The Age Discrimination in Employment Act of 1967: The ADEA protects individuals between 40 and 65 years of age from discrimination in employment.
• Rehabilitation Act of 1973: Section 501 of the act prohibits the federal government from discriminating against qualified individuals with disabilities. Section 505 establishes the procedures and rights for any employee or applicant for employment who is unhappy with the final outcome of a complaint or by the failure of an employer to take final action on such complaint.

• Americans with Disabilities Act of 1990: Title I of the act prohibits employment discrimination on the basis of disability by private employers. Modeled after the Rehabilitation Act of 1973, the act prohibits discrimination against people with disabilities in employment (Title I), in public services (Title II), in public accommodations (Title III), and in telecommunications (Title IV). Title V explains the ADA's relationship with other laws, details insurance issues, prohibits state immunity, provides congressional inclusion, sets regulations, describes the implementation of each title, and notes any amendments to the act.

• Civil Rights Act of 1991 (CRA): The CRA amends Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act, stating that the parties involved can request jury trials and successful plaintiffs can recover compensatory and punitive damages in intentional employment discrimination cases. The CRA also expands Title VII's protections to include congressional and high-level political appointees and eliminates the two- and three-year statute of limitations period for filing private lawsuits under the ADEA.

• VETS-100: This is the Federal Contractor Program requiring any contractor with a contract from the federal government for $25,000 or more, or any subcontractor receiving a contract in the amount of $25,000 or more from a covered contractor, to take affirmative action to hire and promote qualified Vietnam-era veterans, special disabled veterans, and any other veteran who served on active duty. Contractors also must file a VETS-100 Report annually, showing the number of Vietnam-era and special disabled veterans in their workforce by job category, hiring location, and number of new hires.
The Price of Violating EEO Laws

In August 1997, as part of an equal employment opportunity settlement with the U.S. Labor Department, Bluegrass Coca-Cola Bottling Company had to pay $475,206 in back wages to 310 minorities and four women who qualified, but were not hired, for positions at the company’s Louisville, Kentucky, plant. The Labor Department’s Office of Federal Contract Compliance Programs (OFCCP), the agency responsible for enforcing nondiscrimination and affirmative action programs of federal contractors, had alleged that, from March 1994 through February 1995, Bluegrass discriminated against 234 qualified minority applicants for laborer positions and another 75 for merchandiser jobs. The agency also found that, from March 1994 to February 1995, four laborer positions were filled by men who were less qualified than the women who applied, and one clerical position was filled by a nonminority who was less qualified than a minority applicant. Bluegrass Coca-Cola also agreed to an annual review of its selection procedures to prevent discrimination in future hiring decisions.

Similarly, in February 1997 Booneville, Mississippi, manufacturer Quartet Manufacturing Company agreed to pay $232,000 as part of an equal employment opportunity settlement with the U.S. Labor Department. The OFCCP alleged that, from January through December 1995, women were hired at Quartet at a rate significantly lower than male applicants, with 542 qualified female applicants for plant positions being discriminated against. The company agreed to equally distribute a total of $116,000 in back pay, plus $116,000 in front pay. In addition, Quartet agreed to address deficiencies in its affirmative action plan, including inadequate workforce analysis, job grouping, availability analysis, and identification of problem areas.
UltiPro Can Help Your Company Remain Compliant with EEO Regulations

Once an EEO job category is assigned for the job code, then an employee is assigned to the job. That links the employee to that category for as long as he or she is in that position or the category for the job is changed. Employers can generate EEO summary and detail reports for Headcount, New Hire/Rehire, Promotion, Termination, and Transfer (delivered as standard reports in UltiPro). UltiPro also tracks, for example, whether members of the management team have been trained on appropriate actions related to fair hiring and labor practices, and managers can see their training information on the Web.

UltiPro also generates EEO-1 Headcount Summary and EEO-1 Headcount Detail reports for employers to use when filing with the government every year. These reports count the number of employees in a business by job group, gender, and ethnicity. These reports offer useful information on affirmative action tracking because they show hiring trends from which companies can analyze the diversity of their hiring practices.

With regard to VETS-100, UltiPro collects veteran data for reporting. UltiPro can then identify the number of veterans in an organization by job group, from a headcount and new hire perspective.

