

Navigating the Compliance Landscape:

Using Technology to Protect Your Organization from Costly Violations

a white paper from Ascentis Corporation

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Introduction: The Pervasive Compliance Landscape

Compliance violations today don't only afflict the blatantly careless or irresponsible organization. An average of 450 employment lawsuits are filed in the U.S. every day, and 57% of companies have been named as defendants in at least one employment-related lawsuit in the past five years.¹ Many companies presume that they are adhering to strict regulation guidelines when in fact they're at fault for violating a compliance specification located somewhere in the fine print.

This isn't surprising considering the dizzying array of compliance regulations which companies face today consisting of various amendments, exceptions, and definitions – all of which are subject to interpretation (i.e. who qualifies as exempt or nonexempt; what is a 'production worker'; what necessitates overtime pay, etc.) The malleable nature of certain compliance definitions – which leaves them arguable and open to interpretation – makes organizations increasingly liable and poised to incur costly consequences.

Even the most compliance conscientious employer who meets the variant interpretations of specific regulations may encounter unexpected litigation and find their efforts fruitless. An organization's dedicated compliancy efforts can be unraveled in an instant by a disgruntled former employee, a simple delay in paperwork, or even a piece of stray gossip floating around the workplace. Companies can suffer costly lawsuits from employee candidates they never hired or from former employees months after their termination which makes compliance a never-ending risk.

The growing risk imposed by regulations is compounded by even sterner penalties. Falling into the realm of noncompliance can land you with consequences ranging from minor civil penalty fines up to criminal suits involving millions of dollars and possible jail time. One major lawsuit can debilitate an entire organization which is why companies can no longer afford to take compliance matters lightly.

The swelling complexities of compliance requirements coupled with skyrocketing penalties makes reaching and maintaining compliancy more difficult – and yet more necessary – than ever before. Companies need to take an aggressive, proactive approach to remaining compliant which involves adopting technology specifically designed to aid with compliance.

Understanding the Magnitude of Major Compliance Regulations

Preventing compliance fines begins with fully understanding the major compliance regulations, and becoming familiar with the manner in which companies most commonly incite infractions. From fine-print definitions to applicable penalties, discerning the most prominent and wide-reaching regulations is critical to evading compliance fines and remaining violation-free. Drilling down into the specifics of these regulations requires knowing what's at stake, deciphering the controversial definitions, and identifying the particular requirement areas an organization may be sensitive to.

Because certain regulation definitions tend to be pliant and leave room for stretched interpretations, organizations may suffer debilitating financial losses that hinge on the definition of a single word. Not knowing where these

interpretation variables come into play can easily backfire on an organization. Major fines can stem from these very slight errors or miscues, which sometimes seem to be out of an organization's control.

No matter how slight the error, compliance penalties are not forgiving. The only thing that poses a greater threat to an organization than a compliance violation – is a repeated compliance violation. Besides the monetary losses, infractions can lead to even greater degradation in terms of reputation, increasing fines per incidents, and damaged morale within the company.

The repercussions of instances where noncompliance is deemed willful are drastically worse. Commit compliance infractions knowingly and you could face serious charges that have the potential to erode your organization's well-being well into the future. Failing to proactively take action to prevent future occurrences can land organizations up to their necks in litigation and suffering a financial backlash that's hard to recover from.

COBRA Initiatives: Ensuring Proper Communication and Health Coverage

The Consolidated Omnibus Budget Reconciliation Act (COBRA) provides former workers and their families the option to continue to receive health care coverage at group rates for a limited period of time dependent upon certain conditions such as voluntary or involuntary job loss, reduced hours, divorce, and other life qualifying events.

Generally, an employer with 20 or more employees in the prior year that sponsors group health plans is required to offer this continuation coverage to employees and their families in special instances where otherwise coverage would end. Three qualifying elements are used in determining whether individuals qualify for COBRA benefits: plan coverage, qualified beneficiaries, and qualifying events.

COBRA Liabilities

Where organizations repeatedly falter in successfully administering COBRA has to do with the notification process. Standards for administering the notice process regulate the timing and the manner in which employers are required to properly communicate and administer continuation coverage - the temporary extension of health coverage. Companies incur a \$110 per day penalty for each day they are late in notifying qualified individuals of their right to coverage.

Trouble also lies in categorizing the events that precede the loss of coverage as well as deciding who meets the criteria to be a qualified beneficiary. Most organizations facing COBRA fines tend to address stipulations revolving around the requirements to be designated a qualified beneficiary.

