

# BusinessWeek

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## Four Legal Pitfalls Loom in 2010

Attorneys identify employee lawsuits, immigration audits, improper insurance, and Internet security as risks this year and offer their advice

By [Karen E. Klein](#)

Small business owners often don't think about legal issues until they get hit with a lawsuit or decide to sue someone. Unfortunately, once they arise, costly court actions can destroy companies, particularly startups and underinsured and undercapitalized businesses. But suits can also be prevented, with some foresight and planning. [Smart Answers](#) asked several attorneys who work with small companies what they considered the top legal pitfalls for 2010 and how they can be avoided.

**The risk:** Employee lawsuits.

"The top challenge for a small business owner in 2010 is avoiding employment lawsuits, which are skyrocketing as more and more employees are being laid off," says Eli M. Kantor, an employment law specialist in Beverly Hills, Calif.

Marjorie Jobe, an El Paso (Texas) attorney and author of *Business Law Battle Plan for Entrepreneurs*, agrees: "Plaintiffs' lawyers are increasing the filings of employee discrimination and wrongful termination suits across the country, and this will only escalate. Juries will be receptive to finding fault with the business community and corporate America as the economy struggles and companies downsize."

Employee claims filed with the [Equal Employment Opportunity Commission](#) increased 9% in 2008—a record jump—and were up 15% over that in 2009, says Hanna Hasl-Kelchner, a North Carolina attorney and author of *The Business Guide to Legal Literacy: What Every Manager Should Know About the Law*. "Age discrimination claims led the pack, with retaliation claims following in the No. 2 spot," she says.

Add into the mix an aging workforce, a beefed up EEOC budget (increased 7% for 2010), and the fact that employees can now start the filing process online, and companies that are lax in their EEOC compliance are in for trouble, Hasl-Kelchner says.

**The fix:** Do a preventive audit of your employee payroll practices before the U.S. Labor Dept. or your state labor commissioner decides to perform one. "While many small businesses are fully compliant with wage-and-hour practices, others find the cost-cutting pressures of a sputtering economy and cut-throat competition overwhelming," Hasl-Kelchner says, and they lose track of appropriate employment policies.

Common mistakes to look out for are minimum-wage violations, working-off-the-clock violations, and failure to compensate properly for overtime hours. "Quite often small business owners misclassify nonexempt employees as exempt. Just because you call someone a manager and pay him a salary

does not automatically make him exempt" from being paid overtime and getting required lunch and rest breaks, Kantor says.

Another area to check in your audit is employee vs. independent contractor classification. "Just giving employee 1099s instead of a W-2 does not magically transform them" into contractors, he says. "The trend is, if there is any doubt, courts and the administrative agencies are finding that almost everyone is an employee."

Providing training about avoiding sexual harassment is another good idea that can save substantial expense and bad will in the future.

**For more:** [The Road to Independents](#) and [Preventing Lawsuits](#).

**The risk:** Immigration audits.

The U.S. Immigration & Customs Enforcement, known as ICE, launched a bold and aggressive initiative to dramatically increase audits of businesses nationwide in 2009. In late November, [1,000 companies were notified that their compliance with employment eligibility verification laws would be audited](#) over the next several months. "Instead of putting illegal aliens in jail, they're jailing the business owners," says Rubin Ferziger, a New York City business attorney who has worked with entrepreneurs since 1976.

More than 1,600 businesses were audited in 2009, and Jobe says she expects that number to increase this year. "They decided to thrust the burden of illegal immigration enforcement on the backs of business," she says.

**The fix:** If your company hires workers whose legal right to employment in the U.S. might be questioned, do a comprehensive review of your Form I-9s, which employers are required to complete and retain for each of their employees. Have a knowledgeable immigration attorney look over your documents to make sure each appears to be genuine. If you are investigated by immigration authorities and your I-9s are found to be fraudulent, your company could face substantial fines. Criminal prosecution is a possibility if you are suspected of knowingly violating the law.

**For more:** [If Immigration Audits Your Employees' Legal Status, Struggling with the Temporary Worker Visa Process](#), and [Basics for Seasonal Business Owners](#)

**The risk:** Improper insurance.

Is your company overinsured, or have you got too little coverage, putting your livelihood at unacceptable risk? Companies that have downsized may not realize they are still insuring physical spaces, operations, or employees they no longer have, Ferziger says.

**The fix:** Meet with your broker to review your business insurance policies, and make sure you have the proper amount of employment practices coverage and litigation expense coverage. Kantor recommends that small business owners look into whether they need employment practices liability insurance:

"Although in today's business climate you may be reluctant to increase expenses," he says, "in the long run it may be a very sound investment." In general, business insurance can save your company and

keep you out of bankruptcy if a lawsuit strikes, Jobe says.

**For more:** [Securing Insurance in Risky Industries](#) and [Is Liability Insurance a Must to Go Global?](#)

**The risk:** Internet security.

The blurring of private and company Internet use by employees brings up new questions about privacy and loss of productivity. "The growing popularity of online social media means the potential for compromising your company's trade secrets and other confidential information increases the more your employees engage in developing their online personas," Hasl-Kelchner says.

**The fix:** Develop clear policies on Internet use with helpful dos and don'ts to manage employee expectations. Impress on your employees that they should consider themselves "goodwill ambassadors" for your company's goods and services.

Make sure you include e-mail retention policies in those guidelines and include regular purges. "This limits your risk in a lawsuit, since you can show that you regularly dump e-mail as part of a policy and not as a way to hide evidence," Ferziger says.

**For more:** [Putting a Fair Internet Use Policy in Place](#), [Why Your Web Site's Privacy Policy Matters More Than You Think](#), and [Your Site, Others' Misbehavior: The Two U.S. Safe Harbor Laws](#)

In general, embrace binding arbitration agreements in your contracts and with your employees. And act ethically, not only to limit liability but also because it's the right thing to do. Advises Jobe: "Honor your contracts and commitments. Pay your taxes before you pay any other bill. Respect your employees. Treat your customers like guests."

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