

The logo for Xpert HR, with 'Xpert' in white and 'HR' in white text on a blue square background. The background of the entire page is a collage of business-related icons: a red line graph, a money bag with a dollar sign, a shopping cart, a paper airplane, a calendar, a clock, a person icon, a group of people, a search bar, a computer monitor, a smartphone, a presentation board, a gear, a paperclip, a pen, and a notebook.

Xpert HR

# THE TOP 15 MOST CHALLENGING

## HR Compliance Issues for 2018

# INTRODUCTION

Each new year brings changes in the workplace, government, society, culture, technology and the legal landscape that translate into challenges and obstacles for employers. In 2018, XpertHR forecasts that the weather will be stormy and employers will continue to grapple with the uncertainty of a new federal administration and an often deadlocked though Republican-leaning Congress as it confronts key issues such as immigration, tax overhaul and health care. Against this backdrop, employers are also challenged by extremely active state and local lawmakers who have been expanding their reach and attempting to solve workplace problems by enacting various laws affecting reasonable accommodations, marijuana in the workplace, paid sick leave and paid family leave, pay equity, predictable scheduling and minimum wage. Many of these legal developments will likely result in changes and obligations that will cause employers to revise and amend their workplace policies, practices and procedures.

Many issues today carry real risks for the workplace, so it is of utmost importance that employers are aware of these challenges and know how to prepare for them. A constantly evolving workforce, threats of a cyber breach, preparing for workplace violence, and handling employee well-being and mental health issues are examples of serious issues that employers must take notice of.

To better protect themselves, avoid litigation and ensure a productive, efficient and legally compliant workplace, employers need to prepare to meet these challenges head on. Failure to comply may result in increased costs including civil fines, criminal penalties, administrative actions, possible litigation and harm to an organization's business reputation and public image.

XpertHR conducted a survey in October 2017 soliciting input from HR professionals on their view of the most significant compliance challenges in 2018. With over 1000 responses from small, medium and large employers across a wide variety of industries in all geographic areas of the country, the responses guided us as we compiled the top employment law trends and challenges of 2018.

Here are the most challenging HR compliance issues and top employment law trends of 2018 and tips and strategies on how to respond to and prepare for these new challenges.

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## REPUBLICAN ADMINISTRATION AND FEDERAL ISSUES

With the Trump administration and Republican control of both houses of Congress, federal priorities have shifted. A smaller role for federal government and decreased regulations is driving oversight to states and significantly impacting workplace practices. Top federal concerns include:

- The Affordable Care Act (ACA) and the uncertain future of health care continues to plague many employers as **46%** of respondents viewed the ACA as very or extremely challenging and **40%** of respondents viewed ACA reporting as very or extremely challenging. One survey respondent stated that “Trump’s medical plan changes could kill retirement benefits.”
- The administration’s hardline stance and often restrictive policies towards immigration are affecting employers whose workforces have become increasingly diverse and who are drawing on talent from around the globe. In fact, 21% of respondents viewed navigating the hiring of workers on visas as very or extremely challenging and 18% of respondents were extremely or very challenged by responding to the travel bans. 18% of the respondents viewed increased government enforcement of immigration requirement as very challenging or extremely challenging. Survey respondents told XpertHR that there is “concern over the outcome of the Dreamer’s Act controversy” and “immigration law changes.”
- The future of measures proposed and supported by the Republican party and the Trump administration such as the tax overhaul, paid family/parental leave and the Working Families Flexibility Act, which provides private sector employees with compensatory time in lieu of overtime pay, remain very much up in the air. It is unclear what will happen as we gear up for the 2018 election cycle.
- The appointment of Neil Gorsuch to the Supreme Court is sure to have an impact on labor and employment law cases and ensure a conservative majority in favor of employers and management side issues.
- The roll back of agency authority and more restrictive policies of the National Labor Relations Board (NLRB) and the Equal Employment Opportunity Commission (EEOC) will potentially have a positive impact on employers who may now be subject to less regulations. The Trump administration has already taken steps to undo the revised EEO-1 Report and scale back the request for information on hours worked and compensation. Similarly, it appears as if the NLRB may be scaling back in its vigorous pursuit of both union and nonunion employers.

Overall, the Trump administration has created a great deal of uncertainty and as one respondent states “the continuous tumultuous Trump administration creates chaos and anxiety among my employees every day. As an organization that relies on government funding we are constantly on-edge about the future of the federal budget.”

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**WHAT AN EMPLOYER SHOULD DO**

The best way to address the bevy of issues raised by the federal government and the Trump administration is to be vigilant and stay up to date with changes by closely monitoring developments. With respect to immigration, it is important to use the new Form I-9 and comply with immigration laws and requirements. Further, it is essential for an employer to maintain comprehensive documentation with respect to employment decisions, particularly those decisions that may have an adverse impact, and to ensure it has a good and legitimate business reason for taking all actions with respect to employment.



**ADDITIONAL RESOURCES**

Resources to support addressing the Republican administration and federal issues such as immigration include (may require registration):



[Comply with Immigration-Related Paperwork Requirements](#)



[How to Verify an Employee's Authorization to Work in the US Through the Form I-9 Process](#)



[Hiring an H-1B Worker - Checklist](#)

[Employment Verification and Required Documentation During the Form I-9 Process - Checklist](#)



[Dos and Don'ts Regarding the Form I-9 Process](#)

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## STATE AND MUNICIPAL ISSUES

Given the gridlock and inaction on the federal level, states and local governments in cities and in counties have taken the lead and actively sought to address workplace issues by enacting laws and regulations affecting employers and employees. State and local governments are often the first to address emerging issues and the past year saw some notable trends at the state and municipal level which present a major challenge for multistate and multi-city employers as they try to navigate an increasingly complex patchwork of different laws and requirements. This is especially true if an employer is located or does business in more liberal-leaning employee-minded states such as California, Massachusetts, New York and Oregon and cities such as New York City, Philadelphia and San Francisco. State and local laws run the gamut and include:

- Pay equity laws;
- Laws banning an employer from seeking prior salary history;
- Leave laws including paid sick leave and paid parental/family leave;
- Reasonable accommodation laws;
- Equal employment opportunity laws;
- Laws legalizing marijuana for medical and/or recreational purposes;
- Ban the box laws and laws banning prior criminal history inquiries;
- Minimum wage changes;
- Gun laws;
- Joint employer/franchisor laws;
- Safe driving laws;
- Laws regarding smoking and e-cigarettes;
- Social media privacy laws; and
- Laws prohibiting localities from enacting legislation contrary to state law.

What is particularly complex about these laws is that while attempting to address the same issues, the laws and their requirements often differ from one another. Additionally, many of these laws lack clear guidance as to how they will be enforced or interpreted. On top of this, it is difficult to have the resources to stay on top of and monitor the legal developments and how they apply to an employer's workforce.

These concerns were supported by XpertHR's survey in which:

- **41%** of respondents said they were very or extremely challenged by marijuana laws (medical and recreational) and their impact on workplace drug policies and drug testing;
- **38%** of respondents were very or extremely challenged by paid family leave/paid parental leave;

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- 36% were very or extremely challenged by paid sick leave;
- 31% of respondents viewed reasonable accommodation laws and requirements based on disabilities, religion, pregnancy, LGBT status and medical marijuana users as very or extremely challenging;
- 26% believed pay equity trends (i.e., banning employers from requesting salary history and from prohibiting employees from discussing wages) were very or extremely challenging; and
- 26% viewed predictable scheduling laws as very or extremely challenging.

Survey respondents were challenged by “state by state compliance in a multi-unit business,” “multi state location with changing labor laws,” “the cost of city/state/federal requirements coupled with rising benefit costs,” “complying with California labor laws,” and “completely understanding the different county laws that don’t match the state laws.”