Through its partnership with Halogen Software, Ultimate Software also offers customers an eAppraisal and e360 solution that can track and show the details of an employee’s evaluation to help justify a termination or explain why that worker may have been passed over for a job. Managers can set objectives and development plans for an employee and watch that staff member’s progress throughout the year. Both employees and managers have the ability to make notations in an employee’s file regarding accomplishments from their own perspectives. The eAppraisal solution notifies both managers and employees when skills, licenses, and training need to be renewed so there are no surprises if an employee must be terminated because his or her skills have not stayed up to date. eAppraisal also will flag any comments it deems inappropriate and make suggestions for more acceptable statements.
HIPAA Violation Penalties

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) provides rights and protections for participants and beneficiaries in group health plans. HIPAA limits exclusions for preexisting conditions, prohibits discrimination against employees and dependents based on their health status, and allows a special opportunity to enroll in a new insurance plan to individuals in certain circumstances. Civil penalties for health plans, providers, and clearinghouses that violate the standards set forth by the Health Insurance Portability and Accountability Act (HIPAA) are $100 per violation, up to $25,000 per person, per year for each requirement or prohibition that is violated.

Federal criminal penalties for knowingly violating patient privacy can run as high as:

- $50,000 and one year in prison for obtaining or disclosing protected health information
- $100,000 and up to five years in prison for obtaining protected health information under false pretenses
- $250,000 with up to 10 years in prison for obtaining or disclosing protected health information with the intent to sell, transfer, or use it for commercial advantage, personal gain, or malicious harm. Federal criminal penalties for knowingly violating patient privacy can run as high as:

Pregnancy cannot be considered a preexisting condition under a group health plan that offers maternity coverage, and that plan cannot exclude coverage for prenatal care or delivery, regardless of employment or health insurance history. This holds true for both the primary insured and dependents. HIPAA applies to every employer group health plan with at least two participants who are current employees, including companies that are self-insured.

HIPAA prohibits group health plans, insurance issuers, and HMOs from imposing preexisting condition exclusions for longer than 12 months (18 months for late enrollees) and requires them to apply "creditable" health insurance coverage to an individual for previous continuous coverage, meaning that employees receive one day of credit for every day worked with a previous employer.

There are three sections to the Act. HIPAA Title I deals with protecting health insurance coverage for workers and their families who lose or change jobs, without penalty for preexisting conditions. HIPAA may reduce workers’ chances of losing existing coverage, ease their ability to switch health plans, and help them buy coverage on their own, if they lose their employer’s plan and do not have access to other coverage. Under this act, insurers must renew coverage to all groups and accept new employees into their health plans, regardless of the health status of any family member. In addition, HIPAA prohibits group health plans from denying coverage because of mental illness, genetic information, disability, or claims filed previously.

HIPAA’s Rules and Regulations
HIPAA Title II, known as Administrative Simplification, involves the handling of certain claims-related information in both electronic and standardized forms. Its purpose is to improve the Medicare program under Title XVIII of the Social Security Act, the Medicaid program under Title XIX of the Act, and the efficiency and effectiveness of the healthcare system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information.

This privacy rule confers specific rights on individuals, including rights to access and amend certain health information and to obtain a record of when and how their protected health information has been shared with others for certain purposes. The rule requires that each covered entity that maintains or transmits information electronically assess the potential risks and vulnerabilities to such information, and develop, implement, and maintain appropriate security measures to protect that information. These steps must be documented and kept current.

A third and final HIPAA regulation — the HIPAA Security Rule — requires compliance by April 20, 2005 (or April 20, 2006, for small health plans with gross receipts of less than $5 million). This regulation differs from the Privacy Rule in that it establishes standards for the administrative, physical, and technical safeguards to protect the security of electronically transmitted protected health information (PHI). The security rules examine the basic precautions that must be taken to protect electronic PHI from unauthorized access, alteration, deletion, and transmission. The HIPAA Security Rule applies to covered entities as defined in the Privacy Rule and also covers business associates who handle protected health information. Health plans must limit the disclosure of PHI to plan sponsor employers unless certain conditions are met.
In April 2000, a Wisconsin EMT responded to a call involving a woman who appeared to be suffering from a drug overdose. Although the ambulance EMT did not know the woman, he believed that she was a coworker of his friend. Because he remembered that his friend had been concerned about the health of her coworker and "very close friend," he called his friend and told her that the patient had been taken to the hospital with a possible overdose. The friend, in turn, discussed the patient’s medical situation with several of her coworkers. When the patient learned of this, she sued for invasion of privacy under Wisconsin state law. While the EMT offered to settle for $5,000, that offer was rejected, and in May 2003 the jury awarded the patient $3,000 of compensatory damages and more than $30,000 in attorney fees.

