



Employment Law: Are You Putting Your Business at *Risk*?

Don't make these common mistakes



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Introduction

Are you suffering from regulation overload?

If it seems that every time you turn around, there's another employment law popping up, you're not imagining it. The number of government statutes and regulations has burgeoned over the years, and it can be tough keeping up.

But underestimating how labor laws affect your business increases the potential for costly litigation and penalties.

From anti-discrimination training and hiring practices to [how you classify and pay your employees](#), the details of managing your workforce are crucial to ensuring your business stays on course.

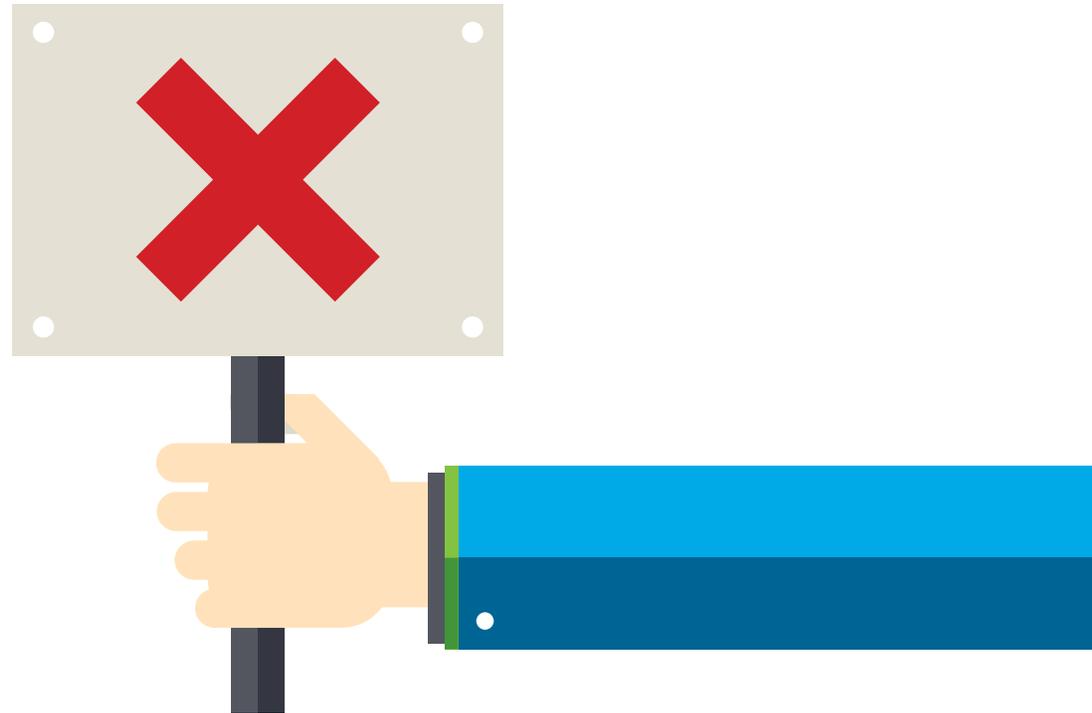
Find out if you're on the right track toward employment law proficiency. Ask yourself these seven questions:

1. Do I know the discrimination and harassment laws?
2. Am I training my employees about what's acceptable workplace behavior?
3. Do I have a handbook that outlines the company's policies and procedures?
4. What is FMLA and what types of leave does it include?
5. What can I ask job candidates during an interview?
6. Are my employee records in good shape and audit-ready?
7. Do I have appropriate insurance policies in place?

Are you ready to get the answers to these questions and more? Let's get started...

CHAPTER 1:

6 HR compliance mistakes that businesses make





6 HR compliance mistakes that businesses make

When you started your business, you probably didn't realize the alphabet soup of compliance that lay ahead: FMLA, FLSA, EEOC.... What do they all mean, and how can you get a handle on the employment laws that apply to you?

Let's take a look at six areas of compliance that affect you and your workforce:

1. Discrimination and harassment
2. Hiring and terminations
3. Employee records
4. Misclassifications
5. Employee wages
6. Family and medical leave



Federal laws that fall under the discrimination umbrella

Americans With Disabilities Act (ADA)

Prohibits discrimination against individuals with disabilities.

Age Discrimination in Employment Act (ADEA)

Forbids discrimination on the basis of age against people 40 or older.