### WHAT AN EMPLOYER SHOULD DO

To address and handle the localization of employment laws and remain compliant, an employer should take the following steps:

- Actively monitor existing and emerging state and local laws and developments, and stay on top of the latest trends;
- Know which state and local requirements apply to your workforce and determine how you will manage any conflicting laws;
- Decide how you will address state and local differences in employee handbooks and workplace policies and how updates to these laws will be handled and accounted for; and
- Train supervisors and employees on any need-to-know state and local laws.



### ADDITIONAL RESOURCES

Resources to support addressing the state and municipal issues such as leave, minimum wage, pregnancy accommodation and safe driving include (may require registration):



[Leave Laws by State and Municipality](#)

[Minimum Wage Rates by State and Municipality](#)

[Pregnancy Discrimination and Accommodation Laws by State](#)

[Distracted Driving Laws by State](#)



[Safe Driving - Supervisor Briefing](#)



[Podcast: Consistency Is Key to Complying with Pregnancy Accommodation Laws](#)

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## WORKFORCE PLANNING AMID AN EVOLVING WORKFORCE

With an evolving workforce and changing societal demographics, workforce planning appears to be one of the top challenges for employers. In today's increasingly global environment, 21st century employers need to respond to both external and internal factors that shape and impact the recruiting, hiring, and retention of workers.

The use of technology and mobile devices allows workers to communicate in more effective and productive ways with employers, managers, coworkers, clients and customers. Brick and mortar offices and the traditional 9 to 5 workday is quickly fading and we continue to see an increase in flexible working arrangements, remote working and a focus on achieving a greater work-life balance. Employers are witnessing the rise of the gig economy and alternative work arrangements as workers are no longer swayed by the promise of a steady pay check and benefits and crave freedom and flexibility. Notions of automation, smart devices, robotics and artificial intelligence are beginning to disrupt the workforce and challenge traditional workers.

Hiring today is challenging and complex amidst the many laws that restrict an employer's ability to gain valuable and insightful information into job candidates. Additionally, there also may be a disconnect between the skill sets of individuals seeking jobs and the positions an employer needs to fill.

Generationally, Millennials and Generation Z have joined the workforce in record numbers and are seeking new ways of working and have different expectations of their employers. Further, employers must confront and account for an aging Baby Boomer population, increased health care costs and making plans for succession and retirement.

XpertHR's survey confirmed workforce planning amid the evolving workforce as a top challenge:

- Almost **50%** of respondents said this was among their top three workplace challenges;
- **52%** of respondents viewed increasing employee engagement, morale and satisfaction as very or extremely challenging;
- **48%** viewed retaining employees as very or extremely challenging;
- **47%** were very or extremely challenged by succession planning;
  
- 46% viewed aligning talent retention strategy with business objectives as very or extremely challenging;
- 44% viewed upskilling employees for future responsibilities as very or extremely challenging;
- 43% viewed managing performance and providing professional development opportunities as very or extremely challenging;
- 29% stated that joint employment and the changing definition of the employer was very or extremely challenging; and
- 28% were very or extremely challenged by flexible working/telecommuting.

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Respondents stated that “growth and retention,” “capacity planning, talent pipeline development,” “retention in a very competitive workforce,” and “attracting and retaining skilled labor,” “the ever-changing laws and keeping up with them,” “recruitment of high performing individuals,” “providing training related to the changes,” and “the declining and aging population in rural locations” were top concerns. Additionally, one respondent noted that “it goes beyond compliance — it’s how to create a transformative HR strategy.” Another respondent revealed that “employee engagement/organizational health will continue to be a top focus for us.”



### WHAT AN EMPLOYER SHOULD DO

Given these challenges, it is important to be proactive and prepared. An employer needs to be able to effectively plan its workforce to make sure that it has the right people for the right jobs at the right cost in order to be successful in a global and competitive marketplace. An employer also needs to take into account the unique factors that affect its business and shape its workforce.

To begin, HR should identify key stakeholders and members of management in different areas of the business and open up communications with them in order to understand the organization’s short- and long-term goals and how employees can play a role in bringing them to fruition. It is also critical to understand how to effectively use data throughout workforce planning, from recruiting and hiring to performance management to retention. Good data analytics can help to understand where and how to focus efforts and can assist in tracking progress. Primary goals should be to increase productivity and efficiency in the workplace and keeping costs low.

With respect to hiring, an employer should:

- Focus on looking for experience in the industry, but also focus on the skills, competencies and talent individuals bring to the table that can benefit the organization;
- Keep budget and business goals in mind;
- Consider whether, when and how to use gig and contract workers as part of the workforce and what the primary objective will be (i.e., cost savings);
- Understand how technology and mobile applications can aid recruiting; and
- Be aware of new laws that ban an employer from seeking salary history information or criminal history and make sure recruiting is legally compliant.

With regard to training, an employer should encourage employees to continue professional development and work with them to develop long terms skill. A focus on leadership and development, along with mentoring and coaching programs, may provide support and guidance to employees who will be able to move into key roles in the organization. An employer can help close the talent gap by creating an atmosphere centered on education, professional development and leadership opportunities throughout an individual’s career. Employees should be able to highlight their key strengths and competencies and work to build on them for the better of the organization.

An employer should consider how it will handle performance management and reviews, what its goals will be, who will conduct the review and how often reviews will be conducted. It is important to evaluate employee retention

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and engagement and why the employer may be losing employees, which employees it is at risk of losing and how to retain them (i.e., increased compensation, better benefits, better work life balance).

It is important to listen to feedback from employees, whether it be through informal meetings, employee engagement surveys etc., in order to know what is, or is not, working in terms of employee engagement and retention as this can provide valuable information to employers on how to improve.

With aging Baby Boomers, an employer needs to consider retirement and how employees will leave the workforce, what packages and benefits it will offer, when employees will be eligible, who will replace them and will it be possible to retain older workers in an alternative work capacity.

Workforce planning is, and will likely continue to be, a primary concern for HR and one that will require thoughtful planning and development as the workforce continues to grow and evolve.



**ADDITIONAL RESOURCES**

Resources to support addressing workforce planning include (may require registration):



[How to Use Analytics in Recruiting and Talent Management](#)

[How to Conduct a Job Analysis](#)

[How to Manage Contingent or Temporary Workers](#)



[Align HR Strategy with Business Strategy - Worked Example](#)



[HR Transformation](#)



[Retain Top Performers](#)

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**CYBER BREACH/DATA SECURITY**

In an increasingly digital world in which a tremendous amount of information is stored on the cloud and online, the threat of a cyber breach looms large for many employers. From personal and private employee information such as Forms W-2, social security numbers, salaries, birth dates, drivers' license information, health and medical records and other personally identifiable information to customer information including credit cards and purchasing records to the employer's intellectual property, proprietary information and trade secrets, there is so much to protect.

In fact, in our survey there was an overwhelming response to this challenge as approximately **64%** of respondent's viewed data security and the threat of a cyber breach as very or extremely challenging.

Data breaches carry high costs in terms of time, money and resources and may also tarnish an employer's public image and reputation. An employer needs to be concerned not only about threats from third parties, persons acting on behalf of a governmental body and organized crime, but also from employees acting negligently or maliciously. Multiple laws address the obligation to protect and safeguard confidential information. On the federal level laws, there are laws such as the Fair and Accurate Credit Transactions Act (FACTA), the Genetic Information Nondiscrimination Act (GINA), and the Health Insurance Portability and Accountability Act (HIPAA), and almost every state has a data breach law requiring businesses to safeguard personally identifiable information. However, there is still no comprehensive federal legislation protecting from a data breach and directing organizations what they should do in the event of one. Therefore, it is incumbent upon an employer to actively work to protect confidential information and guard against cyber breaches.