In another privacy case, a medical records clerk at University Health Associates in West Virginia violated patient privacy rights in 1999 when he took the mental health records of three female patients to local bars where he disclosed the records information to various people. When one of the women complained to the clinic, the records clerk was fired. And while the clinic claimed it had done everything possible to keep the records private and had sanctioned the employee, a jury in February 2003 found the clinic negligent and awarded the three women total damages of more than $2 million.43

Using UltiPro, companies can easily generate HIPAA Certificates of Creditable Coverage (delivered as a standard report) for employees and dependents.

UltiPro can help companies comply with government-mandated employee education training. For example, employers can track whether their employees have been trained in employee data privacy issues. Employers can set up a list of required training programs associated with specific jobs and then, using the Career, Training/Education folder, track who has attended these training classes and who still needs to enroll.

UltiPro’s Human Resources and Benefits Administration functionality helps businesses track HIPAA information in employee records, such as benefit eligibility and coverage dates, effective dates, benefit maximums, and dependent benefit data.
Potential COBRA Liabilities

The purpose of the Consolidated Omnibus Budget Reconciliation Act (COBRA), which became law in 1986, is to provide continuation of employer-sponsored group health coverage that otherwise might be terminated. This law amends the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code, and the Public Health Service Act.

Failure to comply with COBRA laws can result in the following penalties:

- Employers who fail to inform employees of their rights or violate COBRA policies may face the loss of federal income tax benefits.

- Companies found in violation of COBRA may have to pay damages, attorneys’ fees, and may be responsible for any outstanding medical claims.

- Employers that do not comply with COBRA’s requirements are subject to a minimum excise tax of $100 per day for each day that a plan is not in compliance with COBRA.

- Plan administrators who are in violation of COBRA’s notice requirements can be fined up to $110 per day for each qualified beneficiary who is not notified.

Noncompliance begins on the date of the failure and lasts until the date when the failure is corrected or the date six months after the last day of the otherwise applicable COBRA coverage period, whichever is earlier. The maximum amount an employer can be liable for under the tax penalty is limited to the lesser of $500,000 or 10% of the preceding year’s total costs of providing group health coverage.

A third party may incur the COBRA excise tax penalty if it signs a written agreement with an employer to assume responsibilities for either plan administration or plan benefit payment. But an administrator or benefit provider may be subject to penalties only for violations relating to the specific responsibilities it assumed under the written agreement. In addition, the third-party’s actions (or lack thereof) must be a contributing factor to the violation in question. Yet, even in cases where a written agreement exists between the employer and the third-party administrator or provider, the administrator/provider may not be liable for COBRA violations where the employer’s actions (or lack thereof) render the administrator/provider unable to carry out its responsibilities under the agreement.

For third parties that are found to be jointly liable for violations, the maximum liability for the excise tax penalty is $2 million per noncompliance period.
COBRA’s provisions give certain former employees, retirees, spouses, former spouses, and dependent children the right to temporary continuation of health coverage at group rates. This coverage is available, however, only when coverage is lost due to certain events. For employees, that could include voluntary or involuntary termination of employment for reasons other than “gross misconduct,” or reduction in the number of hours of employment. Spouses can apply for COBRA due to the covered employee becoming entitled to Medicare; a divorce or legal separation from the covered employee; or the death of the covered employee. For children of employees, it could include the loss of dependent child status under an insurance plan’s rules or the effects of a covered parent’s loss of coverage.

An employer or plan administrator must provide notice to an employee within 30 days of a qualifying event of their right to continue coverage, informing them of their rights under COBRA, and describing the law. COBRA information also must be part of the plan’s summary plan description.

When the plan administrator is told that an event has occurred that qualifies an employee or beneficiary for COBRA, it must then notify each qualified person of the right to choose continuation coverage.

Qualified beneficiaries have 60 days during which to elect to continue coverage. This period begins either from the coverage loss date or the date the notice to elect COBRA coverage is sent, whichever comes first. If elected and paid for by the qualified beneficiary, COBRA coverage is retroactive. A covered employee or the covered employee’s spouse can elect COBRA coverage on behalf of any other qualified beneficiary. A parent or legal guardian may elect coverage for a minor child.

