HR Compliance – A US domain

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In the US, HR professionals are at the center of a complex legal ecosystem, which requires compliance with a large set of constantly evolving laws and regulations, which are often State-dependent. Compliance affects every aspect of US employment, and knowledge of the law is mandatory: The federal government and Department of Labor in states of employment will extend substantial fines and penalties upon violations, even in cases of accidental and menial first-time violations.

1. Recruiting

a. Job Descriptions and postings

It is extremely important to have a detailed job description for the all positions as it prevents conflict and misunderstandings down the line. If possible, the salary range for the position must be made public – or at least appear in internal documents, such as Job Requisition Forms. It is important to note that salary overtime exemptions largely depend on the nature of the job, as defined in the job description.

A compliant JD only refers to the responsibilities and requirements of the job and not to anything unrelated to the professional context. Owning a car, in that perspective, is not a compliant requirement, even for salespeople, but having a certain type of driving license is.

Job postings must display the JD and the commitment of the Company to abide by Equal Opportunity Practices. Certain states have additional requirements: For instance, it is a violation of the Second Chance Act in NY State to specify in an ad that criminal background checks are required.

b. Interviews

As is the case with job descriptions, interviews must focus on the professional requirements of the job and not deviate from the iron rule – how will the candidate perform at the position? As such, and even if it seriously impedes your ability to make small talk, you cannot ask a candidate anything private, for instance, if they have children, or even where their accent is from, without exposing yourself to potential discrimination complaints. It has also become the norm, in the State of CA, to ask the candidate first how they would like to be addressed, and the correct way to pronounce their names.

c. Selection

There is a well-establish natural bias of hiring managers to want to bring to their team people they feel are similar to them, or that they can identify with. This tendency affects diversity, and possibly creates an Adverse Impact situation wherein of 10 qualified candidates, the manager will want to hire the one person who does not belong to some form of minority. HR professionals have to pay special attention to the applicants' demographics and their chances to make it through the interview process based on non-professional considerations.

d. Offer Letter

Although employment is mostly at-will in the US, and simple offer letters are much easier to handle than long employment contracts, there are still certain rules to abide by.

i. **PTO**
Most states don't rule PTO allocations, but if you choose to extend PTO, you will have to state very clearly the total hours, the nature of these hours, the form of accrual, and the allowed carryover. Many states now require a certain minimum of sick hours in a year, and some obligate carryover.

ii. **Background checks**

Even outside of NY State, criminal background checks should not be mentioned to the candidate until a written job offer is extended. The offer letter is contingent on a satisfactory reference and background check in any case.

iii. **Non-Compete agreements and NDAs**

The State of CA prohibits employers from requesting the employees to sign non-compete agreements, and most states won't uphold the agreement due to right of employees to work in their designated profession.

It is recommended to tailor appendices to the offer letter to the State of the employee residence.

2. Hiring

a. Employment eligibility verification

Homeland Security requires all employers to perform a verification of work eligibility within 72 hours of the employee's start date. Employees should be sent the list of acceptable documents rather than being told which document(s) to present.

The person performing the verification must be qualified to do so – foreign citizens who are not employed by the US entity should not be performing the verification because it will fail an audit.

b. Background checks

Background checks should ideally be performed by a certified and specialized third party. They will make sure that the authorization to perform the background check is legally compliant.

Refusing to hire someone after an offer letter has been extended on the basis of an unsatisfactory background check can be problematic, especially in case of misdemeanors – for instance, what do you do if someone was charged of possession of marijuana 15 years ago, considering the fact that it would now be legal to have the same amount of the drug in

several states of the US? What about a 20-year old DUI that occurred on a Saturday night? It is important to have a policy that addresses such cases and not deviate from it.

c. Accessibility / Accommodation

The topic of accessibility has become very prominent in 2020, with the emergence of COVID, but the ADA requires certain accommodations for employees to perform their jobs. Disability is not necessary visible to the eye, and litigation has emerged from cases wherein employees were not properly asked if they needed accommodation. HR professionals often found themselves walking the thin line between asking too many or too few questions; in this case, it is recommended to ask the employees whether they would need any type of accommodation, whether material or in any other form, to be able to perform their job.