**WHAT AN EMPLOYER SHOULD DO**

Raising awareness throughout your organization of the types of information the employer possesses, what can happen and what is at risk, is paramount to safeguarding confidential information and preventing cyber breaches. To protect private and confidential information and minimize the risk of a cyber breach an employer should consider taking the following steps:

- Keep all confidential and private information in a secure area on the employer's network and utilize firewalls, two-step or biometric authentication methods, encrypted data in the cloud and other technological tools to protect such information;
- Encourage third-party vendors, partners and providers to take similar security measures;
- Ensure individuals are only permitted to access private and personal information if it is related to their job duties;
- Implement and enforce policies to protect information such as confidential information if it is related to privacy policies, mobile device policies, social media policies and employee conduct and business ethics policies;
- Provide training on the policies so that employees and supervisors and those handling private and protected information are aware of such policies and that discipline that may imposed for unlawful disclosure;

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- Use confidentiality agreements designating which information is private and should be protected and highlight the consequences for violations;
- Conduct background screenings for individuals handling private and confidential information and remain on notice for signs of fraudulent or dishonest conduct which may threaten the employer;
- Monitor the workforce to make sure employees and supervisors properly use the businesses computer systems and networks; and
- Conduct exit interviews and require departing employees to turn over access to information and ensure they comply with any confidentiality obligations.



**ADDITIONAL RESOURCES**

Resources to support addressing cyber breaches and data security include (may require registration):



[Webinar: Your Workplace and Technology - SWOT Style](#)



[How to Protect Personal and Confidential Employee Information](#)

[How to Prevent a Cyber Breach](#)

[How to Protect Trade Secrets When Employing a Mobile Workforce and Telecommuters](#)

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## RECRUITING

Recruiting and hiring in the 21st century presents an immensely different landscape for employers who grapple with attracting, hiring and retaining the right talent in light of shifting business needs, federal, state and local legislation and evolving technologies.

Finding the right person for the job is often a struggle as XpertHR's survey shows.

Recruiting as a whole was one of the top three work place challenges for over **50%** of respondents. Finding high-quality applicants was viewed as very or extremely challenging by **59%** of respondents, while aligning talent acquisition strategy with business objectives was very or extremely challenging for **31%** of respondents.

In fact, survey respondents named recruiting as one of their greatest challenges and one respondent stated that "the biggest issue is finding productive employees that are willing to work". Another respondent stated that "finding qualified workers and finding workers who can pass background checks" was a challenge while "recruiting and retaining a workforce within a changing regulatory environment" presented a challenge. Another issue was "finding qualified candidates to fill trade type positions such as technicians and mechanics."

Further, recruiting and hiring today is made all the more challenging because of federal, state and local laws aimed at providing all individuals with a fair chance at employment. While it is permissible to ask about an applicant's background, education, skills and experience, employers and those with the authority to recruit and hire must comply with the following:

- Laws aimed at protecting the social media privacy of prospective employees;
- Laws banning employers from requesting information regarding salary history;
- Federal, state and local antidiscrimination laws;
- Ban the box and fair chance laws aimed at providing those with a criminal past with a fair shot at employment;
- Affirmative action requirements; and
- Laws relating to background checks and screening candidates (i.e., FCRA, GINA).

To add to this, while an employer may be motivated to hire a diverse workforce it may be faced with obstacles and challenges when it comes to complying with ever increasing immigration requirements. Further, while many employers view diversity as a worthy goal, 33% state that it is very or extremely challenging to eliminate unconscious bias.

Lastly, while technology and mobile devices and the use of analytics have made recruiting easier, 33% of respondents state that they are very or extremely challenged by using predictive analytics in recruiting and hiring and 29% say they are very or extremely challenged when it comes to optimizing mobile recruiting.

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**5****CHALLENGE****WHAT AN EMPLOYER SHOULD DO**

To navigate the complex world of recruiting today, an employer needs to create a comprehensive recruiting strategy and consider how and where it will recruit, what tools it will use, who will lead recruiting and how recruiting strategies will vary for different positions within the organization. The employer should be sure to use social media wisely and avoid attempting to access any non-public private information. It is important to make sure that the recruiting team is as diverse as possible — whether in terms of its gender and racial makeup or life experiences generally — as this will serve to expand the pool of applicants meriting serious consideration. An employer should not rely solely on word-of-mouth-recommendations and it should attempt to use the internet, visit job fairs and promote through trade organizations.

The employer should frequently review and assess its applications and job advertisements for any discriminatory language or to see whether the employer is unlawfully seeking information regarding salary history and criminal history, among other things. The employer should ask the same questions of all candidates and evaluate them against a standard set of pre-established criteria. A few examples include:

- Why should we hire you?
- What do you consider your greatest achievement at work?
- What is the biggest obstacle you have had to overcome in your job?
- Describe one thing about yourself that you would most like to improve?
- What do you think you can bring to the organization?

An employer should be sure to comply with all laws addressing recruiting and hiring and further train individuals with the authority to recruit and hire on the parameters of those laws.

To confront the challenge of unconscious bias, an employer may want to consider blind recruiting and manually screening results or blacking out names and addresses before passing them along to hiring managers or utilizing a software program to remove personal identifiers, such as an applicant's name, gender and age, from their resume.

Lastly, any pre-employment screening tests should be conducted in a uniform and nondiscriminatory manner. All background checks, credit checks and drug testing should be handled carefully and comply with all legal requirements.

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### ADDITIONAL RESOURCES

Resources to support addressing recruiting issues include (may require registration):



[How to Reduce Unconscious Bias in Recruiting and Hiring](#)

[How to Create a Legally Compliant Job Advertisement](#)



[Podcast: Making the Most of Mobile Recruiting](#)



[Conduct Effective Job Interviews](#)

[Develop a Legally Compliant Job Application](#)

[Establish Social Media Strategy for Recruitment and Job Screening](#)

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## TECHNOLOGY, THE INTERNET AND SOCIAL MEDIA

As a result of rapidly expanding technology, our world is now more connected than ever. Computers, the internet, social media, the rise of robotics and artificial intelligence, workplace wearables and mobile devices stand to have a profound impact on the workplace of today and of tomorrow. Workplace communications have been revolutionized and workers are able to better communicate with each other as well as with clients and customers in a meaningful manner. Technology can have a positive impact and be used in novel ways for recruiting and hiring purposes. Through technology, supervisors are able to enhance management and training as the employer will be able to monitor employee activity and social interactions in real time and evaluate performance, productivity and efficiency. Technology can also have a positive effect on safety and security and assist in monitoring the workplace for external and internal threats and hazards and dangerous situations. Smart office technology can help an employer optimize space, monitor its usage and conserve energy and resources which can have a positive impact on the employer's bottom line and protect the environment.

However, with the omnipresence of the internet and social media there are a great many risks to employers and their businesses. Social media and the internet create liability concerns from negative postings damaging to an employer's professional and business reputation, to the disclosure of confidential and proprietary information and trade secrets, to discrimination and harassment claims, to decreased employee productivity and wage and hour issues. The internet of things threatens to invade employee privacy and allows employers to be subject to all types of private and personal information which may unduly influence an employer. While technology can assist employers in monitoring and maintaining a productive and efficient workforce and workplace, this must be balanced against the privacy rights of employees to lead personal and private lives.