Under COBRA, covered employees or family members are responsible for informing the plan administrator of a divorce, legal separation, disability, or a child losing dependent status under the plan.

Employers must notify the plan administrator of the employee’s death, termination or employment, reduction in hours, or Medicare entitlement.

If covered individuals change their marital status, or their spouses change addresses, they must notify the plan administrator.

In general, group health coverage for COBRA participants is usually more expensive than health coverage for active employees, because the former employer is no longer paying a portion of the premium that it would normally pay for active employees. Usually COBRA participants must, therefore, pay the entire premium themselves. Even so, it is ordinarily less expensive than individual health coverage.
The law generally pertains to group health plans maintained by employers with 20 or more employees in the prior year, and applies to plans in the private sector and those sponsored by state and local governments. COBRA does not, however, apply to plans sponsored by the federal government and certain church-related organizations.

Health care benefits available to COBRA beneficiaries may include inpatient and outpatient hospital care; physician care; surgery and other major medical benefits; prescription drugs; and health care benefits, such as dental and vision care. Life insurance is not covered under COBRA.\(^{54}\)

COBRA beneficiaries are eligible for group coverage for up to 18 months. Certain events, or a second qualifying event occurring during the initial period of coverage, may extend that coverage to a maximum of 36 months. Special rules for disabled individuals may extend their maximum period of coverage to 29 months.\(^{55}\) Nondisabled family members who are entitled to COBRA continuation coverage are also entitled to the 29-month disability extension.

A child who is born to a covered employee, adopted, or placed for adoption with a covered employee, while the employee is under COBRA continuation coverage is also considered to be a qualified beneficiary.

Coverage for COBRA beneficiaries begins on the date that coverage would have ended and can be terminated for any of the following reasons:

- The last day of coverage is reached
- Premiums are not paid on time
- The employer no longer maintains a group health plan
- The COBRA beneficiary obtains health insurance with another employer group health plan that does not contain any exclusion or limitation with respect to any preexisting condition of the beneficiary
- A beneficiary may begin receiving Medicare benefits.\(^{56}\)

If a group health plan limits or excludes benefits for preexisting conditions but because of the new HIPAA rules those limits or exclusions would not apply to, or would be satisfied by, an individual receiving COBRA continuation coverage, then the plan providing the COBRA continuation coverage can stop making that coverage available.\(^{57}\)

It’s also important to note that if workers want to protect their rights to coverage in the individual market as a HIPAA-eligible individual, they must take and exhaust COBRA or similar state continuation coverage offered to them.\(^{58}\)
Effective January 1, 1997, the following changes were made to the COBRA laws pursuant to the Health Insurance Portability and Accountability Act section 421, which affects three areas in the continuation coverage rules applicable to group health plans under COBRA:

**Disability Extension**
If an individual entitled to COBRA continuation coverage is disabled, as determined under the Social Security Act, and satisfies the applicable notice requirements, the plan must provide COBRA continuation coverage for 29 months. The disability extension also applies if the individual becomes disabled at any time during the first 60 days of COBRA continuation coverage. HIPAA states that if the individual entitled to the disability extension has nondisabled family members who are entitled to the COBRA continuation coverage, those nondisabled family members are also entitled to the 29-month disability extension.

**Definition of Qualified Beneficiary**
Individuals entitled to COBRA continuation coverage are called qualified beneficiaries and are the spouse and dependent children of a covered employee and, in certain cases, the covered employee. Prior to HIPAA, in order to be a qualified beneficiary an individual had to have been covered under a group health plan on the day before the event that caused a loss of coverage (such as a termination of employment, or a divorce from or death of the covered employee). HIPAA changed this requirement so that now a child who is born to the covered employee, or who is placed for adoption with the covered employee, during a period of COBRA continuation coverage is also a qualified beneficiary.

**Duration of COBRA Continuation Coverage**
HIPAA changes the COBRA rules so that if a group health plan limits or excludes benefits for preexisting conditions but because of the new HIPAA rules those limits or exclusions would not apply to (or would be satisfied by) an individual receiving COBRA continuation coverage, then the plan providing the COBRA continuation coverage can stop making the COBRA continuation coverage available.
The Supreme Court of the United States issued a ruling on June 8, 1998, in the *Geissal v. Moore Medical Corporation* case. In a unanimous decision, the Supreme Court ruled that an employer may not deny COBRA coverage to an otherwise eligible individual because he or she is covered under another group health plan, or Medicare, at the time he or she elects COBRA. In July 2003, the Eighth Circuit Court of Appeals ordered Moore Medical Corp. to pay the Geissal estate $217,369 for attorney’s fees and court costs and awarded retroactive COBRA coverage.