According to EARN (Employer Assistance and Resource Network on Disability Inclusion), accessibility has three known dimensions: Physical accessibility (such as wheelchair access), technological accessibility (adequate software and hardware) and attitudinal awareness, which may require company-wide training.

d. Forms and notices

Certain states require a number of forms to be present in the employee file, such as the NY WTPA (Wage Theft Prevention Act) form, which must be signed upon hiring. Lack of compliance in this domain leads to hefty fines.

e. Employee Handbook

The Employee Handbook is an important document that needs to be signed by the employees on or shortly after their first day at work. The Handbook determines critical elements of corporate behavior, such as the expected code of conduct and company policies. It is also expected from the handbook to present all company policies, especially the anti-harassment policy, and provide a complaint form in accordance with that policy.

f. Mandatory Anti-Harassment Training

Anti-harassment Training is mandatory in the state of NY, where it originated, but also in the following states:

State	minimum number of employees in total	minimum number of employees in that state	Who needs training?
CA	5	1	only those in CA
NY	1	1	ALL
CT	3	1	only the ones in CT
IL	1	1	ALL
MN		15	
DL	50	50	ALL

DC and WA also have mandatory training pertaining to tipped workers/hospitality industry.

g. Mandatory Record Keeping

Employees' record, which consist of their resume, job application, offer letter, new employee form, and work eligibility documents, together with any evaluation, role/pay change, and other legal documents by state, must be kept for a period of 7 years. The records can be kept digitally, however in that case it is critical to comply with the rules for safeguarding personal and privileged information.

h. PII (Personally Identifiable Information) Compliance

Any information pertaining to identifying a specific person is PII, but HR Professionals pay special attention to the two critical components that need absolute protection - Date of Birth and SSN. That information needs to be kept absolutely confidential and only used to the benefit of the employee, for instance to assure payroll. It is preferable to then use an employee ID and mask the DOB in the file.

Although no single federal law regulates the protection of PII, Consumer protection laws such as the *Federal Trade Commission Act* (FTCA) prohibit unfair or deceptive trade practices involving the collection, use, processing, and disclosure of PII. Additionally, employees harmed by the accidental leak of PII have grounds to sue for remediation.

3. Compensating

a. Type of Employee

Employees can be full-time, part time, temporary or permanent.

Independent contractors are not employees and someone holding an employee position at the Company should never be compensated as an independent contractor, as the IRS and the local state will consider this as a move by the Company to avoid paying the overhead associated with a regular employee. Even if the contractor agrees to work on a 1099 (IRS form given at the end of the year in place of a W2), companies need to examine very carefully whether the job performed justifies a contractor.

b. Pay range

It is highly recommended to define the salary range for the position in the Job Req, agree on it internally, and if the location is clear, mention it in job postings, together with the list of criteria that allow some variation within the range.

i. Exemptions

By default, all US pay is hourly, and calls for overtime. However, there is a possibility to pay a yearly salary, and not look at all at the hours worked, by meeting certain rules of exemption, based on the combination of three criteria:

1. Type of Job – for instance, Executive Assistants and Computer Professionals qualify for exemption by job type
2. Minimum exempt pay, which varies by state ($58,500 in NYC)
3. Type of degree, and ability to practice independent judgment at the job and other job-related qualifications

Please note that all three criteria must be met, and that employees agreeing to a yearly salary definitely have grounds to sue for retroactive overtime pay if they discover that the exemption was not lawful and compliant.

ii. Equal Pay Act

Simply put, employees performing the same job would earn the same pay. There are provisions for cost of living according to the employees' locations, but years of previous experience, for instance, are not relevant.

This area of the law is a very strong concern of HR professionals in the US, because hiring managers often employ, inadvertently, practices that make intuitive sense, but are completely unlawful under the EPA. Salary History Ban

Many hiring managers look at irrelevant data such as previous salaries – a practice that is forbidden in several states as it promotes and perpetuates inequalities.

It is completely legitimate to inquire about salary expectations in all states, but according to labor statistics, female and older workers often underestimate the right pay for a job – therefore salaries need to be within a reasonable range, which allows for a 5% variation between similar locations.

iii. Cost of Living

The EPA provisions certain variations due to the cost of living. The governmental (GSA) guidelines for per diem by city and state are a useful tool in calculating the relative percentage of one location to another. For instance, looking at the M&I (Meals & Incidentals) rates, NYC is 35% more expensive than Plano, Texas.

c. Payroll schedule

Most states require employees to be paid semi-monthly, or more frequently. You can always pay employees before the expected date (which is what happens if the pay date is on a weekend or a holiday). CA requires the last pay, including accrued and untaken PTO, to be paid out on the day of termination – or within 3 days in case of resignation.

d. Benefits

It is important to note that many benefits are not mandatory under federal or state law, with the exception of Paid Sick Leave and FMLA, where applicable. However, the CARES Act introduced different rules during the COVID pandemic, namely, a paid 2-week leave

and additional partially paid leaves for longer periods of time, for all companies with 2 or more employees.

i. **Paid Time Off (PTO)**

Paid Time Off is comprised of vacation, sick and Holidays.