XpertHR's survey results reflect the fact that the internet and social media present a great many challenges for employers:

- **47%** were very or extremely challenged by managing mobile devices/wearable tech/internet of things;
- 36% were very or extremely challenged when it came to managing technology and social media at work;
- 36% were very or extremely challenged when it came to preventing employees from working off the clock including answering emails after working hours on mobile devices;
- 29% were very or extremely challenged with respect to using social media to enhance recruiting, hiring and business brand; and
- 27% were very or extremely challenged when it came to preparing for the use of robotics, artificial intelligence and automation that replaces workers.



### WHAT AN EMPLOYER SHOULD DO

In order to keep pace with technological changes and minimize employer liability, an employer needs to be proactive. To start, consider creating comprehensive policies that comply with legal requirements and protect the employer's legitimate business interests. This includes providing guidelines for the proper use of social media, the internet and wearable technology. An employer should also maintain strong confidentiality policies addressing how personal

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and private information should be protected and what to do in the event of a breach or disclosure. Strong EEO policies prohibiting discrimination and harassment can also aid the employer and minimize the risk of harassment, discrimination and cyberbullying via the internet and social media.

It is also essential to provide supervisors and employees with training on what is considered acceptable use of technology and how to handle, secure and properly destroy confidential and proprietary information.

Keep in mind that when enforcing any technology related policies, it is important to strike a careful balance between respecting employee expectations of privacy and protecting the employer’s interests. Monitoring employee use of social media and technology is critical but it should not infringe upon the privacy rights of employees. An employer should be up front about its intentions and avoid surveillance and monitoring in areas where an employee may have a reasonable expectation of privacy.

The National Labor Relations Act (NLRA) prohibits an employer from restricting an employee’s right to engage in protected concerted activity and collective action to improve their wages, hours and working conditions, and avoid infringing upon these rights or conducting any unlawful surveillance of union activities or unlawful monitoring and be mindful of any collective bargaining agreements. It is also important to comply with any federal laws such GINA or the Computer Fraud and Abuse Act (CFAA) or any other state laws relating to genetic privacy, biometric data or social media privacy. With the world of technology constantly evolving, this is one area that should remain in the spotlight.



**ADDITIONAL RESOURCES**

Resources to support addressing technology, the internet and social media include (may require registration):



[Manage Wearable Technology Devices at Work](#)

[Deal with an Employee Who Has Posted Negative Comments About the Company on Facebook or Other Social Media](#)

[Determine Whether a Social Media Post Is Protected by the NLRA](#)



[How to Draft and Enforce a Social Media Policy in the Workplace](#)



[Podcast: Why Robotics Is Reshaping the Workplace](#)

[Webinar: Wearable Technology in the Workplace - Managing Your Legal and Business Risks](#)



[Preparing for Robotics and Artificial Intelligence in the Workplace - Checklist](#)

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## WORKPLACE VIOLENCE AND ACTIVE SHOOTER SITUATIONS

In this unfortunate age of mass shootings, bomb threats and terrorist attacks, workplace safety and preparing for an act of workplace violence is paramount. Active shooter situations and other violent events are devastating and unpredictable and can evolve and escalate very quickly. Unfortunately, the frequency of these incidents has increased in recent years, often occurring in a place of business.

In fact, in our survey, **45%** of respondents identified preparing for, or responding to, an active shooter or workplace violence as very or extremely challenging.

As a result, an employer is well-advised to implement certain procedures to protect the workplace in the event of an active shooter situation, as well as ensure employees and managers are mentally and physically prepared to respond to such a situation and to manage the aftermath.

Further, amid stricter calls for gun regulations on the federal level, employers need to understand the complex set of gun laws on the state level and how gun rights differ from state to state. Different state laws on gun control may impact an employer's policies regarding weapons in the workplace and an employee's right to possess a firearm.

A prudent employer should consider implementing measures to increase individual awareness of workplace violence and to improve the chances of preventing, and responding effectively to, an active shooter event.



### WHAT AN EMPLOYER SHOULD DO

In order to minimize the risk of workplace violence and prepare for an unfortunate situation, an employer should take the following precautions:

- Background screen applicants for a dubious past, but be mindful of ban the box laws and other laws restricting the ability to question applicants about criminal history;
- Implement a "zero tolerance" workplace violence policy, and a clear complaint procedure for reporting incidents of violence;
- Institute a policy that weapons are not allowed on the employer's premises and the consequences for violations;
- Communicate procedures to be taken when an incident of violence or active shooter situation occurs; and
- Provide workplace violence prevention training and drills in case of emergency. Such drills will depend on the employer's size, staff and resources and might include information on:
  - Safe spots to take cover in the event of an incident;
  - How to recognize the sound of gunshots and react quickly to gunfire;
  - Understand when and where to call 911;
  - React appropriately when law enforcement arrives; and
  - Adopt the survival mindset during a time of crisis.

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An employer also should consider conducting a safety and security audit to identify and correct gaps in safety and security in the employer's workplace such as broken locks and malfunctioning security systems. The employer should also consider measures such as:

- Instituting controls, e.g., keys, security pass codes;
- Distributing floor plans, keys and personnel lists and telephone numbers;
- Assembling crisis kits containing radios, floor plans, personnel lists, first-aid kits and flashlights; and
- Ensuring that the facility has at least two evacuation routes.



### ADDITIONAL RESOURCES

Resources to support addressing workplace violence issues include (may require registration):



[How to Create a Crisis Management Team](#)

[How to Prepare for an Active Shooter Event in the Workplace](#)



[Implement a Workplace Violence Policy](#)



[Workplace Violence Prevention Policy](#)

[Workplace Weapons Policy](#)

[Prepare for an Act of Violence - Checklist](#)



[Guns in Parking Lots Laws by State](#)

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## EMPLOYEE LEAVES

The expansion of leave laws on the federal, state and local level continues to present multiple challenges for employers who are tasked with understanding, providing and tracking such leaves. Depending on the jurisdiction or jurisdictions in which an employer operates, it may be required to comply with a variety of different leave laws providing paid sick leave, paid family leave, military leave, bereavement leave, blood donor leave, domestic violence leave/safe leave, emergency responder leave, and school activities leave. Federal, state and local lawmakers have been particularly focused on providing leaves to handle illnesses, medical situations and parenting needs.

Survey respondents agreed that managing employee leaves was among their top challenges. For example:

- **46%** of respondents found tracking and complying with rapidly changing state leave laws to be very or extremely challenging;
- **43%** found tracking and complying with rapidly changing municipal leave laws to be very or extremely challenging;
- 39% found determining which federal, state or local laws to apply to specific situations to be very or extremely challenging;
- 36% found determining an overall business strategy for leave to be very or extremely challenging;
- 31% found paid family/parental leave to be very or extremely challenging; and
- 25% found paid sick leave to be very or extremely challenging.

Therefore, it is not only critical for employers and HR to understand the complex interrelationship between the different and varying leave laws and how to comply, but it is also important to incorporate leave law obligations into workplace policies, practices and procedures.



### WHAT AN EMPLOYER SHOULD DO

To properly address and manage leave law issues and challenges, an employer should:

- Determine which leave laws apply to them and make sure to notify employees of their rights under those laws by incorporating them into its policies and procedures, employee handbooks and workplace notices and posters and advise employees how leave should be requested and used. Policies should be flexible and not punish employees for legitimate absences;
- Avoid having blanket policies that set a maximum amount of leave time before an employee is automatically terminated;

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- Train supervisors and managers on how to handle leave requests in a nondiscriminatory manner and how to track, document, manage and schedule leaves and have a good faith discussion with an employee regarding leave eligibility; and
- Understand how leave laws intersect, what leaves may be used concurrently and how to properly document leaves.