Equal Pay Act (EPA)

Makes it illegal to pay different wages to men and women for equal work in the same workplace.

Genetic Information Nondiscrimination Act (GINA)

Protects individuals from genetic discrimination in health insurance and employment.

Title VII of the Civil Rights Act

Prohibits discrimination on the basis of race, color, religion, sex and national origin.

1. Discrimination and harassment

Discrimination and harassment are a threat to your business because it's natural for people to bring their biases into the workplace. But it's up to you to make sure your leadership team and employees know what is acceptable behavior. This can be done with regular [anti-discrimination and anti-harassment training](#).

WHY TRAINING IS IMPORTANT

- Helps minimize or prevent incidents of discrimination or harassment.
- Raises awareness and curtails insulting and inappropriate behavior.
- Educates your supervisors on how to conduct job interviews and performance reviews.
- Promotes consistency in how incidents are reported, documented and investigated.
- Demonstrates your commitment to meeting your responsibilities as an employer.

The Equal Employment Opportunity Commission, or EEOC, enforces the issue on a federal level, but there are states and municipalities that also have anti-discrimination laws. Typically, the law that's most favorable for the employee prevails.

The most common discrimination complaint filed at the EEOC is [retaliation](#).

From the EEOC: "An employer may not fire, demote, harass or otherwise 'retaliate' against an individual for filing a charge of discrimination."





The [Equal Employment Opportunity Commission, or EEOC](#), enforces federal civil rights laws related to harassment and discrimination based on protected characteristics, such as age, race, color, religion, sex, national origin, pregnancy, disability, or genetic information.

2. Hiring and terminations

To stay ahead of the compliance game, you need to know what you legally can – or can't – do when [hiring and firing employees](#). Process and documentation are two tools that can keep you out of hot water. Areas where you'll want to implement these tools:

INTERVIEW QUESTIONS

Be consistent in what you ask each candidate by having a checklist of questions based on the job's functions. This will help you avoid claims of bias and keep the interview focused.

If you ask about protected characteristics, such as national origin, religious beliefs, age or disabilities, a job candidate may accuse you of discriminatory hiring practices.

For example, you should not ask, "Are you a U.S. citizen?" You can, however, ask if the person is legally able to work in the United States – just not about their national origin.





DRUG TESTING

Your [drug-testing policy](#) should be clearly defined to specify who gets tested, when and under what circumstances. State and federal laws can affect your ability to drug test applicants or employees.

Here are six things employers need to consider when implementing drug tests:

1. It is recommended, and in some states required, that drug tests be conducted only after an offer of employment is made.
2. Marijuana legalization in some states may have an impact on your policies. Consult an HR or legal professional for guidance.
3. In some states, accommodations may be needed for employees with a valid medical marijuana card.
4. If permitted in your state, a zero-tolerance policy lets you terminate any employee who fails a drug test.
5. Businesses in “second-chance” states may be required to offer [employee assistance programs](#) – EAP – services to employees who fail drug tests.
6. Oral fluid and blood testing for drugs are illegal in some states.



BACKGROUND CHECKS

Verifying a job candidate's background and experience can potentially save your business a lot of time, money and training to ensure you have the **right person in the right position**. But, there are some compliance issues to be aware of.

As part of the Fair Credit Reporting Act, **negative information found through the screening process** by a third party that causes an employer to consider adverse action must first be reported to the employee.

The EEOC has recommended that **employers limit the use of arrest and conviction records** in employment decisions because it could be discriminatory. Instead of immediately disregarding a candidate who has a criminal record, the EEOC recommends that you consider how much time has passed, the nature and gravity of the offense and whether it relates to the job.



Screening services vary in the accuracy of their information. Make sure yours can verify details so that you're reviewing factual information.

TERMINATIONS

Written policies and procedures help govern employee conduct. When these are broken, it must be documented. Although it can be time-consuming to note slight infractions, it may be needed to support your claim of an employee's unsatisfactory job performance.