In 2002 a court upheld a $10,800 fine against an employer in the case of *Scott v. Suncoast Beverage Sales Ltd.* when a third-party insurer failed to send a terminated employee notice of his right to continued health coverage under COBRA. The employee argued that during his termination meeting, he initialed a form indicating that COBRA health insurance information had been discussed with him. He was then told that he would receive the actual COBRA information in the mail shortly thereafter. But he never received it. He sued the company, claiming that it failed to properly notify him of his right to continuation benefits under the law. Suncoast Beverage argued that it wasn’t liable because it had acted in good faith by hiring its insurer to send out the notice, and that its COBRA obligation therefore had been satisfied. The court disagreed and decided in favor of the plaintiff, ruling that the company had simply hired an agent without procuring any evidence that the proper notification was sent.

In the case of *DiGiovanni v. The Guardian Life Insurance Company of America*, the employee had been receiving long-term disability and medical benefits for more than three years after she stopped working. Her employer, which was also the insurer, then terminated the benefits. Seven and a half months later, the employer sent the employee a letter stating that her “separation date” was the date that her disability benefits ended and that she could elect group health continuation coverage under COBRA, retroactive to the first day following her separation date, if she paid a premium of $3,300 for the first eight months of COBRA coverage. She declined the coverage and sued her employer to recover her medical expenses incurred during the period beginning on her separation date and ending at the time that the employer provided her with the COBRA notice. She also asked for statutory penalties because the employer failed to provide COBRA election notice in a timely manner. The court found that the employer had provided the COBRA election notice to the employee 215 days late. The court awarded the employee $100 per day penalties for a total of $21,500.

What Every Employer Must Know to Avoid Costly Lawsuits

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UltiPro Can Help Your Company Remain Compliant with COBRA Regulations

Through UltiPro, employers can track COBRA information, including COBRA status and the date and description of a COBRA-qualifying event for employees and their dependents. UltiPro will help you generate COBRA Continuation of Coverage reports (delivered standard in UltiPro). And it can track disabled employees (through an indicator) for ADA purposes.
Not Enforcing Sexual Harassment Policies Can Put You in the Danger Zone

Sexual harassment is a form of sex discrimination in violation of Title VII of the Civil Rights Act of 1964. Title VII defines sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,” when “submission to or rejection of this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance or creates an intimidating, hostile or offensive work environment.”

Verdicts in cases of sexual harassment can lead to:

- awards amounting to hundreds of thousands of dollars in federal cases for damages, plus economic damages and attorneys’ costs
- awards resulting in multimillion-dollar settlements in cases brought under state laws
- company liability, not for sexual harassment per se but for intentional infliction of emotional suffering, negligent supervision, invasion of privacy, assault, battery, or any number of other torts.

Examples of sexual harassment include unwelcome sexually oriented gestures, jokes, or remarks; repeated and unwanted sexual advances; touching or other unwelcome bodily contact; and physical intimidation. Sexual harassment among peers can occur if coworkers repeatedly tell sexual jokes, post pornographic photos, or make unwelcome sexual innuendos to another coworker.
Sexual Harassment
Rules and Regulations

Federal law recognizes two different sets of legal grounds for claiming sexual harassment under Title VII, the first being *quid pro quo*, and the second being a hostile work environment. Under *quid pro quo*, an authority figure demands sexual favors of a subordinate as a condition of getting or keeping a job benefit. A hostile work environment is fostered by a coworker or supervisor who engages in unwelcome and inappropriate sexually based behavior, making the atmosphere intimidating, hostile, or offensive.65

Statistics on sexual harassment in the workplace vary widely, with some research stating that anywhere from 40% to 70% of women and 10% to 20% of men have experienced some form of sexual harassment at some point in their lives. This wide range may be due in part to the fact that what some people might consider acceptable behavior, others might think of as sexual harassment.66

Although a 1999 survey by the Society for Human Resource Management stated that 62% of corporations offer sexual harassment prevention training programs, and 97% have a written sexual harassment policy,67 in fiscal year 2003, the EEOC and the Fair Employment Practice Agencies received 13,566 charges of sexual harassment, 14.7% from men, for a total of $50 million in benefits awarded (not including monetary benefits obtained through litigation).68