A multistate employer must navigate a patchwork of state and local laws and come up with a general strategy, and decide whether it will offer standard leave benefits to all employees or different leaves depending on where they work.

Further, an employer needs to determine whether it will go beyond legal requirements and provide any leave as a benefit to reduce employee turnover and absenteeism and increase productivity, retention and morale.

In any event, an employer should be extremely careful when it comes to managing employee leaves. Wrongful denial of a leave request or mishandling a leave could land the employer in hot water and open them up to costly claims and litigation. Because leave laws are rapidly changing, an employer should tread carefully.



#### ADDITIONAL RESOURCES

Resources to support addressing leave law issues include (may require registration):



[How to Comply with Paid Sick Leave Laws](#)

[How to Handle a Request for FMLA Leave](#)

[How to Administer the FMLA to Be Consistent with Other Employer-Provided Leaves](#)

[How to Handle an Employee's Request for Leave as an Accommodation](#)



[Paid Sick Leave by State and Municipality](#)



[Develop a Paid Sick Leave Policy](#)

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## BENEFITS AND THE AFFORDABLE CARE ACT

Employee benefits play a unique role in the workplace because, in addition to compensation, benefits can help attract and retain employees, increase employee engagement and provide a significant competitive advantage. A well-rounded benefits package can keep employees healthy and happy, and decrease incidents of absenteeism and tardiness.

However, benefits continue to be a major challenge for employers as they must make sure that their benefits offerings are compliant with various laws such as the Employee Retirement Income Security Act of 1974 (ERISA), the Consolidated Omnibus Budget Reconciliation Act (COBRA), the ACA, HIPAA and GINA.

Further, benefits should be effectively communicated to the workforce so that employees know how the benefits work and what requirements must be satisfied in order to be able to participate.

The ACA, its requirements and its uncertain future presents challenges for employers. Approximately 46% of employers were very challenged or extremely challenged when it comes to preparing for the future of health care and the ACA. In fact, one survey respondent told XpertHR “the ACA reporting for employers is hugely significant! Employers spend hundreds of hours each year on this. What is the actual benefit to anyone?”

XpertHR's survey found that **32%** of survey respondents were very or extremely challenged when it comes to establishing compliant wellness programs to reduce health care costs and improve employee health while **26%** of respondents were very or extremely challenged when with respect to determining which voluntary benefit programs (supplemental benefits) provide the best ROI. **36%** were very or extremely challenged with respect to adjusting benefit offerings to different employee stakeholders. **36%** of respondents were very or extremely challenged with respect to effectively communicating the value of the benefits to the workforce while **36%** were very or extremely challenged with respect to aligning employee benefits with business strategies.



### WHAT AN EMPLOYER SHOULD DO

So how can an employer effectively manage benefits and create a benefits strategy? To start, it is critical to review the organization's current benefit offerings to make sure it is providing a comprehensive set of benefits, carefully considering what others in the industry and market are doing. An employer should determine how its employee benefits program compares to the latest benefit trends and consider whether it will add any additional offerings in order to attract and retain employees. Consider getting ahead of the curve and beyond the commonly offered health care, dental care and vision insurance, an employer may want to offer:

- Tuition reimbursement;
- Flexible work schedules;
- Telecommuting;
- Job sharing;
- Transportation benefits;

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- Gym membership;
- Wellness programs;
- Employee assistance programs;
- Concierge services (pet care, child care, automobile services, dry cleaning);
- Student loan assistance; and
- Financial and retirement planning.

With respect to the ACA, it is important for an employer to comply with reporting requirements in an accurate and timely manner. The employer should assess each worker and understand their obligations to them under the

ACA. With various generations in the workforce, all with different benefits needs, an employer should be aware of the latest benefit trends and consider taking a more personalized approach to benefit offerings. Employees value freedom and choice and an employer should attempt to satisfy that.

An employer should also be aware of the increased role technology and the internet are playing with respect to benefits such as telemedicine and mobile applications to track and access benefits and health care.



#### ADDITIONAL RESOURCES

Resources to support addressing the ACA and benefit issues include (may require registration):



[Reduce Benefit Plan Costs](#)

[Prepare for ACA Reporting Requirements](#)

[Implement Wellness Initiatives](#)



[Determine If a Penalty Is Owed Under the Affordable Care Act](#)

[Determine Responsibility for Information Reporting Under the Affordable Care Act \(ACA\)](#)



[What Employers Should Know About the Affordable Care Act \(ACA\)](#)

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## EMPLOYEE WELL-BEING AND MENTAL HEALTH

Employee mental health and fostering a healthy and stable workforce is a top concern for employers. While a physical illness or disability may be more easily recognized and addressed in the workplace, it is important to recognize that federal and state antidiscrimination laws also provide protections for those suffering from mental health issues including post-traumatic stress disorder (PTSD), depression and bipolar disorder or schizophrenia. Statistics from the National Institute of Mental Health show that approximately 1 in 5 adults in the US experiences mental illness in a given year, and approximately 1 in 25 adults in the US experiences a serious mental illness in a given year that substantially interferes with, or limits, one or more major life activities.

Mental health is a serious concern for employers as mentally healthy and stable employees will be more productive and more efficient at work and less likely to be absent. On the flipside, employees with mental health issues may be more likely to engage in workplace violence, engage in negligent acts and bring negative press and a bad reputation and attention to the workplace. Further, such employees may be frequently absent, less productive, easily distracted and more likely to be involved in workplace accidents.

Mental health concerns were echoed in XpertHR's survey with **39%** of respondents finding this issue very or extremely challenging.

One respondent felt that there must be an increased focus on "wellness and mental health issues" and another said there was a concern about "rising health care costs" and "providing incentives for healthy behavior, lifestyle and outcomes." It is critical to raise awareness surrounding mental health issues and make promoting employee mental health and wellness and reducing stress a priority in order to attempt to achieve a healthy workplace culture.



### WHAT AN EMPLOYER SHOULD DO

To address mental health issues, it is critical for an employer to comply with the various laws that come into play when dealing with an employee that has a mental health issue such as the Family and Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA). Employees and applicants do not need to disclose a mental health condition and the employer should avoid asking about it except in cases where an individual requests an accommodation. When it comes to recruiting and hiring, an employer should not discriminate against those with mental health issues and the focus should be on an individual's ability to perform the essential functions of the position. If adverse action must be taken, there should be a clear and lawful business reason for taking it. If an employee requests an accommodation, the employer should engage in the interactive process and see if one may be provided without creating an undue hardship.

However, the employer must intervene if the employee poses a direct threat to him or herself or to others. The safety of the employee, coworkers and third parties in the workplace is of paramount importance. While an employer should not stereotype individuals with mental health conditions, it is not obligated to hire or retain workers who cannot perform the job or threaten the safety of the workplace, even with a reasonable accommodation.

In addition to an overall benefits package with access to substance abuse services and behavioral health treatments, an employer may want to consider employee assistance programs, allowing employees access to counselors with expertise in alcohol and drug abuse, stress, depression and other mental health issues. This should all be integrated

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with other benefits such as health plans, wellness programs and disease management programs. An employer may also wish to provide employees with paid time off and personal time, vacation days or personal days to address mental health issues and consider providing benefits to encourage a healthy lifestyle including access to gyms and health clubs and flexible working arrangements.

Supervisor training on mental health issues is important as supervisors should be aware of the signs of mental health disorders including tardiness, decreased performance, increased errors and sloppy work, mood swings and decreased energy. Supervisors should also be able to recognize the warning signs of depression, suicide and violent tendencies so that they may address issues before they escalate. Make sure that all medical information remains confidential and keep any medical records separate from an employee's personnel file. The employer should not reveal personal and private information regarding an employee's mental health and access should be limited to HR and supervisors and only provided to those with a need to know.

