

# Top 2017 Compliance Challenges For HR



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# What is at Stake

## 2017 Has Seen Significant Changes in the Workplace

### **Trump as President- Many questions and measures are up in the air**

- Obama Laws and Executive Orders- ACA, DOL overtime, paid leave federal contractors, LGBT rights
- Regulatory actions by DOL, EEOC, NLRB, OSHA
- Immigration and E-Verify (undoing DACA)

### **State and municipal governments continue to pass employment legislation**

- Minimum wage
- Paid leave
- Predictable scheduling
- Criminal background checks/ban the box
- Marijuana--medical and recreational

# Risks of Noncompliance

## Employers Face High Stakes

- Civil fines
- Criminal penalties
- Administrative actions
- Litigation
- Harm to business reputation and professional image
- Bad publicity



# XpertHR Survey

- XpertHR surveyed HR professionals on their view of compliance challenges in 2017
- Received nearly 1200 responses from small, medium and large employers in November 2016
- Wide variety of industries, all geographic areas of the country
- Will touch on several specific findings throughout today's presentation
- **Stay tuned- a new survey is on its way!**



# Challenge# 1: Trump as President

- Historic election of Trump and Republicans controlling Congress brings great deal of uncertainty
- Many employers are wondering what will happen to Obama's pro-employee initiatives



# Trump as President

## Employment Issues at Stake

- Supreme Court - effect on employment cases, conservative judges such as Neil Gorsuch
- NLRB appointees/issues (expanded workplace rights - protected concerted activity, independent contractors, temporary workers and the joint employer doctrine)
- Obama-backed employment initiatives (revised overtime regulations now halted, EEOC's revised EEO-1 Report suspended, increased penalties/reporting requirements under OSHA, EEOC's focus on expanding protections (i.e., LGBT), paid sick leave for federal contractors and immigration measures)
- Democratic congressional measures - fair pay, pregnancy accommodations, paid sick leave
- Cyber security and data privacy
- Federal regulations on businesses, return to states' rights
- Gig economy
- Trump proposals

# Trump as President

## What Hangs in the Balance?

- Immigration (travel ban - Iran, Libya, Somalia, Sudan, Syria, and Yemen and now Chad, Iran, Libya, North Korea, Somalia, Syria, and Yemen, Venezuela, limiting visa workers, increased ICE raids, undoing of DACA)
- Future of healthcare and ACA
- Proposed paid family/parental leave
- Proposed Working Families Flexibility Act (allowing comp time for employees in private sector)
- Approach to transgender individuals – proposed military ban
- Conservative makeup of Supreme Court as well as lower federal courts
- Future of EEO – 1 Report

# Trump as President

## State and Local Issues

- Minimum wage increases (multiple states)
- Paid sick leave (Arizona, Oregon Washington and Chicago, Cook County, LA, Minneapolis, St. Paul, )
- Marijuana medical (Florida, N. Dakota, W. Virginia) recreational (California, Maine, Massachusetts, Nevada)
- Salary history ban/equal pay (Delaware, Massachusetts, Oregon, NYC, Philly, San Francisco)
- Ban the Box (Vermont, Connecticut, NYC and LA recently)
- Predictable/predictive scheduling (NYC, Seattle, Oregon)





# Trump as President

## What an Employer Should Do

- Stay the course
- Comply with the laws and regulations that are on the books, at least until they are changed
- Monitor developments closely and be on lookout for changes
- Maintain detailed adequate records/documentation regarding employees/employment actions
- Make sure there is a legitimate business reason for taking a particular course of action or making an employment decision

# Challenge #2 - Workforce Planning

## 21<sup>st</sup> Century Workforce Trends Affecting Employment

- Gig economy – entrepreneurial workforce
- Alternative work arrangements
- Aging workforce
- Search for talent/finding high quality applicants
- Changing societal demographics
- Millennials and Baby Boomers at work
- Global marketplace
- Using HR data- predictive analytics



# Survey Says

55% felt extremely or very challenged in finding high quality applicants

21% felt extremely or very challenged by screening candidates (i.e., Ban the Box, FCRA/credit checks)