Both the victim or the harasser may be a woman or a man, the victim does not have to be of the opposite sex, and the conduct must be unwelcome. The harasser can be a supervisor, an employer’s agent, a supervisor in another area of the company, a coworker, or a nonemployee. The victim does not have to be the person harassed but can be anyone affected by the offensive conduct. To be considered unlawful sexual harassment, an act does not have to cause economic injury to or discharge of the victim.69 It is illegal for retaliatory action to be taken against an employee who complains about sexual harassment or any type of discrimination protected by the Civil Rights Act.70

Under federal law, an employee must file a complaint with the EEOC within 300 days of the unlawful act.71 After the EEOC investigates a claim of sexual harassment on the job, it issues a *right to sue* letter, regardless of its conclusions about the matter. The victim then has only 90 days to file a lawsuit against his or her employer in federal court. If the court rules in the victim’s favor, he or she can receive up to $300,000 in compensatory damages for each incident of unlawful harassment, as well as back pay, attorneys’ fees, and possibly additional money damages under state or local law.

If the victim was fired or did not receive a promotion as a result of the harassment, the court can order reinstatement or promotion.72
To avoid sexual harassment suits, an employer is responsible for establishing a sexual harassment policy that must be communicated to all of its employees via memoranda, orientations, workshops, videos, departmental training, bulletin board postings, staff meetings, and any other formal or informal training. Also, a company must institute a sexual harassment complaint procedure and designate a sexual harassment complaint processor to receive the complaint and investigate the allegations.

Supervisors’ and/or managers’ responsibilities include having the proper knowledge of sexual harassment, the employer’s sexual harassment policy, and the consequences of sexual harassment in the workplace.

For a company to be able to defend itself successfully in court, it must be able to prove that it had an effective policy against harassment stating that improper behavior would not be tolerated, that the employee alleging harassment failed to take advantage of that policy, or if a harassment complaint was made, that the company investigated promptly and thoroughly. This “affirmative defense” requires companies to make reasonable efforts to prevent and correct harassment, have a policy against sexual harassment, put it in writing, disseminate it, and enforce it. Under recent Supreme Court rulings, companies must have sexual harassment training for supervisors, as well as a strategy for responding to sexual harassment complaints. Employees should be told in writing, as part of the company policy, the steps an employer will take in investigating a complaint.

In a situation in which an employee finds the harassment so pervasive that he or she resigns, the courts may rule that it was a constructive discharge. This would entitle the employee to collect benefits discharged workers collect, including unemployment compensation and continued health benefits.

Title VII was amended with the Civil Rights Act to allow sexual harassment victims to recover compensatory damages beyond back pay. Damages can be recovered in jury trial and can encompass “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” Punitive damages can also be collected if the plaintiff can prove the employer acted with malice or with reckless or callous indifference. The maximum sum of compensatory and punitive damages ranges from $10,000 to $300,000, based on the number of employees in a company.

In June 2000, in the case of Blakey v. Continental Airlines, the New Jersey Supreme Court ruled that employers can be liable in certain circumstances for sexual harassment and retaliation that occurs on a work-related Internet bulletin board. If an employer knows or should know that its employees are using a work-related Internet chat room or bulletin board to harass a co-employee, the employer is obligated to stop the harassment. The employer can be held accountable even if the harassment did not take place on the employer’s physical premises. At present, this case applies only to employers in New Jersey, but other courts could follow suit, obligating employers to monitor Internet chat rooms and bulletin boards that they know their employees use to share information about the workplace.
The Price of Violating Sexual Harassment Laws Can Be as High as $34 Million or More

In the case of Meritor Savings Bank v. Vinson, the definition of what constitutes sexual harassment was challenged. After being fired from Meritor Savings Bank for “excessive use of sick leave,” Michelle Vinson sued the bank and her boss Sidney Taylor, claiming that Taylor had sexually harassed her throughout her four-year term of employment. Vinson’s suit argued that the bank had been in violation of Title VII of the 1964 Civil Rights Act banning discrimination against women and other groups. On appeal, the Court held that an employer is liable for sexual harassment by supervisory personnel, whether or not the employer knew or should have known about it. The Court also stated that Title VII of the Civil Rights Act of 1964 prohibits sexual harassment in employment, even if the harassment does not cause direct financial injury to the employee. This case was the first instance in which the Court recognized a cause of action for sexual harassment based on creation of a hostile intimidating work environment, in contrast with a quid pro quo case where sexual favors were demanded in return for favorable personnel decisions, or adverse action was taken based on the denial of sex.