Employee mental health issues are a primary concern today and it is essential to try and foster and encourage a healthy work life balance as well as personal well-being.



**ADDITIONAL RESOURCES**

Resources to support addressing employee well-being and mental health include (may require registration):



[How to Handle Mental Health Concerns](#)

[How to Manage an Employee with Mental Disabilities Under the ADA](#)

[How to Deal with an Employee Who Is a Direct Threat to Self or Others](#)



[Well-Being](#)

[Stress Management](#)

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## EMPLOYEE HANDBOOKS

Creating and maintaining an employee handbook, and including necessary workplace policies, is a critical part of managing a workforce today. A well-drafted handbook can provide guidance with respect to the employer's mission and goals as well as issues such as employee benefits, leave and paid time off and discrimination and harassment. It not only educates employees, but is it also a useful tool for managers to use in understanding HR and personnel issues as they are often the frontline of inquiries. A handbook also helps promote fairness and consistency across the board and can assist an employer in enforcing its policies. With a handbook, the employer can show that employees knew of the policies and agreed to abide by them. A handbook can also be an important resource in preventing and defending against lawsuits.

However, employee handbooks are not without their challenges. In fact:

- **42%** of respondents stated that ensuring handbooks are read or understood by employees is very or extremely challenging;
- 41% found that keeping current with new laws and trends was very or extremely challenging;
- 36% were very or extremely challenged by managing handbooks as a multistate employer and addressing conflicting and overlapping requirements;
- 28% found it very or extremely challenging to manage employee handbooks as a global employer with conflicting or overlapping requirements;
- 31% found it very or extremely challenging to incorporate municipal requirements into their employee handbooks;
- 26% found aligning the employee handbook with business objectives to be very or extremely challenging; and
- 23% found the National Labor Relations Board invalidating employment policies to be very or extremely challenging.

One respondent provided insight into this and revealed that "keeping our employee handbook up to date is becoming harder and harder with new laws changing so fast."



### WHAT AN EMPLOYER SHOULD DO

To confront the various challenges employee handbooks raise, make sure that the employee handbook is effective and that it works for the organization. Monitor developments at the federal, state and local levels and recognize and understand which laws apply to the employer. This is especially important due to rapid changes in laws with respect to EEO, reasonable accommodations, smoking and leave, as well as quickly emerging issues such as predictable scheduling. An employer should make sure to update its employee handbook on an annual or even semiannual basis. It is also critical to take the right approach for the employer's workforce particularly as a multistate and/or multijurisdictional employer. Some approaches include:

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- Developing a general handbook based on federal requirements and providing state supplements for state policies;
- Using separate handbooks for each state; and
- Having one handbook with uniform policies across all states, which requires providing the greatest benefits to all employees.

An employer needs to consider how generous it wants to be against the time, effort and resources needed to create an employee handbook.

Employee handbooks should be clearly drafted in an unambiguous manner and should not infringe upon the right of union and nonunion employees to engage in protected concerted activity. Special attention should be paid to policies addressing social media, contact with the press, confidentiality, investigations and employee communications, as such policies have been found to violate employee rights.

Employee handbook policies should be readable, relevant and interesting and connect to the workforce through the use of hypotheticals, practical examples, anecdotes and narratives as well as colors, visuals and graphics to convey important workplace information and guidelines regarding employee conduct. An employer should require employees to acknowledge receipt, consent and understanding of the employee handbook and provide frequent training to employees and supervisors.



### ADDITIONAL RESOURCES

Resources to support addressing employee handbooks include (may require registration):



[How to Amend an Employee Handbook](#)

[How to Create an Employee Handbook](#)

[How to Update an Employee Handbook for 2018](#)



[50 State Employee Handbook Templates](#)



[Work Rules/Handbooks - Examples of Lawful and Unlawful Language](#)



[Webinar: Is That in Writing? Making the Most of Your 2018 Employee Handbook](#)

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## DRUG TESTING AND SUBSTANCE ABUSE

Addressing and managing drug use and drug testing remains one of the most challenging issues for employers who are tasked with making sure their workforce is efficient and operating safely and productively. While over half of the states and multiple municipalities have legalized marijuana for medical, and in some instances recreational, use, marijuana remains a Schedule I illegal drug under the Controlled Substances Act and is unacceptable under Department of Transportation drug testing regulations, which state that marijuana use is unlawful as it can be particularly dangerous for those employed in safety-sensitive positions.

To add to this, the use of prescription drugs and narcotics is on the rise and the opioid crisis and use of illegal narcotics and drugs is growing. America's growing opioid addiction and the ensuing epidemic is having a harmful effect not only upon the millions of citizens who are addicted to prescription drugs, and taking them for non-medical reasons, but also it stands to have a harmful effect on employers and the health and safety of the workplace. The opioid epidemic is creating a tremendous challenge for employers who now face:

- Decreased productivity;
- Increased risk of accidents and hazards on the job;
- Decreased efficiency;
- Increased insurance costs and premiums;
- Reduced profits;
- Increased workers' compensation claims;
- Increased absenteeism and tardiness;
- Increased inattention; and
- Increased turnover.

XpertHR's survey results reflect employers' challenges with this issue as **35%** felt very or extremely challenged by managing employees who use marijuana medically or recreationally and **32%** found addressing the impact of substance abuse (such as heroin and opioid addictions) on the workplace to be very or extremely challenging. **13%** were very or extremely challenged when it came to handling the drug testing of employees and applicants.



### WHAT AN EMPLOYER SHOULD DO

To address the challenges presented by drugs and substance abuse, an employer should develop, implement and enforce drug free workplace policies prohibiting the use of unlawful drugs both on the employer's premises and during working time. An employer also may prohibit the misuse of prescription drugs that are otherwise lawful.

Just as with alcohol, it is lawful to prohibit an employee from bringing both lawful and unlawful drugs to work and using such substances on the job because of the risks drug use may have on the safety and productivity of the workplace.

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An employer should be cautious and avoid making quick decisions when managing employees who may be using or abusing drugs. Be particularly careful as employees and applicants who are medical marijuana users, or users of prescription drugs, may be protected under the ADA and similar state and local laws, and an employer may be required to provide reasonable accommodations based on a disability. Further, be cautious about taking adverse action against employees based on lawful off-duty conduct if the state protects employees who engage such activities. So much of this is state dependent and will really vary from state to state.

Finally, drug testing policies should reflect the latest laws on the use of marijuana for medical and recreational reasons. Consider whether it is necessary to test for non-safety-sensitive positions, especially if the employer operates in a state that has legalized marijuana for medical or recreational purposes. Remember that testing will depend upon the industry and the position the employer is testing for. Further, it is important to notify employees of drug testing and the methods and means that the employer will use to test. An employer may want to consider using different testing mechanisms, akin to field sobriety tests, that measure incapacitation by marijuana use rather than traces of drug use.

In any event, this is one area to stay on top of federal, state and local developments as laws are rapidly changing.



**ADDITIONAL RESOURCES**

Resources to support addressing drug testing and substance abuse include (may require registration):



[How to Discipline Misconduct Related to Marijuana Use](#)

[How to Handle Employees Who Have Drug and Alcohol Issues](#)

[How to Help an Employee with a Substance Abuse Problem](#)



[Test a Job Applicant for Drug Use](#)



[Drug and Alcohol Testing Policy](#)

[Drug-Free Workplace Policy](#)

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## DIVERSITY AND INCLUSION

Creating and maintaining a diverse and inclusive workplace is of paramount concern for employers. To address this challenge, an employer must develop, implement and enforce strong EEO policies prohibiting discrimination, harassment and retaliation based on membership in a protected class to comply with federal, state and local laws. However, in today's global workplace an employer needs to recognize that diversity goes far beyond race, sex, ethnicity, age, national origin and religion and includes differing work experiences, sexual orientation, educational status, marital status, socioeconomic status, physical characteristics, life experiences, background and upbringing. It is important to create an inclusive workplace in which all employees feel valued and respected and where they can actively contribute to the employer's success.