45% were extremely or very challenged by employee engagement and satisfaction

43% were extremely or very challenged by employee retention

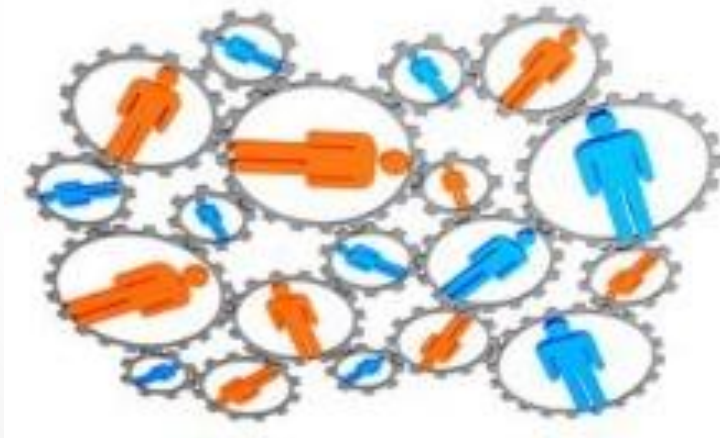
37% found aligning talent acquisition strategy with business objectives to be extremely or very challenging

38% found aligning talent retention strategy with business objectives to be extremely or very challenging

# Workforce Planning

## What an Employer Should Do

- HR should play an active role in shaping the evolving workforce
- Align HR objectives with business objectives
- Investing in talent - greater return on investment/improves economic performance
- Bring creative solutions to business challenges
- Strengthen corporate brand and reputation
- Follow trends in technology, industry and diversity
- Provide mentoring and leadership to employees



# Challenge # 3: Leave Protections

## Various Types of Leave Now Legally Required

- Rapid rise of leave laws on the federal, state and local level
  - Federal-- FMLA, ADA, USERRA, push for paid sick leave, Trump says he will provide maternity leave
  - State and local level – paid sick leave, military leave, domestic violence leave, bereavement leave, donor leave
- Managing their complex interrelationship
- Leave as a benefit/perk



**LEAVE REQUEST**

Name \_\_\_\_\_ Date \_\_\_\_\_

Department \_\_\_\_\_

Vacation       Illness       Without pay  
 Holiday       Injury       Other

Explain: \_\_\_\_\_

FROM		TO		TOTAL Days or Hours
Date	Time	Date	Time	

Employee's Signature \_\_\_\_\_

Supervisor's Approval \_\_\_\_\_

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# Leave Protections

## Intersection of Leave Laws

- Injured employee may be subject to FMLA- ADA – workers compensation
- Sick employee may be subject to State and local paid sick leave laws- ADA
- Pregnant employee/new parent may be subject to FMLA, state family leave laws, paid family leave insurance
- Military employee may be subject to USERRA – ADA- family military leave- state military leave laws



# Leave Protections

## New York State Leave Laws

- Adoption leave
- Military spouse leave (20 or more employees at one location)
- Pregnancy disability leave
- Voting leave
- Military leave
- Jury duty
- Crime victim/witness leave
- Bone marrow donation leave (20 or more employees in at least one worksite)
- Blood donation leave (20 or more employees)
- Emergency responder leave



# Leave Protections

## **New!** New York Paid Family Leave

Starting January 1, 2018 full time/ part time employees working at least 6 months eligible up to 8 weeks leave per year

### **Reasons for Leave**

- To care for a close relative (i.e., spouse, domestic partner, children, parents, parents-in-law, grandparents, grandchildren) with a serious health condition
- To bond with the employee's newborn, newly adopted or newly placed child within the first 12 months after childbirth/ placement adopted/ foster child
- When spouse, child, domestic partner or parent is on active duty or impending call to duty

\* Not an employee's own serious health condition- law complement the state disability insurance program

\* Contributions deducted from employee payroll

### **Steps to Take**

- Review their payroll policies and practices and make sure employees are classified properly
- Purchase a paid family leave insurance policy or arrange to self-insure
- Review and revise workplace policies to make sure they comply with the new law's requirements
- Comply with its notice posting requirements



# Survey Says

34% found administrative burden of managing leaves extremely or very challenging

33% found tracking and complying with rapidly changing leave laws across *states* to be extremely or very challenging