1. Vacation time is negotiable and the recommended numbers only reflect best practices, however the State of CA requires the full carryover of all hours of accrued and untaken vacation from one year to the other. Other states allow employers to limit or deny any amount of carryover.
2. Sick time is regulated by the State of Employment – which means the Employee's State of Residence when working remotely. NY, NJ, CA, and WA are among the states that closely monitor the amount of sick leave and the mandatory carryover.
3. Holidays are usually aligned with the main Federal Holidays and mentioned in the offer letter and the Company Handbook.

ii. **Health Benefits**

Health benefits are comprised of Medical, Dental and Vision insurance, but the employer may choose to only provide medical coverage – the rest is considered as ancillary benefits.

Employers with 50 or more full-time employees across the US are mandated to provide affordable medical insurance to employees and their dependents according to the Affordable Care Act of 2016.

In any case, most employers provide group insurance as soon as they meet the threshold required by the insurance carrier. That threshold used to be 5 employees, but market conditions are now showing that carriers won't quote a group smaller than 10 people, even when that group works with a PEO. You will, nonetheless, have access to dental, vision, and other ancillary insurances through your PEO, even if you have only one employee.

Employers with 50 or more full-time employees across the US are mandated to provide affordable health insurance to employees and their dependents according to the Affordable Care Act of 2016.

However, most competitive employers provide group insurance as soon as they meet the group threshold number of 5 employees, as this is an expected benefit and a best practice. Health benefits are comprised of Medical, Dental and Vision insurance, but the employer may choose to only provide medical coverage. Certain states like MA require all employees in that state to receive the same amount of company contribution toward benefits, even if working with a PEO (Professional Employer Organization).

iii. **Parental Leave**

NY State was the first state to provide a paid parental leave, with employee and employer payroll deductions towards the premium, but several states have followed their lead: NJ, WA, MA, RI, CA, CT, and DC. OR will start in 2023. The number of weeks and maximum allowed benefits vary per state. However,

employees need to work for a certain number of hours (6 months on a full-time basis in NY) to qualify for the paid leave, and they will not receive their entire pay. The system is very similar to unemployment benefits in the sense that both employers and employees contribute to the premiums, but that certain conditions and limitations apply to the leave. I have compiled a list of states and their Parental Leave regulations, which I regularly update and will send you upon request.

The Federal Medical Leave Act mandates an unpaid leave of up to 12 weeks at Companies with over 50 employees in a certain geographical radius, but most small employers extend that unpaid leave even in the absence of a mandate. Parental Leaves apply to all genders (otherwise it would be discriminatory) so it may be necessary to create both a Parental Leave policy and a Pregnancy/Childbirth policy.

In a market wherein demand for talent is high, even small employers are offering some kind of paid parental leave to attract and retain valuable employees. As mentioned above, Google offers a total of 20 weeks of paid leave, which is not something a startup can afford – not just in terms of costs, but also because every employee absence is truly felt at a startup.

iv. **401k**

Employers are not mandated to provide a 401K of any type in any state of the US, but if they do create a 401K plan, it needs to meet certain conditions sets by the IRS. As such, it has to pass a number of tests (the plan testing) or incur additional company contribution and penalties for failure. On top of the flat contribution of 3% to all employees in case the plan fails, the IRS mandates that high-earners receive their contributions back if the plan is deemed "top-heavy" which means that it is privileging executives and Highly Compensated Employees

Small companies often adopt a Safe Harbor 401K, which requires a contribution match but protects the plan for corrections and penalties in case of failure.

v. **Supplemental benefits**

Employers, especially those working with a PEO, can choose to extend a large array of supplemental benefits, such as life insurance, Short-Term and Long Term Disabilities, or Accident coverage. These benefits are not considered as core Health benefits and are therefore taxable. It is important to note that even if the employer pays the premium for Short-Term Disability, it is the entire responsibility of the employee to present a valid claim to the insurance carrier and follow-up on payments – the employer cannot be part of that process.

Employees can also choose supplemental benefits on a voluntary basis – payments will be made, after taxes, from their payroll.

In a tough hiring market, companies often bring creative benefit solutions to the table, in the form of meal allowances, bike allowances, or contributions toward team-building social activities such as escape rooms. I have found that the "coolness factor" far outweighs the actual value of the benefit.