Further, an employer should realize diversity can have a positive impact on the workplace and may provide myriad benefits including, but not limited to:

- Increasing employee productivity;
- Reducing legal claims;
- Improving internal and public image and brand;
- Increasing customer loyalty and engagement;
- Increasing the ability to communicate with customers;
- Increasing sales and profits;
- Increasing employee retention;
- Bringing new ideas, perspectives and viewpoints to the table leading to creativity, innovation and new ideas;
- Providing the best talent possible from the widest pool of potential employees; and
- Enhancing adaptability in a changing and increasingly diverse marketplace.

Notwithstanding this, diversity presents many challenges for employers.

In fact, approximately **29%** of respondents told XpertHR that they were very or extremely challenged by recruiting a more diverse workplace. **30%** were very or extremely challenged by increasing women in leadership roles and **33%** were very or extremely challenged by increasing minorities in leadership roles. Lastly, **23%** were very or extremely challenged by developing a workplace culture of inclusion. Additionally, survey respondents revealed to XpertHR that they are concerned about hiring women and minorities in technology roles as well as protecting the voices and rights of non-minority workers.

In fact, one respondent stated that they were very challenged by "the trend against employers in hiring decisions based on EEOC rules and regulations and finding the way to be compliant given the need for reasonable accommodations and the ever-expanding definition of disability".

Thus, is it up to HR to lead the way and incorporate diversity into the organization with the goal of creating an inclusive and tolerant workplace.

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### WHAT AN EMPLOYER SHOULD DO

It is critical to understand that diversity starts at the top and there must be commitment by upper management to align diversity efforts with business goals and corporate strategies. Having key stakeholders including HR and upper management committed to creating a diverse workplace, is essential.

Creating a diverse workforce begins with the hiring process. Job ads should be neutral and free of bias to attract a wide variety of candidates and recruit from a variety of sources, looking beyond its immediate geographic pool. The focus should always be on the job requirements, and the ability, qualifications and performance of a particular candidate. Job candidates should be interviewed by a diverse panel.

When onboarding employees, the employer should demonstrate that it believes strongly in an inclusive and tolerant workplace culture where all individuals feel welcome and part of the team. The employer should make clear that it emphasizes respect and acceptance.

An employer must implement policies that prohibit discrimination, harassment and retaliation, ensure these policies are part of the employee handbook and provide training on them. Going one step further and providing diversity and sensitivity training to all employees and managers may be a good way to address and root out stereotypes and prejudices. Providing reasonable accommodations based on disability religion, sexual orientation, etc. if justified and if it would not create an undue hardship for the employer, is also a vital part of any diversity initiative.

The employer should also try to build relationships and create opportunities such as mentoring programs where individuals from different backgrounds can work together and communicate with each other. Creating employee resource or affinity groups, where individuals with similar backgrounds can discuss shared experiences, is also a good idea. Such groups can help provide individuals with the opportunity to meet, network and discuss workplace challenges and reduce feelings of isolation while increasing employee morale and retention. Diversity remains a constant challenge and one that an employer should closely monitor.



### ADDITIONAL RESOURCES

Resources to support addressing diversity and inclusion include (may require registration):



[How to Create a Diverse Workforce](#)



[Create a Diverse Workplace](#)



[Diversity and Inclusion - Supervisor Briefing](#)



[Webinar: Building a Global Diversity and Inclusion Strategy](#)

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## CHALLENGE

**PAY EQUITY AND SALARY HISTORY BANS**

One of the hottest trends sweeping the nation is the push for pay equity for women. Despite the fact that women are more likely to graduate college than men, and approximately 47% of US workers are women, women still earn an average of 82 cents for every dollar a man earns.

In attempt to even the playing field, there has been a tremendous focus on equal pay laws. In addition to discrimination and equal pay laws which prohibit an employer from treating a woman differently with regard to compensation (including wages, benefits, bonuses and equity) and prohibit wage discrimination, new and amended laws also make it easier to bring wage discrimination claims and more difficult for employers to defend them. Some new laws aim to make wages more transparent and ban employers from prohibiting discussions regarding pay.

However, employers are now seeing one type of trending law that is taking this issue even further. In a growing number of states, employers are now prohibited from doing what has long been a part of the recruiting and hiring process- asking for an applicant's prior salary history. The reasoning behind this is that many women may have been historically disadvantaged and discriminated against in compensation. If compensation is based on previous pay, even candidates who negotiate and advocate for themselves may end up making less than a male employee who happened to earn more at a prior position.

In an effort to close the wage gap and make sure women are treated more fairly and provided with the same compensation and opportunities, states such as California, Delaware, Massachusetts and Oregon and cities such as New York City and San Francisco are passing salary history bans. Such laws generally prohibit an employer from:

- Requesting or requiring an applicant to provide prior salary history information;
- Relying on prior salary history and using it as a factor to determine whether to offer employment or what salary to offer. The laws generally prohibit employers from requesting this information either orally or in writing, directly or indirectly from the individual as well as from the individual's current or former employers;
- Asking about salary history on a job application or during the interview process; and
- Conducting internet or other searches or background checks in an effort to determine the applicant's salary history.

In some instances, an employer will be able to use salary history to consider or verify salary information to determine salary, benefits and compensation but only if the disclosure is voluntary and not prompted by the employer. Additionally, the new laws generally do not prohibit employers from discussing salary expectations and ranges with candidates.

XpertHR's survey reflects pay equity concerns as approximately **26%** of respondents were very or extremely concerned with respect to pay equity trends (i.e., banning employers from requesting salary history and from prohibiting employees from discussing wages).

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**WHAT AN EMPLOYER SHOULD DO**

In the quest to achieve pay equity, these new salary history ban laws are a potential game changer. Thus, an employer must adequately prepare and be equipped to handle such a ban should it find itself in a jurisdiction that has enacted one. In order to comply with these new laws and attempt to achieve greater pay equity, an employer should do the following:

- Provide training to managers, supervisors and those with the authority to recruit, interview and hire on the parameters of the new laws including what may and may not be asked;
- Make sure those with the authority to recruit, hire and interview do not ask for current or past salaries of applicants from the applicants themselves or from a current or prior employer. Instead the focus should be on an applicant's salary requirements, as well as the skills and qualifications the individual has that entitles them to a particular salary;
- Remember that it is often still permissible to ask about salary expectations and discuss ranges. It also may be appropriate to ask about hours worked, sales history, performance history, book of business or profits generated which may provide a legal justification for paying different wages for the same or a similar position;
- Update job applications and related forms and materials and remove salary history questions;
- Make sure salary history information is not sought during additional background checks or verification inquiries;
- Remember that an employer can still use market survey data and benchmarking information which will provide employers with a ballpark salary;
- Establish a range of salaries with each tied to different merit, skills and qualifications and match the applicant to a salary based on the applicant's merit, skills and qualifications;
- Clearly document the factors and criteria used to determine salary, promotions, bonuses, etc.; and
- Make sure not to request salary history during a job interview. If a candidate voluntarily discloses it, make sure to make a record of this and memorialize it in writing so as to protect the employer's interests. Document any instances where an applicant voluntarily discloses salary history.