28% found tracking and complying with rapidly changing leave laws across *municipalities* to be extremely or very challenging



28% found determining what federal, state and local leave law provisions apply to specific employee situations to be extremely or very challenging

28% indicate that determining overall business strategy for employee leave benefits and compliance is extremely or very challenging



# Leave Protections

## What an Employer Should Do

- Determine which leave laws apply to each workplace
- Revise policies and procedures, employee handbooks and workplace notices to properly advise employees of their rights under leave laws
- Review all paid time off, vacation or other paid leave policies and reasonable accommodation policies to determine if other policies may need to be created
- Train supervisors on leave laws and how to handle leave requests
- Understand how different leave related laws intersect

# Challenge #4: Threat of a Cyber Breach

## Increasingly Digital World Carries Risk for Employers

- Rapid pace of technological developments/omnipresent internet/mobile devices
- Significant impact on the workplace in terms of mobility, communication, productivity and efficiency
- Risks with regard to safety and security- can lead to data breaches and loss of confidential information, damage employer's reputation
- HR needs to take steps to minimize risk of cyber breaches/ protect digitally-maintained confidential information, such as trade secrets



# Survey Says

44% found preventing  
cyber breaches to be  
extremely or very  
challenging

32% noted that  
managing mobile  
devices/wearable  
technology was  
extremely or very  
challenging

# Threat of a Cyber Breach

## What an Employer Should Do

- Safeguard confidential information and minimize the risk of a cyber breach
- Critically assess, audit and properly safeguard the confidential information belonging to:
  - Employers (i.e., trade secrets and confidential and proprietary information)
  - Employees (i.e., credit reports, social security numbers and driver's license information, health and medical records)
  - Customers (i.e., credit card data and purchasing records)
- Make sure employer's confidential information secure – encrypted, firewalls, increased protections

# Threat of a Cyber Breach

## What an Employer Should Do

- Develop, implement and enforce policies to minimize risk:
  - Confidentiality policies
  - Privacy policies
  - Mobile device policies
  - Policies regarding social media and internet use
  - Policies relating to business ethics and employee conduct
- Utilize nondisclosure agreements
- Train employees and supervisors
- Screen potential employees for dishonest or fraudulent conduct
- Conduct exit interviews
- Make sure all equipment and technological devices are returned and access to private and confidential information is terminated

# Challenge #5: Benefits/ACA

## ACA

- Reporting deadlines, penalties
- Challenging issues – independent contractors, gig economy, joint employers- complicated relationships
- Future of the ACA under Trump and Republican Congress and what possible replacement, if any

## Benefits

- Pros - attract and retain employees, increase employee engagement and provide an employer with a significant competitive advantage,
- Cons - rising healthcare costs have required creative strategies and evolving offerings



# Survey Says

21% were extremely challenged or very challenged by offering different benefits to different groups of employees

27% were challenged by aligning benefits offerings with business objectives

38% of respondents stated that ACA reporting requirements were very or extremely challenging



36% were concerned about the ACA in general and rated it extremely or very challenging

30% of respondents ranked this as their first, second or third highest concern for 2017 on a scale of 1-10





## What an Employer Should Do

- Offer creative benefit options - tuition reimbursement, flexible work time, commuting benefits and gym membership, healthcare, dental and vision insurance, telemedicine
- Manage benefit needs of different cohorts different generations in workforce - reject cookie cutter approach
- Consider supplemental and voluntary options/ personalization and customization
- Understand increased use of technology and mobile applications
- Make sure that any wellness programs comply with the EEOC's rules under the Genetic Information Nondiscrimination Act (GINA) and the Americans with Disabilities Act (ADA) effective January 1, 2017
- Employer must complete the proper forms accurately and in a timely manner

# Challenge #6: Evolving Workforce

## New Ways of Working Due to Technology and Communications

- Telecommuting and the virtual workplace
- Flex time
- Job sharing and flexibility
- On-demand or gig economy - independent contractors/freelancers/ temporary/contingent workers
- Traditional jobs, brick and mortar workplace of 9 to 5 diminishing