OSHA Requirements: Maintaining Safety in the Workplace

The Occupational Safety and Health Administration (OSHA) was created to ensure the safety and health of workers by establishing standards,

communicating those through education and training, and enforcing strict measures and investigations. This is one of the most far-reaching compliance measures since almost every working man and woman in the country falls under OSHA's jurisdiction with a few exceptions.

Safety and health standards set forth by OSHA were enacted to create safer work environments and prevent work-related injuries, illnesses, and deaths. OSHA assigns different levels of priority in determining which particular instances deserve investigations – ranging from the top priority being reports of imminent danger in which accidents are about to happen to less urgent priorities involving targeted inspections and special emphasis programs that focus on hazardous work.

OSHA Consequences

Failing inspections can warrant an array of fines dependent upon the areas of negligence. Violations can range from unlawful noise levels and temperature control – to failing to perform systematic maintenance checks – to maintaining hazardous conditions liable for serious accidents or deaths. OSHA defines a willful violation as one committed with an intentional disregard of, or plain indifference to, the requirements of OSHA regulations.²

In 2003, OSHA cited U.S. employers for 83,760 safety and health violations, an increase of almost 8 percent from 2002. Almost 60,000 of those violations were categorized as "serious," an increase of 11 percent from 2002. The Bureau of Labor Statistics reported that U.S. workers missed 1.46 million days of productive time because of on-the-job injuries in 2001.³

OSHA fines can range from \$0 to somewhere in the millions – with one of the highest proposed violations made by OSHA being the proposed fines of \$2.5 million arising from the March 27, 2000 explosion and fire at the Phillips Chemical Company's Houston Chemical Complex in Pasadena, Texas.⁴ Regardless if fines may be less catastrophic than those assigned by some of the other major compliance requirements, failing OSHA compliance can have a much larger consequence – endangering your employees' lives.

FLSA: Enforcing Fair Labor Practices

The Fair Labor Standards Act (FLSA) delegates the federal minimum wage, restricts the employment of minors, requires overtime pay for certain employees who work more than 40 hours a week, and enforces proper recordkeeping. The U.S. Dept. of Labor divides all workers into two classifications – exempt and nonexempt – nonexempt workers are entitled to overtime pay if they work more than 40 hours in a week. Determining which employees fall under which classification can be extremely complicated and is the area of discretion from where most lawsuits come from.

FLSA Fines

A \$90 million verdict against Farmers Insurance Exchange, an organization based in Los Angeles, California, by its claim adjusters argued that the claim workers qualified as simply 'production workers' – and therefore entitled to overtime pay – since they were not acting independently or with discretion even though they made decisions regarding whether to accept or deny claims and decided how much money was awarded to claimants.⁵

Lenience is a main culprit of FLSA compliance infractions. While bending the hours or the rules in the workplace may make you more of a likeable employer, it also makes you a target for costly lawsuits – especially if you’re not bending the rules for everybody. Complications arise when employers use ‘comp time’, a practice in which employers promise to redeem employees for working overtime by cutting their hours in the future. Even if they do fulfill their promise, they’re still violating federal wage-and-hour laws which state all wages must be paid in the payroll period in which the work occurred.

Overtime payment infractions are common FLSA violations. Under the new Overtime Security Rule enacted in August of 2004, an additional 6.7 million American workers will be guaranteed overtime protection. It’s estimated that employers will have to pay out an additional \$375 million annually in overtime under the new rule.⁶

Failing to record all the hours actually worked by an employee to include time spent both before and after a shift doing extra duties that could qualify as work – spells huge liabilities. Remote employees also throw a wrinkle into the equation because it’s difficult to truly gauge their hours since they’re not under direct supervision. Which means employers can’t be sure they’re not working overtime without getting paid – regardless if you asked them to or not.

Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil money penalty of up to \$1,000 for each such violation. Violators of the child labor provisions are subject to a civil money penalty of up to \$10,000 for each young worker who was employed in violation. Willful violations of the FLSA may result in criminal prosecution and the violator fined up to \$10,000. A second conviction may result in imprisonment.⁷

EEO, VETS, and ADA: Accommodating the Requirements of Special Individuals and Enforcing Equal Treatment

Equal employment opportunity (EEO) laws prohibit specific types of job discrimination in certain workplaces and are designed to ensure equal and fair treatment for all individuals. Compliance requirements in this area ensure equal treatment by prohibiting discrimination based on race, color, national origin, religion, gender, age, disability, or reprisal.

Discriminatory practices under EEO laws include harassment based on race, religion, sex, etc., retaliation against an individual for filing discrimination charges, making employment decisions based on stereotypes or assumptions about individuals based on qualities such as ethnic group or age, and denying employment opportunities to an individual because of a person’s association with another individual defined by a particular attribute such as religion or disability.