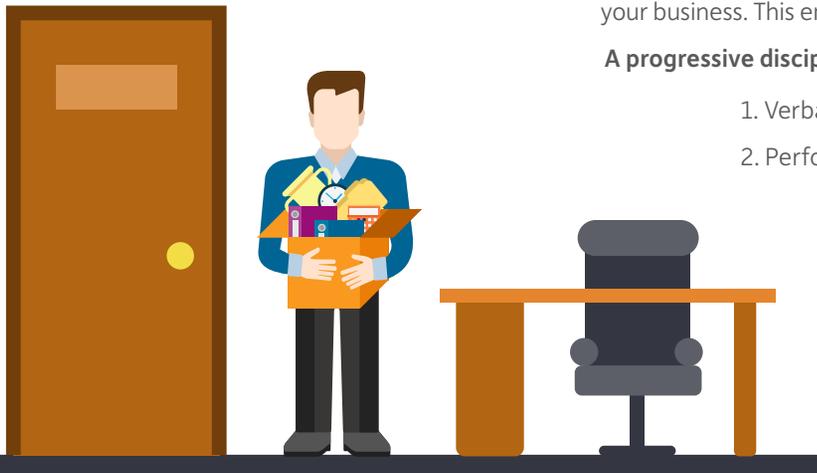
If you fail to have proper documentation when you [terminate an employee](#), your business may have a harder time defending a discrimination or unemployment claim. Note that unemployment claims are handled at a state agency level.

Before you terminate an employee for poor performance, here are some steps you should take first:

- Offer informal feedback – the good and the bad. This helps employees understand how they're doing before you even get to a disciplinary action.
- Give employees plenty of time to improve, and give them tools to do so – training, coaching, mentoring, modeling, etc.
- Write down everything and communicate expectations for how the job needs to be done. Use your employee's job description as a guide.
- Have a progressive disciplinary policy in place. This outlines how corrective actions and terminations take place in your business. This ensures consistency in handling each issue.

A progressive disciplinary policy may look something like:

1. Verbal discipline
2. Performance improvement plan
3. Written counseling
4. Termination





3. Employee records

Developing an employee paperwork system may take some time, but in the long run, it will save time, and maybe some money. Establish a schedule for how long documents must be kept based on federal, state or local guidelines. Missing deadlines, not filing paperwork or disposing of it too soon could lead to fines.

The [Fair Labor Standards Act](#), or FLSA, requires that you keep certain records, including everything from employees' names, addresses and social security numbers to their pay rate and hours they've worked for three years. There also may be state or local statutes for employee records and how long they should be kept.

In addition, the U.S. Department of Homeland Security's [Immigration and Customs Enforcement](#) can conduct random audits of [I-9 forms for each employee](#), including active and recently terminated employees. An I-9 verifies employee identity and work eligibility in the U.S. Keep these in a separate area for easy access.

The Health Insurance Portability and Accountability Act, or HIPAA, protects the health information of all employees. Ensuring this information is kept secure should be a priority.



HIPAA danger zone

Things to watch out for when trying to protect the privacy of health information

- Losing devices that store employee health information
- Getting hacked
- Employees inappropriately accessing files
- Improper disposal of documents



Review your employees' classifications regularly.

Job descriptions may be out of date or inaccurate. Duties help determine how an employee is classified. Job titles don't determine exempt status.

4. Misclassifications

The Department of Labor and the IRS have their sights set on businesses and how they classify employees. Specifically, the IRS focuses on whether individuals providing services are properly classified as employees or independent contractors. The DOL, however, seeks to ensure that employees are properly classified as exempt or nonexempt workers. How you classify your employees affects your compliance with, among other things, the Affordable Care Act, state and federal tax laws, overtime pay and the Fair Labor Standards Act. Misclassifying employees could mean hefty fines for your business.

Here are some ways to determine your workers' classifications:

INDEPENDENT CONTRACTOR

- No tax withholding
- Provides own equipment
- Sets own hours and not directed by your company on a daily basis

NONEXEMPT EMPLOYEE

- Tax withholding
- Paid based on actual hours worked (salaried employees may still be nonexempt if the employees' job duties don't meet the FLSA's exemption requirements)
- Must receive additional pay for overtime hours
- Employer must track and maintain records of all hours worked

EXEMPT EMPLOYEE

- Tax withholding
- Usually must be paid on a salary basis
- Not eligible for overtime pay
- Employer may track and maintain records of all hours worked

For more information, read: [5 Common Mistakes When Classifying Workers](#)





5. Employee wages

The FLSA establishes minimum wage, [overtime pay](#), recordkeeping and youth employment standards.

The U.S. Department of Labor has added a number of new investigators to conduct audits looking for wage violations. And, certainly, they're targeting small to midsize businesses. It can take just one complaint from one employee to trigger an audit. Companies can be selected for audit without an employee complaint.