# Evolving Workforce

## New Ways of Working

### Benefits

- Flexibility
- Save on childcare and commuting
- Not dictated by geography

### Challenges

- Application of federal, state and local discrimination and harassment protections
- Application of wage and hour laws and protections/ Managing and properly classifying employees
- National Labor Relations Act and collective bargaining rights
- Many of these alternative work relationships are focus of federal agencies

# Evolving Workforce

## New York City Freelance Isn't Free Act

- With the rise of the gig economy- push to make sure workers paid fair wages, protected from discrimination, harassment and retaliation, and provided with job protections
- **New!** Effective May 15, 2017 Freelance Isn't Free Act
- Freelance workers in NYC gained increased job protections and have right to:
  - A written contract
  - Timely and full payment
  - Protection from retaliation
  - Bring a lawsuits by filing a claim in state court
  - Recover penalties and damages if their rights are violated



# Survey Says

20% are extremely challenged when it comes to remote workers and telecommuting or alternative work arrangements (job sharing, flex time)

Almost 50% of employers rank the evolving workforce as one of their top concerns in the workplace today

# Evolving Workforce

## What an Employer Should Do

- Establish clear policies for employees who work remotely or have alternative work arrangements setting forth the employers expectations regarding:
  - Availability during business hours
  - Meeting deadlines
  - Completing projects in timely manner
  - Maintaining accountability
  - Keeping track of and recording time properly
  - Cautioning about working unauthorized overtime
- Guidelines for gig workers/independent contractors/temporary or contingent workers
  - Make sure properly classified and provided with workplace protections
  - Critically evaluate all working relationships to ensure compliance with federal, state, local laws

# Challenge #7: Equal Pay Initiatives

## Questions for HR/Employers

- Does your organization limit employee discussions of wages?
- Does your organization request salary information as part of the recruiting and hiring process?



# Challenge #7: Equal Pay Initiatives

## Focus of Federal, State and Local Law

- EEOC Strategic Enforcement Plan – focus on compensation discrimination
- EEOC – revised EEO-1 Report will collect information on compensation and hours worked
- State laws- expand reach of equal pay laws, prohibit employers from banning salary discussions, prohibit employer from requesting salary information/history





# Equal Pay Initiatives

## **New!** New York State Equal Pay Law Strengthened 2016

- Employers may not engage in wage discrimination based on age, race, creed, color, national origin, sex, sexual orientation, disability, military status, predisposing genetic characteristics, marital status, or domestic violence victim status
- Employer has high burden to prove wage differential justified
- Definition of “same establishment” expanded includes different workplaces
- Employers banned from prohibiting employees discussing wages
- Increased damages - successful plaintiffs can recover liquidated damages up to 300% of wages due for willful equal pay violations



# Equal Pay Initiatives

## **New!** New York City and New York State Ban on Salary History Information

- NYC - Effective October 31, 2017, New York City employers prohibited from inquiring about prospective employee's salary history during all stages of the hiring and employment process
- If employer already aware it is prohibited from relying on information to determine salary
- May inform applicant about position's proposed/anticipated salary range/discuss salary expectations
- If salary history voluntarily disclosed, employer may consider/verify it
- Similar legislation proposed at state level



### **Step to Take**

- Immediately/carefully examine hiring documentation, policies and practices to eliminate inquiries
- Train those involved in interviewing and hiring to avoid salary history questions
- Make sure third parties/outside vendors such as recruiters./background checkers do not supply prohibited information

# Survey Says

25% say changes to the EEO-1 Report (to include information on compensation and hours worked) will be extremely or very challenging

More than one in three respondents ranked pay issues in their first, second or third workplace challenge in a scale of 1-10

One in four believe that equal pay and wage transparency is extremely or very challenging



# Equal Pay Initiatives

## What an Employer Should Do

- Review pay practices, job descriptions, salaries, benefits and bonuses to make sure that it is not discriminating based on sex, race, national origin or any other protected class
- Make sure wage differentials based on legitimate and nondiscriminatory factors -- such as education, training or experience -- and supported by written documentation or they should be corrected
- Maintain EEO policy prohibiting wage discrimination
- Institute internal multichannel complaint procedure allowing an employer to investigate claims of discrimination
- Create clear guidelines for compensation, including salary increases and bonuses based on predictable, objective and nondiscriminatory factors such as merit, productivity, performance, sales or some combination of factors should be established