In April 2003, the Dial Corporation agreed to pay $10 million to settle a lawsuit alleging sexual harassment at its Montgomery, Illinois, facility. Although the company did not admit any wrongdoing, about 100 female employees had alleged that they were subjected to lewd comments, groping, and other improper acts while on the job. Before the settlement, the EEOC was seeking $27 million in damages. Under the terms of the agreement, the female employees will average $100,000 in awards, with some receiving up to $300,000, depending on the level of harassment and other factors. In addition, Dial agreed to revise its existing policies and procedures that prohibit sexual harassment at the facility, and an independent third party will help resolve any future complaints at the manufacturing facility.

In another sexual harassment case, on August 7, 2003, the U.S. Equal Employment Opportunity Commission (EEOC) and Cheap Tickets, a retailer of discounted leisure travel products, announced a $1.1 million settlement of a class action sexual harassment lawsuit under Title VII of the Civil Rights Act of 1964. The suit alleged that dating back to 2000, female agents working at Cheap Tickets’ Los Angeles call center were subjected to a sexually hostile work environment by their supervisors that included sexual propositioning, unwelcome touching, and derogatory sexual comments. In addition, the woman who filed the initial discrimination charge suffered retaliation.

In June 1998 Mitsubishi Motor Company agreed to settle the nation’s largest sexual harassment lawsuit in history, and will pay $34 million in compensation for at least 350 women who were employed at a Normal, Illinois, plant since 1990. The women claimed that they had been groped, grabbed, pressured for sex, threatened by coworkers, and that the company did little to stop it. Along with the financial settlement, they were offered an apology. This was the second such lawsuit filed against Mitsubishi. Previously, the company paid $10 million to settle a private lawsuit filed by 29 female employees with similar complaints. Since the 1998 settlement, training at Mitsubishi was mandated, along with the creation of a three-person panel of outside monitors to ensure that sexual harassment policies at the company are effective.
UltiPro Can Facilitate Proactive Sexual Harassment Training

Preventing sexual harassment and safeguarding a company from legal action has become a training and communications issue. As companies establish clear policies and procedures, HR managers need to convey those practices to employees and management. UltiPro’s training module helps employers meet that goal by recording which employees have taken sexual harassment classes and which ones still need to enroll.

Additionally, Ultimate Software markets an employee relations module that tracks disciplinary actions and grievances. With this module, managers can go online, track incidents, and record specific information such as names of witnesses to the harassment, the status of the incident (i.e., is it still open?), and whether follow-up actions are pending. Employers can track if a grievance has been filed, witnesses’ statements, see the status of arbitration, and any discussions centering around the grievance. They can also discover what the employee views as the end result of his/her action.

Ultimate Software also offers businesses the ability to maintain centralized and secure 24-7 storage and access to a repository of past and present performance plans through Halogen Software’s eAppraisal and e360 products. This helps companies record promotion histories and other appraisal details that can be useful if an employee files sexual harassment charges.
Conclusion: A Comprehensive Human Resources/Payroll System Is Your Best Defense Against Employment-Related Disputes and Litigation

In the face of increasingly complex workplace regulations (and increasingly costly lawsuits), employers must work harder than ever to protect themselves from compliance risks. One of the best ways to reduce vulnerability is through meticulous record keeping in all matters related to human resources. By precisely tracking data concerning the hiring, training, promotion, transfer, and/or termination of employees, companies reduce the risk of compliance violations — and their vulnerability to litigation. Furthermore, for any organization faced with the prospect of fines or lawsuits, the ability to retrieve such data quickly and accurately is an invaluable asset.

Comprehensive human resources/payroll solutions such as UltiPro are specifically engineered to fulfill this critical role. By taking advantage of the extensive HR functionality built into UltiPro, companies can:

• Retrieve and review historical payroll data instantly
• Record promotion histories and appraisal details
• Track past grievances and disciplinary actions
• Monitor compliance with training requirements
• Generate reports and certificates on demand

For more information about UltiPro Workforce Management from Ultimate Software, please call (800) 432-1729 or visit www.ultimatesoftware.com.
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