Keep up-to-date records to show you've made a good-faith effort to keep accurate records and pay your employees what they're due. It will go a long way to help you [in the event of litigation](#).

When dealing with employees' wages, be sure you:

- Classify workers appropriately: employees, independent contractors, overtime exempt or nonexempt.
- Correctly record and pay employees for all time worked (including overtime and travel time for nonexempt employees) and paid time off.
- Pay departing employees according to timelines set by state law.
- Know the wage and hour laws of the states, cities and counties where you do business and where your employees work.
- Ensure pay deductions are made with proper and prior notification and authorization from affected employees.



Common types of FMLA leave

- Personal illness
- Illness of a family member
- Birth or adoption of a child
- Military service



6. Family and medical leave

The Family and Medical Leave Act, or FMLA, provides unpaid, job-protected time off work, along with benefit continuation, for eligible employees when qualifying events, such as personal or family medical needs, arise. Eligible employees are allowed up to **12 weeks of leave per year under federal law**, and in some states – or under certain circumstances – additional time is allowed.

To stay compliant and reduce liability while employees are on leave, you should:

- Be aware that applicable paid time off typically runs concurrently with **an employee's leave of absence**. Having available time off doesn't delay the start date of a leave; nor does not having enough accrued time off. Employees should submit proper supporting documents, such as a doctor's note, birth certificate or military orders.
- Continue to pay the employer health benefit contributions during the period. Your employee should continue making their standard contribution, too.
- Obtain written authorization from a health care provider before allowing employees to return from medical leave. This can help prevent liability issues or workers' compensation claims.
- Note: If employees don't qualify for a state or federal leave, they still could be entitled to leave under the **Americans With Disabilities Act**.

CHAPTER 2: How to stay current with employment law changes





In addition to these online resources, you can also find help from:

- EEOC.gov
- State and local workforce or human rights agencies
- Employment law webinars (especially when there's a change in law)
- Local government websites

How to stay current with employment law changes

Knowing you need to stay compliant with federal, state and local HR laws is one thing – but how can you keep up with all the changes?

Here are a few online resources that can help you stay informed:

U.S. Small Business Administration

The SBA offers information about starting and managing a business, including areas of [employment and labor law](#).

What you'll find on the SBA site:

- Which federal employment laws apply to your business?
- Relevant state labor laws with links to individual state labor offices.
- Information by topic, including commonly asked search terms.
- An employment law guide to help with wage, benefit, safety and anti-discrimination standards.

Department of Labor

The [Department of Labor's elaws](#) (Employment Laws Assistance for Workers and Small Business) tool provides information about FMLA, pay and benefits, health and safety, posters and recordkeeping, veterans' issues and federal contractors, among others.

Occupational Safety and Health Administration

An arm of the Department of Labor, [OSHA has small business resources](#), including compliance assistance, e-tools and an onsite consultation program.

SHRM Employment Law Areas

The Society for Human Resource Management, or SHRM, is a good resource for information about legal issues, HR strategies and research. It posts information about [employment laws](#) and public policy and has a number of webcasts or newsletters to which you can subscribe. Note, however, some of the content is for SHRM members only.



CHAPTER 3: How to safeguard your business





To Find out more about common mistakes in employment law, read [Employment Law: 3 Compliance Mistakes You Don't Know You're Making](#).

How to safeguard your business

To help your business in the event of an employment law claim, keep good records and establish consistent employment practices and policies. Here are three things that will help safeguard your business:

1. Create an [employee handbook](#).
2. Document everything.
3. Handle every employee claim carefully.





Why create an employee handbook

As soon as you have your first employee, [you need an employee handbook](#). An employee handbook gives your business structure and outlines processes. It sets the foundation for how you do business, gives ground rules and outlines what's expected of your workforce. This will go a long way to help prevent labor law violations – or protect you in the case of a lawsuit.

Make sure all employees receive a handbook when they're hired and that they sign an acknowledgment it was received.

[Review handbooks annually](#), and when changes are made, distribute revised copies to your employees and collect their signatures again.

WHAT A HANDBOOK SHOULD INCLUDE

Nondiscrimination policy: Written documentation of your commitment to be in compliance with local, state and federal employment laws.

Code of conduct: Outlines ethics, appropriate conduct, dress codes, safety codes and attendance.