# Equal Pay Initiatives

## What an Employer Should Do

- Train managers and those with hiring or supervisory responsibilities on parameters/salary history ban
- Document all decisions regarding hiring pay, performance and promotion
- Implement recordkeeping policies and procedures
- Keep record of wages, job classifications, pay performance, promotion and other terms and conditions of employment
- Avoid limiting employee discussions of wages
- Do not ask about prior salary history- can ask about salary expectations and discuss range for position

# Challenge #8: Employee Handbooks

## Critical to Implement and Update Your Employee Handbook

- Communication tool between employer and employees
- Sets forth standards for employee behavior, workplace conduct and performance expectations
- Used by managers/supervisors as a guide to handle common issues
- Incorporate an employer's goals and mission
- Prevent and defend against lawsuits

# Survey Says

21% felt extremely or very challenged by the NLRB invalidating employer policies infringing upon right to engage in protected concerted activity

42% found it extremely or very challenging to ensure handbooks are read and used actively by employees

26% are extremely or very challenged by having employee handbooks align with their business objectives



22% are extremely or very challenged by multistate handbook variations

21% are extremely or very challenged by incorporating municipal requirements into employee handbooks



# Employee Handbooks

## What an Employer Should Do

- Remain compliant with latest federal, state and local laws and the interplay between those laws
- Monitor legal developments in areas such as EEO, leave, safety and accommodations that change rapidly
- If employer operates in multiple jurisdictions consider adopting broad workplace policies encompassing federal, state and municipal requirement or use state supplements
- Draft policies in narrow/unambiguous manner- do not infringe upon employee right to engage in protected concerted activity





# Employee Handbooks

## What an Employer Should Do

- Be particularly cautious about policies addressing social media, contact with the press, confidentiality, investigations and employee communications
- Make the employee handbook and its policies easily accessible, readable, relevant and interesting
- Use hypotheticals, practical examples, anecdotes and narratives as well as colors, visuals and graphics
- Train all employees and supervisors on handbook provisions
- Require employees and supervisors to acknowledge receipt and review

# Challenge #9: Wages and Overtime

## Revised Overtime Rule Halted

- Would have increased salary for exemption
- What will happen legislatively and in the courts is unknown at this time



# Challenge #9: Wages and Overtime

## NYC Leading Way Trend of Predictable Scheduling Laws

- Aim to provide workers with predictable schedules and predictable paychecks (NYC, WA, OR, San Jose)
- **New!** New York City Fair Work Practices Law (11/26/17) regulates fast food/retail scheduling and wages
- Fast food employers must:
  - Provide advance notice of work schedules to employees/pay a premium if hours changed
  - Offer work shifts to current employees before hiring additional employees
  - Refrain from “clopenings,” in which employees work consecutive work closing and opening shifts.
- Retail employers:
  - Prohibited from engaging in on-call scheduling and must post schedules 72 hours before shift starts
  - Must provide written copy of employee schedule for any work week worked within the past 3 years, as well as the current schedule for all retail employees at the work location upon the employee’s request.
  - Must allow employees to request time off and switch shifts with co-workers.
- Critical to train fast food and retail supervisors on these new requirements/make sure policies compliant

# Challenge #9: Wages and Overtime

## New York Changes to Minimum Wage

- Trend of increasing minimum wage, different wages for different regions of the state depending on employer's location, size and industry
- Graduated increases
- NYC → \$15 for larger employers in 2018, \$15 all employers in 2019
- Nassau, Suffolk and Westchester Counties → Annual \$1 increase reaches \$15.00 end of 2021
- Upstate New York → Increase to \$12.50 by end of 2020
- Violators subject to hefty fines, back wages, liquidated damages and civil penalties
- Properly audit workforce and ensure employees are paid proper wages