An employer should also conduct a thorough audit of its pay practices and do the following:

- Make sure job advertisements and job descriptions do not discriminate and use neutral, fair and nondiscriminatory language and focus on the skills, qualifications and knowledge needed for each position. Salaries should be based on the value a particular position brings to the organization. There also should be a clear connection between written job descriptions and the actual job responsibilities.
- Review all pay practices, job descriptions and salaries of all employees to make sure wage discrimination is not occurring. Salaries should include all bonuses, equity, benefits and any other forms of compensation.
- Establish clear guidelines for salaries, pay and bonuses and make sure these are tied to merit, productivity, performance, sales or some combination of factors. The criteria should be objective, predictable, measurable

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and free of surprise so that employees are keenly aware of the employer’s expectations and how compensation decisions are made.

- Provide supervisors, managers and those with the authority to recruit, interview and hire with thorough information on the employer’s policies on salary increases and the authority and discretion they have, if any, and encourage them to keep accurate records of any discussion or decisions.
- Make sure any wage differentials are based on legitimate, nondiscriminatory factors and supported by written documentation. If they are not, correct them and readjust for any pay differences unless a seniority system, merit system or a bona fide factor other than sex, such as education or training, can explain those differences.
- Maintain clear records regarding employment and compensation decisions and document how they were made and the legitimate, nondiscriminatory factors taken into account as this will provide evidence in case of a later lawsuit.
- Retain records regarding compensation, job classifications as well as terms and conditions of employment in accordance with federal, state and municipal requirements.
- Provide timely and effective performance evaluations so employees know the employer’s performance expectations and if the employee is meeting them.
- Create an atmosphere of fairness in which all employees are valued based on their merit, skills, qualifications and contributions to the organization.
- Carefully compare the pay of men and women doing the same work, identify any pay gaps and eliminate those gaps that cannot be explained on grounds other than gender. If wage differentials are not supported by well documented and legitimate nondiscriminatory reasons, the pay differences should be corrected. Self-evaluations and audits can reduce the chance of employer liability and the potential for costly litigation.
- Avoid cutting pay to even the playing field and become legally compliant. If adjusting pay because of a pay differential, an employer should only increase the pay of the lower paid employee.



**ADDITIONAL RESOURCES**

Resources to support addressing pay equity and salary history bans include (may require registration):



[How to Make Pay Equity Reviews Count](#)

[How to Prevent Wage Discrimination and Ensure Equal Pay](#)



[Podcast: Why Salary History Bans Are on the Rise](#)

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## HARASSMENT

A review of the top issues an employer needs to consider would be remiss without a mention of the issue that has shown up on almost every employer's radar over the course of the last few months. From government to entertainment to Fortune 500 companies to the media to the halls of Congress, it seems that sexual harassment has become an even greater risk for employers as the issue continues to boil up and come to the forefront.

It is critical for an employer to understand that it must work to eradicate sexual harassment and all forms of harassment based on any protected class from the workplace because the employer has so much at stake.

An employer needs to be particularly vigilant regarding acts of harassment in the workplace because depending on whether the alleged harasser is a supervisor or coworker, an employer may be liable and face EEOC charges, legal complaints, fines, and penalties on top of negative press and damage to its reputation.

It is important to hold all individuals in the organization to the same standards of conduct and make sure that no one — not a manager, supervisor or owner — is provided with special treatment. It is no longer possible to maintain a culture of silence and complicity and there must be a cultural shift in recognizing that there is no place for harassment at work.



### WHAT AN EMPLOYER SHOULD DO

To start to address the issue of harassment, an employer must work to develop, implement and enforce a zero-tolerance policy for harassment and make sure it is included in the employee handbook. The policy should clearly convey that harassment goes beyond sexual harassment and may involve harassment based on religion, race, national origin, age etc. In fact, harassment may be based on one, two or more protected characteristics. Harassment also may involve a wide variety of conduct — physical, written or verbal, as well as conduct over the internet and social media including cyberbullying. The harassment policy should further set forth a multichannel complaint procedure allowing victims to bring a complaint to various members of management, or even a hotline, so that a victim will not be forced to report harassment to a supervisor or manager who may be the harasser. All employees and managers should be aware of the policy and be required to acknowledge receipt and that they will consent to and abide by its terms.

Training on the employer's harassment policy is essential for all employees and supervisors of the organization. In fact, in some states it is required by law. It is critical to understand what type of conduct constitutes harassment and to know how to identify and report it. Further, a comprehensive harassment training program will be very valuable if the employer later faces a sexual harassment claim.

Once on notice that a potential act of harassment has occurred, the employer should immediately document the complaint and begin to investigate the claims. A thorough investigation involves a neutral investigator who reviews documents such as emails, interviews the individual, the alleged harasser and any third-party witnesses, and documents the findings. The employer should be sure that the investigator documents each step of the investigation as this will be a useful record to show what steps the employer took once it was on notice of potential harassment. Such documentation also may be invaluable if the employer later faces an EEOC charge or legal complaint. The employer should also make clear that it intends to keep the complaint and investigation confidential, that it will reveal information only on a need-to-know basis and that it will not retaliate against individuals who complain of harassment.

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Further, it is essential for the employer to take interim measures while the harassment investigation is pending. This may include separating the victim and the alleged harasser or changing the lines of reporting as this may minimize the risk that further acts of potential harassment will occur. This may also help avoid any retaliation or adverse action from being taken against the victim. The employer also must impose discipline, up to and including termination of employment, upon those who are determined to have engaged in harassing conduct as this will send a clear message that harassing conduct will not be tolerated.

Finally, a critical component of preventing harassment as well as discrimination against women and minorities in the workplace is providing them with greater opportunities to succeed and placing them in positions of management and leadership within an organization.



### ADDITIONAL RESOURCES

Resources to support addressing harassment include (may require registration):



[Conduct an Internal Investigation After Receiving a Complaint of Sexual Harassment](#)



[Sexual Harassment - Supervisor Briefing](#)



[How to Prevent Harassment](#)



[Harassment Policy](#)

[Harassment Complaint Form](#)



[Investigate a Claim of Sexual Harassment](#)

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## What's your biggest HR challenge today?

### CONCLUSION

With a new year upon us, employers must gear up to prepare for these new challenges and changes. Employers need to recognize the issues, what is at risk and the way in which these new laws and trends will have an impact on their workplace, HR and their business operations. To best protect themselves and save time, money and resources, an employer should review and amend its workplace policies and practices to make sure they are compliant. In order to minimize the risk of employer liability, it is essential to monitor developments closely and make changes accordingly.

- ✓ Demonstrating the strategic value of your HR efforts?
- ✓ Improving diversity in the workplace?
- ✓ Ensuring workplace policies are compliant and up to date?

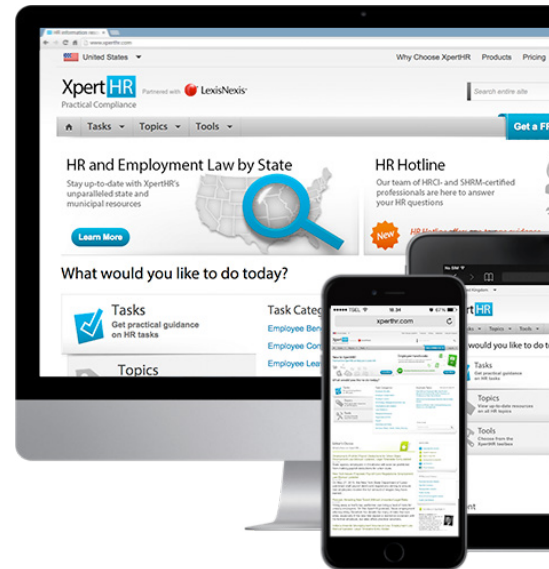
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