Communications policy: How personal, company and customer information will be handled, and that policies on discrimination, harassment and ethics extend to all forms of communication.

Compensation and benefits policy: Explains timekeeping, certain deductions, overtime procedures, FMLA, workers' compensation, etc.

Employment and termination policy: Covers basic terms, standards of employment, job classifications, introductory periods, transfers and relocations, and union information as applicable.

Who to contact: This can cover anything from who to contact for benefits information to how to report a safety or harassment issue.



Why documentation is important

When talking about compliance issues, documentation is king. From IRS forms to [employee performance reviews](#), if it's not written down, it's almost like it never happened. Documentation can be a key piece of proof if you're ever faced with an HR-related lawsuit.

For example, after a conversation with an employee about performance, recap the meeting in an email and send it to yourself and the employee. Outline the issues discussed, the solutions you agreed to and expectations for going forward.

When documenting, there should be a process that is followed, whether it be for how you interview job candidates, how to conduct a performance review, or when and how paperwork is filled out for onboarding. Compliance with HR laws often requires that deadlines are met, employees are notified, paperwork is kept on hand for X-number of days or records are stored in a specific way.

The [Society for Human Resource Management](#) warns of making common mistakes in disciplinary documentation:

- Don't guess or focus on a perceived cause of the performance problem. Stick to the actual problem.
- Don't use absolutes, such as "never" and "always." They are hard to defend.
- Don't include too much detail, making note of every infraction and wrongdoing. Instead, give a general overview and support it with a few examples.
- Be clear about the consequences, if there's no improvement.

What to do if a claim is filed against you



DISCRIMINATION CLAIMS

If you're faced with an investigation by the EEOC, the first rule, [according to the Society for Human Resource Management](#), is don't ignore the charge. It's not going to go away, so being prepared and responsive is in your best interest. **SHRM also recommends you:**

- Notify your insurer. If you have an Employment Practices Liability Insurance policy, you want to stay compliant with the terms of coverage.
- Provide requested information, such as policies, handbooks and personnel files in a timely manner to the EEOC investigator.
- Keep emails, voicemails and records of internet use.
- Conduct your own internal investigation so you can prepare a position statement and offer information to the investigator.
- Ensure no retaliation takes place – remember retaliation is the No. 1 complaint brought to the EEOC.

WHAT TO EXPECT FROM THE EEOC

The [EEOC has a process](#) for dealing with discrimination claims that includes:

- Notifying the organization or business that a charge has been being filed.
- Investigating the charge including reviewing information from the charging party and the organization.
- Determining whether there is reasonable cause that discrimination occurred, and working with both parties to resolve the charge.
- Ultimately, if reasonable cause is found and the parties can't resolve it informally or the employee chooses to bring a lawsuit even if reasonable cause isn't found, the case may go to federal court.

WORKERS' COMPENSATION CLAIMS

When employees are injured on the job, they can file a workers' compensation claim for medical expenses and possibly to reimburse lost wages. These laws vary among states, but having workers' compensation insurance is your first line of defense. Your insurance company will handle the claim for you, but you will need to assist with documents and/or testimony.



Find out [how to reduce your workers' compensation costs](#).





WAGE AND HOUR CLAIMS

Employee pay laws often change and vary by state, so reviewing your policies is key. But, if you're defending against a lawsuit, here's what you'll need, [according to a SHRM report](#):

- Accurate and complete employee records
- Detailed pay records that show hours worked each week for purposes of determining overtime.
- Proof of employee approval for any edits to time tracking not made by the employee.
- Data in electronic format that can be quickly accessed.

UNEMPLOYMENT CLAIMS

When a former employee files for unemployment, it's in your best interest to appeal any unwarranted claims to prevent a tax increase. Unemployment benefits are provided by state agencies.

Typically, if the position was eliminated at no fault of the employee's, there's little use in your contesting the claim. If the employee was terminated for just cause and you have documentation to prove it, then it's worth fighting to keep your unemployment tax rate from going up.

Once again, your best defense is a paper trail.

HOW TO HELP PROTECT AGAINST A LAWSUIT

- Have a company handbook with corporate policies on anti-discrimination, employee leave, requests for accommodations, safety, etc.
- Provide anti-discrimination and safety training to employees.
- [Follow OSHA regulations](#) and provide a place of employment free from recognized hazards and post safety rules.
- Document employee coaching and counseling and how employee concerns have been resolved.
- Take all employee complaints seriously and be consistent in how you address them.
- Keep up-to-date and thorough employee records, including forms, personal data, wage and hour information, training, and disciplinary actions.
- Ensure hiring and screening processes comply with related laws.
- Employment Practices Liability Insurance, or EPLI, may provide insurance coverage for you against workers' claims that their employment rights have been violated.