According to the Equal Employment Opportunity Commission, in Fiscal Year 2002, 364 equal employment opportunity suits were filed claiming \$52.8 million in monetary benefits to those who filed suits.⁸

VETS Stipulations

The U.S. Department of Labor's Veterans' Employment and Training Service (VETS) enforces laws to assist veterans seeking federal employment. Under VETS, veterans are entitled to preference over other candidates in hiring processes as well as in times of retention when workforce reductions are being made. A veteran or other qualified eligible person who believes his or her eligibility for preference in the federal government is not being extended for the purposes of hiring or a Reduction in Force (RIF) may file a complaint in writing to VETS within 60 days of the alleged violation.⁹

The Federal Contractor Program requires that any contractor or subcontractor receiving a contract from the federal government in the amount of \$25,000 or more must file a VETS-100 Report on an annual basis – a special report which reflects an organization's number of targeted veterans in the workforce in relation to a variety of categories. Many organizations incite compliance infractions related to missed deadlines or inaccurate reporting when dealing with the VETS-100 Report.

Employers can expect more veterans to be entering the workforce now and in the future. Thanks to \$3.78 million in Department of Labor (DOL) grants awarded in December of 2004, more than 1,600 veterans in 15 states will be placed in new jobs. In addition, DOL expects another 600 veterans to receive employment and training services as a result of these grants, which are awarded under the Workforce Investment Act (WIA).¹⁰

ADA Requirements

The Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities; and requires organizations to meet the accommodation and access needs of applicants and employees with disabilities. An individual with a disability under ADA is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.¹¹

Reasonable accommodation requirements under ADA require organizations to make a wide scope of their processes favorable to and usable by individuals with disabilities. Such accommodations range from modifying an organization's physical facility to specializing equipment to providing readers and interpreters.

Every public facility is responsible for complying with ADA regulations. Existing and new facilities that don't comply with ADA regulations face fines as high as \$55,000 for a first offense and a \$110,000 fine for any offense thereafter.¹² ADA physical regulations can be excruciatingly strict – one case in California involved a disabled person who sued over the technical width of a parking space while others have even sued for noncompliant doorknobs. Organizations can also be particularly liable to compliance fines in relation to the hiring and firing of individuals with disabilities if the reasons for exclusion from the organization point to the individual's disability.

Sarbanes-Oxley (SOX): Redefining Financial Accountability

Known as one of the most sweeping and challenging compliance regulations today, the Sarbanes-Oxley Act of 2002 (SOX), enforces strict requirements upon the manner in which public companies handle and disclose financial and accounting information.

Proven to have a profound, widespread affect on businesses everywhere, SOX sets new standards for corporate governance, causing organizations to redefine their financial reporting processes to accommodate the myriad of restrictions related to the storage, accessibility, dissemination, security, and authenticity of financial information.

Because any aspect of an operation that contributes to an organization's financial outlook falls under the scrutiny of SOX legislation, reaching compliance consists of a host of substantial revisions including: redefining internal processes, revising financial reporting systems, aligning organizations with an adequate IT infrastructure, and refining the human resources department. The AMR research firm predicts the Fortune 1000 will spend more than 2.5 billion in investigation and initial compliance-related work.¹³

SOX compliance requires periodic audits to reflect accounting and financial reporting reforms and detect particular areas of vulnerability that might contribute to noncompliance. Before filing reports, companies must pass Section 302 and 404 audits. Section 302 (Certification of Financial Reports) requires the CEO, CFO, and an attesting public accounting firm must certify the accuracy of financial statements and disclosures in the periodic report, and prescribes criminal penalties if CEOs or CFOs knowingly or willingly issue inaccurate statements.¹⁴

Section 404 (Certification of Internal Controls) requires public companies registered with the Securities and Exchange Commission to file a special report (along with their standard annual report) that documents their internal processes, controls, and resources used in relation to financial reporting operations. This report should demonstrate how a company is enforcing internal control over their financial reporting processes – and prove that those have been verified by an auditor – to certify the validity of their numbers. Strict reporting deadlines require publicly traded companies with market capitalization greater than \$75 million to comply with the new rules for fiscal years ending on or after November 15, 2004 while other publicly traded companies with equity caps under \$75 million must comply with fiscal years ending on or after July 15, 2005.