# Wages and Overtime

## What an Employer Should Do

- Think strategically about present course based on whether employer has implemented changes already and best course to take
- Employers that already implemented changes → Decide whether to rescind or go forward with changes
  - Financial and business impact of those decisions
  - Proceed cautiously when it comes to employee communications and employee relations
- Business that did not implement changes → Maintain status quo or prepare for change
- Maintain open and honest communications with employees and supervisors
- Update employment policies
- Closely monitor overtime issues
- Ensure workers are properly classified, especially given today's evolving workforce

# Challenge #10: Diversity

## Benefits of Diversity in an Increasingly Global World

- Business and cultural benefits
- Improve employee productivity and efficiency
- Obtain the best talent
- EEO compliance
- Positive impact on employer's bottom line
- Positive impact on brand, customer and employee relationships
- Creativity, innovation and new ideas – viewpoints/ perspectives
- Opportunities for learning, growth, development, challenges
- Increased adaptability/ flexibility - changing marketplace/increasingly global world
- Employee retention/ less turnover, mutual understanding/ respect
- More civil workplace –fairness, decrease conflict and reduce complaints



# Diversity

## Challenges of Diversity Increasingly Global World

- How to reconcile cultural fit and diversity/inclusion
- Time to manage diversity efforts
- Communication (language/cultural barriers)
- Resistance to change
- Increased conflicts/tension - decreased productivity/turnover
- Stereotypes, prejudice and discrimination
- Perceived preferential/favorable treatment
- Cost/resources -training, accommodation
- Lack of leadership/support from CEO/senior management and leaders
- Not aligned with business strategies/plans/priorities
- Size or location of workplace
- Low turnover



## New York State and NYC Leading the Way on Diversity

- Creating/strengthening opportunities for all workers
- *Breastfeeding women*- sanitary locations, unpaid breaks for 3 years (NYS)
- *LGBT rights* - gender identity discrimination (NYC- guidance and NYS)
- *Pregnant women* - Reasonable accommodations (NYS and NYC)
- *Family responsibilities/ caregivers* - discrimination (NYS and NYC)
- Discrimination based on association (NYS)
- *Sexual harassment* - protections strengthened (NYS)
- *Medical marijuana* – cannot take adverse action based on status (NYS)
- *Equal pay law/salary history ban* - amended and strengthened (NYS and NYC)
- *Criminal history/ban the box* - fair chance at employment (NYC)
- *Paid sick leave* – time off to care for self or family (NYC)
- *Paid family leave* – job protected leave (NYS)





# Survey Says

**20%** found aligning diversity and inclusion efforts with business strategy is extremely or very challenging

**20%** found building and maintaining a diverse workforce to be extremely or very challenging

**26%** feel extremely challenged or very challenged when it comes to managing different generations in the workplace



# Diversity

## What an Employer Should Do

- HR should be proactive and incorporate diversity into the employer's organization create an inclusive workplace with training and policies to support
- Align diversity with business goals and corporate strategies
- Obtain buy-in of key stakeholders and those in upper management
- Understand benefits diversity bring to the organization
- Look beyond geographic pool when hiring/reach out to a wide variety of candidates
- Maintain neutral job advertisements



# Diversity

## What an Employer Should Do

- Provide reasonable accommodations and incorporate diversity into the workplace
  - Accessible restrooms
  - Same-sex marriage legal everywhere
  - EEOC- guidance on national origin (language policies), mental health conditions, leave
  - Be careful about background checks- Ban the Box, discrimination against immigrants



## What an Employer Should Do

- Focus on individual's education, skills and experience
- Develop and enforce policies and practices encouraging diversity and tolerance
- Prohibit discrimination and harassment
- Provide reasonable accommodations
- Provide training to supervisors and employee's
- Consider utilizing employee resource groups or affinity groups for those who share common traits or characteristics (i.e., working mothers, LGBT individuals, veterans, Hispanics and individuals with disabilities)
  - valuable tool to promote diversity
- Implementing EEO policies, open door policies
- Granting reasonable accommodations
- Provide diversity and sensitivity training to all employees and supervisors
- Consider employee resource groups

# Final Thoughts

## Know How to Respond to Challenges

- Review and revise their workplace policies and practices
- Develop employee handbooks and distribute policies to employees
- Train supervisors and employees
- Maintain thorough records and documentation
- Make sure to remain legally compliant
- Be proactive and prepared to respond to changes in a meaningful way