CHAPTER 4:

Reduce your compliance concerns: How a PEO can help





Discover how a PEO really works.
Read: [What is a PEO?](#)

Reduce your compliance concerns: How a PEO can help

As you can see, employment law is deep and wide, with litigation lurking that you may not even be aware of. So, what can you do to help your business remain in compliance with federal, state and local HR laws?

The **most common HR compliance mistakes** can be avoided if you have a team of knowledgeable professionals who stay current with employment laws and regulations – so you can focus on building your business.

There's help out there – it's called a professional employer organization, or PEO.

In addition to providing HR compliance assistance, a PEO can be the go-to source for:

- Employee benefits
- Payroll processing
- Workers' compensation coverage and administration
- Performance management support
- Training and development
- Recruiting support
- Strategic HR support and planning



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Want more resources to guide you?

Keeping up with the latest in business trends and best practices can be challenging. Insperity can help.

From in-depth e-books to interactive infographics, we provide a variety of complimentary online resources that are chock-full of useful and timely content for business leaders like you. Explore the latest news and proven advice on a wide array of business and HR topics, including business performance, benefits and compensation, leadership and management, and legal compliance that help keep you in tune with new ideas and best practices.



E-books

Browse our online library of comprehensive e-books to gain insight from our seasoned business and HR professionals on issues giving you the most trouble.



Blog

With new posts going up each week, The Insperity blog keeps you up to speed on the latest HR industry topics. While you're there, be sure to sign up for our email newsletter.



Checklists

Checking off boxes as you go can feel cathartic, but are you checking from the right list? Our checklists will help you feel confident you're following best practices.



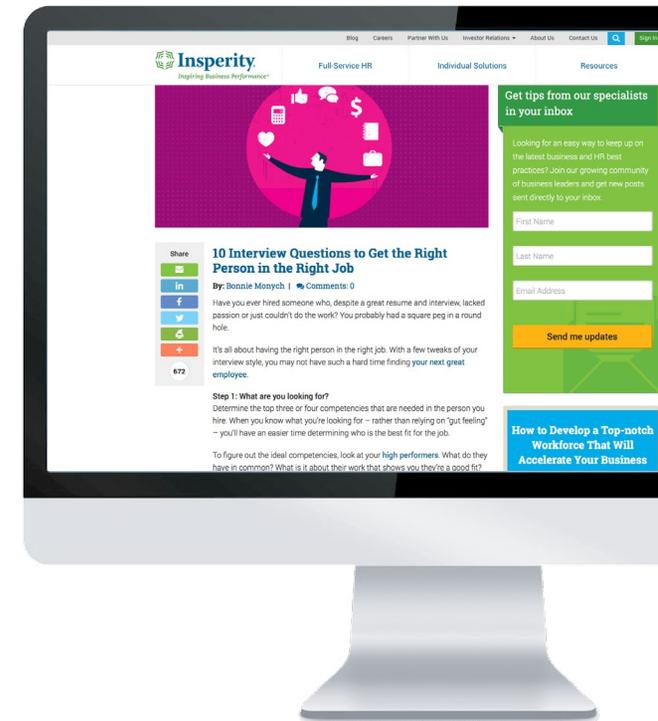
Infographics

Visual learners can rejoice – we've got you covered, too. Our infographics allow you to visualize business trends and statistics in understandable charts and graphics.



Case studies

Need some evidence that our HR strategies really work? Our case studies showcase them in action.





FULL-SERVICE HR

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- Employee benefits
- Employee training and development
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About Insperity

Our mission is to help businesses succeed so communities prosper

YEAR ESTABLISHED

1986



CLIENTS/EMPLOYEES

Insperity serves 100,000+ businesses with more than 2 million employees.

SERVICE TEAM AVERAGE

12+ years of experience in their fields

We serve businesses with employees from 5 to 5,000

NSP LISTED NYSE Publicly traded on NYSE under ticker symbol NSP

2015 REVENUE

\$2.6 BILLION

60 offices across the U.S. with 2,400+ corporate employees