4. Retaining

a. Employee Feedback

Employers are not legally required to collect employee feedback, however, the law in several states, such as NY State, makes special provisions for whistleblowers. Employees must be given a safe and discreet way to report irregularities or incidents, present a complaint to HR, and are protected from retaliation when they do so.

b. Performance Evaluations

Performance Evaluations are a useful and efficient tool of feedback, and there are no legal guidelines for the process, however, it is important to give the employee a recourse in case the person evaluating performance has some type of bias against that specific employee. It is therefore very important to be extremely specific and illustrate issues with specific examples. Feedback should never be delivered in the form of "you are just not friendly enough" but rather "there were several reported incidents with your co-workers, showing that you may have been abrupt with them and in some instance, openly aggressive".

c. Optimized work environment

Complaints of a hostile work environment emerge at companies of all size, even when employees work remotely. It is very important to give employees appropriate anti-harassment training (and it's mandatory for companies with even a single employee in the State of NY). Additionally, companies need to take into account the State laws regulating, for instance, the usage of proper pronouns (CA) leading to hefty fines upon violations.

d. Ethics code and credo

Although creating and posting an Ethics Code is not mandatory, research shows that it promotes a better work environment and is an excellent tool for attracted like-minded talent. An Ethics Code is usually comprised of a list of statements, while the credo encapsulate the essence of the corporate culture into a single statement.

5. Promoting

a. Salary/Pay updates

Federal and State laws allow companies to promote or increase the pay of any employee without even requiring a notice, as the new pay will serve as notice after two or more pay cycles. However, it is clearly a good practice to share the good news with the employee, even if verbally.

However, demotions and salary decreases are rarely practiced in any state, as employment is at will and unless there is a reorganization, requiring for instance all remote employees to lower their pay, it is recommended to just separate from an employee rather than singling out that person for a decrease in pay. Not only could that practice lead to a discrimination suit if the employee belongs to any protected class (and states like NY and CA are constantly introducing new protected classes) but at the least, will create strong resentment and loss of morale amongst the employees.

b. **Job enlargement, enrichment, transfer**

Job enlargement consists of expanding the responsibilities of an employee, while enrichment pertains to allowing the employee to perform certain tasks for their own benefit and growth. It is important to remember than non-exempt employees will be eligible for overtime even if they were the ones who requested to perform these tasks, if the plan was approved. In both cases, the new tasks must be properly documented, explained in details, and then confirmed in writing by the employee in order to avoid any possible confusion or misunderstanding.

Job transfers cannot represent a loss of opportunity or benefits. For instance, you cannot change a salesperson territory if that employee has no contacts there and does not speak the language as it will clearly affect their ability to perform the work and their total earnings.

6. And when we need to separate…

a. Employment termination (involuntary)

Employment is generally at will, so there are no laws requiring employers to give a notice (unless specified in the offer letter), or even a reason for the termination.

This may sound very harsh, and many employers feel that they have to justify their decision with lengthy explanations of why the termination is happening. The reality is that people are usually incapable of understanding and accepting a termination due to a lack of skills. They will, literally, take it personally and go to extreme lengths to prove their employer wrong. It is a much more elegant, and legal solution, to explain that the company misjudged the skills required for the position, and that the expectations of the job were much greater than originally stated. In practice, no employer can be 100% sure of the new hires until they actually perform the job, so it is legitimate to give people a chance, and correct unfortunate mistakes.

Certain states require the last payment to include all accrued and untaken vacation days up to the date of termination – and in CA, employees must get that last pay on the day of termination, which means planning ahead with the payroll processor.

b. Resignation

It is important to remember than any notice specified in the offer letter will obligate the employer – but not the employee, who is not supposed to miss a great work opportunity because of that notice. Therefore, an employee notice, even if signed, does not really engage the employee and won't stand in a court of law.

Employers can choose not to pay accrued and untaken vacation days in several states when the employee resigns.

c. The Consolidated Omnibus Budget Reconciliation Act (COBRA)

If the employer provides group insurance, COBRA provides a Continuation of Benefits for a period of 18 months to 36 months whether the termination is voluntary or involuntary. The employee pays the full COBRA premium, and is no longer considered as part of the Employer's group insurance so is no longer an employer liability.

7. References

a. HR Knowledge Base and Certifications Organizations

There are two main professional associations and certifications institutes in the US: HRCI (HR Certification Institute) and SHRM (Society for HR Management). Their respective certifications range from the easiest, aPHR (associate Professional in HR) to GPHR (Global Professional in HR) and from CP (SHRM's certified professional) to SCP (Senior Certified professional). These certifications require ongoing learning and professional mastery of all aspects of HR in the US – as well as global HR Management in the case of GPHR.

b. Useful Links

i. Compliance assistance Toolkits

https://www.dol.gov/agencies/whd/compliance-assistance/toolkits

ii. PII

https://www.gsa.gov/reference/gsa-privacy-program/rules-and-policies-protecting-pii-privacy-act

iii. Per Diem rates

https://www.gsa.gov/travel/plan-book/per-diem-rates

iv. SHRM

https://www.shrm.org/

v. HRCI

https://www.hrci.org/

vi. EARN

https://askearn.org

vii. COBRA

https://www.dol.gov/general/topic/health-plans/cobra

viii. Equal Pay and EEOC

https://www.eeoc.gov/employers/small-business/small-business-requirements