One of the biggest SOX headaches for organizations pertains to Section 409 (Material Event Reporting) which requires the disclosure of information related to material changes in an organization's operations or financial condition on an ongoing basis to inform investors of potential financial consequences. The trouble usually lies in detecting and determining what qualifies as a 'material event', and disclosing that information on a timely basis to the marketplace. Material events refer to both internal and external operational and financial events such as new investments, mergers, or profile changes that will incur significant financial variances. Companies must disclose 'material events' that affect their business within 48 hours of when they occur.¹³

Penalties for noncompliance with SOX vary widely and are severe. Noncompliance can potentially result in imprisonment if found willfully

fraudulent. Various categories of infringement such as willful destruction of documents or inappropriately influencing an auditor also deem more significant penalties. The most severe penalties are enforced when organizations are found guilty of 'destruction of records' which involves altering or falsifying any record – leading to fines, imprisonment, or both. Qualifying for 'Corporate Fraud Accountability' imposes penalties with a maximum of \$25 million dollars and a maximum of 20 years in prison. Beyond monetary setbacks, noncompliance with SOX can also lead to revenue loss, diminished shareholder value, and a scarred reputation.

Employing Compliance Solutions: Leveraging Technology to Strengthen the HR Department

The good news is that for almost every compliance regulation, there's a solution equipped to alleviate the corresponding complexities and complement the duties of the human resources department. A variety of human resources-related solutions can help companies remain compliant by providing the necessary tools and functionality needed to assist with proper communication, documentation, reporting, security, privacy, and other issues related to compliancy.

Because the hr department is the hub of where most litigation – and the chance to prevent litigation – stems from, the best compliance safeguard is a resilient, compliance-proactive hr department. Serving as the backbone of every organization, the most diffused and the most volatile and controversial duties fall into the lap of the hr department which is why it plays such a critical role.

Human resources-related solutions designed specifically to accommodate your compliance needs can enhance the operational efficiency of the human resources department and mitigate risk. Solutions address a variety of compliance needs including built-in forms and templates for adhering to reporting requirements, benefits administration tools, automatic calculations, claims tracking, and more. Human resources scorecards assist with measuring compliance goals and hr audits involve the systematic examination of a company's hr practices and policies.

Reporting plays one of the most critical roles on both sides of the equation – both preventing and defending compliance violations – which is why one of best defenses against alleged violations lies in keeping detailed documentation of everything. Leveraging technology designed to assist with EEO summary and detail reports, or using data collection solutions for gathering information such as veteran data for VETS-100 or tracking COBRA information can alleviate strict reporting requirements.

Beyond employing technology, companies need to allocate an adequate amount of time and resources towards compliance efforts, adopt specific processes for ensuring compliance standards are communicated and met, distinguish what falls where under the differing requirements, and delegate individuals to properly monitor and enforce compliance. Above all else, the single greatest force in remaining compliant is communication. Regularly communicating with employees, supervisors, and managers increases awareness, emphasizes clear strategies, and brings to light any questionable liabilities.

Conclusion: The Call for Technology and the Rewards of Compliancy

The compliance landscape proves to be an extremely sensitive, volatile arena in which seemingly minor infractions can result in largely debilitating financial losses. Compliance regulations have become pervasive enough that organizations frequently unknowingly default on stringent policies. Although sheer ignorance may be a major culprit of compliance violations, it's not a valid excuse. Whether inadvertently or purposefully executed, noncompliant actions render organizations susceptible to costly lawsuits and open the floodgates for further liabilities.

Embracing compliance-related technology has become imperative. Pairing an efficient human resources department with technology resources geared towards compliance is the best bulwark against violations.

While the compliance landscape is seemingly insurmountable at times, regulations were created in the best interests of both employers and employees, and operating in accord with compliance regulations not only keeps your organization legal but it ensures fair practices, equal treatment, a healthy and safe work environment, and rewards you with an overall positive and constructive workforce.

About Ascentis Corporation

Founded in 1994 and based in Bellevue, Wash., Ascentis Corporation is a pioneer in state-of-the-art human resources management systems (HRMS). The company's flagship product, HROffice, eliminates the paper process and builds on the latest technologies from Microsoft for easy integration with those tools HR departments use on a day-to-day basis. Connect, communicate, and control all aspects of HR with HROffice. HROffice provides comprehensive benefits management, online benefits enrollment, and seamless connectivity to payroll providers and insurance carriers for small to mid-sized organizations.

As a Microsoft Gold Certified Partner, Ascentis Corporation was named to the Deloitte & Touche prestigious Fast 50 Program for the second year in a row – named one of the fastest growing technology companies in Washington State. Additionally, Washington CEO Magazine included Ascentis in its "Hightech 100" list, Workforce Management Magazine named HROffice to its hot list of the "Top 15 HRMS Systems" in its March 2004 issue, Software Magazine included Ascentis in its "2004 Software 500 list," and Forbes.com named Ascentis to its "Best of the Web Pick" in the human resources category. For more information on Ascentis Corporation and the HROffice product line, visit www.ascentis.com or call 800.229.2713.

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