EMPLOYEE HANDBOOK POLICIES:
THE IMPORTANCE OF REGULAR UPDATES AND TRAINING

By: Kaitlin A. Brown, Esq.

I. PURPOSE OF EMPLOYEE HANDBOOK

A. Employee Handbooks should welcome employees by explaining the mission of the company and describing what distinguishes the company from its competitors. It should establish clear expectations and obligations for an employment relationship that maximizes the strengths of employees to promote continued success and development of the company.

B. Employers should consider an introduction to the handbook that reminds employees of the company's culture, purpose, founding principles, and role in the community.

C. Overarching considerations that should guide an update to employee handbook policies include:

1. What were the principles upon which the company was founded? How did the company establish itself in the marketplace? What is the long-term vision for the company? What does the company need to make that vision a reality?

2. What qualities must employees have to meet company needs? What incentives can the company offer to retain and maintain these employees?

3. What liabilities has the company encountered in the past? How can policies be tailored to prevent this exposure in the future?

4. Which laws apply to the employer? If operating in multiple states, do managers and human resources professionals

understand the legal distinctions between each applicable states' laws? Do the federal laws apply to each location in which the employer operates? Has training been provided?

II. POLICIES THAT EXPAND AN EMPLOYER'S POTENTIAL LIABILITY

A. Potential liability increases when policies do not comply with legal updates.

1. Equal Employment Opportunity policy should include all protected classifications required under federal and applicable state and local law.

a. Under federal law, all employers, regardless of size, must not discriminate against applicants and employees based on their performance, past performance, or application to perform, or obligation to perform service in a unformed service.[1] Employers with four or more employees must not discriminate against applicants and employees based on citizenship status (citizenship or intending citizenship) unless a legal basis or exception applies.[2] Employers with fifteen or more employees must not discriminate against applicants and employees based on race, color, religion, sex (including pregnancy, childbirth, or related medical condition), national origin, disability, and genetic information.[3] Employers with twenty or more employees must not discriminate against employees based on age (40 years or older).[4]

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[1] Uniformed Services Employment and Reemployment Rights Act.
[2] Immigration and Nationality Act.
[3] Title VII of the Civil Rights Act of 1964, Pregnancy Discrimination Act, and Genetic Information Nondiscrimination Act.
[4] Age Discrimination in Employment Act, as amended by the Older Workers Benefit Protection Act.

b. Protected classifications under Michigan law include race, color, religion, national origin, sex, age (no minimum), height, weight, misdemeanor arrest record, familial status, marital status or military status".[5]

c. Local laws are being passed to protect sexual orientation, gender identity, and gender expression.

2. Time recording policy should accurately describe what constitutes hours worked for non-exempt employees. For example, unpaid meal breaks consist of at least 30 minutes of uninterrupted work and breaks lasting 20 minutes or less constitute compensatory time. Thus, policies should not implement an automatic deduction of half-hour meal breaks, even if employee works during the lunch period. Employees must be paid for any hours worked.

a. Conditional certification of a class action was granted when employees argued that employer's timekeeping system left employees with no method for tracking meal breaks, that supervisors required them to work through breaks with little recourse, and that the employer prioritized patient-care responsibilities over the ability of its workers to take meal breaks (a principle embodied in the Employee Handbook and reaffirmed by supervisors, who allegedly discouraged employees from seeking compensation for missed meal breaks).[6]

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[5] Elliott-Larsen Civil Rights Act and MCL 32.271 ("No person shall discriminate against any officer or enlisted man of the military or naval forces of the state or of the United States because of his membership therein.").

[6] *Galt v. Eagleville Hosp.*, No. CV 15-6851, 2017 WL 839477, at *2 (E.D. Pa. Mar. 2, 2017).

b. Travel time is designated as hours worked, depending on the underlying facts, place of origination, and destination. Commuting to and from work, for example, is not compensable. Traveling all in a day's work (e.g., from job site to job site), however, is considered compensable.

3. The Family and Medical Leave Act ("FMLA") and Uniformed Services Employment and Reemployment Rights Act ("USERRA") require certain protections to be provided to eligible employees requiring leave to take care of their own serious medical condition, to care for particular family members who have a serious medical condition, to care for a new baby or adopted baby, to care for a particular relative military service member in a qualifying exigency, or to care for a covered service member.

B. Potential liability increases when employee handbooks exclude policies <u>required</u> by law.

1. Social Security Number Privacy: Michigan's Social Security Number Privacy Act requires employers to maintain a policy concerning the privacy of social security numbers to ensure confidentiality, prohibit unlawful disclosure, limit access, describe disposal procedures, and establish penalties for violation of the policy.[7]

2. Confidentiality: Permitting employees to disclose trade secrets when in pursuit of a whistleblower or other anti-retaliation claim may provide the opportunity for requesting exemplary damages upon any related breach, provided that the employee or former

[7] MCL 445.84.

employee complied with the criteria of the Defend Trade Secrets Act.[8]

3. Health Insurance Portability and Accountability Act: Covered organizations must adopt a written policy establishing the privacy and confidentiality of protected health information.

C. Potential liability increases when policies provide benefits and rights not required by law. These benefits, however, may be voluntarily offered by companies to retain and maintain employees.

1. Payment of paid time off: Michigan does not require employers to pay employees unused accrued paid time off upon termination of employment. If the employer commits to make such payment according to its policies, however, payment will be due. Rather than having paid time off be payable upon termination, the policy may designate that unused accrued paid time off has no monetary value.

2. Jury Duty Leave: Michigan does not require employers to pay employees on jury duty leave, but employers must not discharge, threaten to discharge, discipline, intimidate, or coerce or employees for having requested time off for or by reason of serving on jury duty.[9] In Michigan, the combination of en employee's jury duty service and hours worked on that day must not, unless voluntarily agreed to by employee, (a) exceed the number of hours normally and customarily worked during a day or (b) extend beyond the normal quitting time for employee.[10]

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[8] Defend Trade Secrets Act.
[9] 28 U.S.C. § 1875 and MCL 600.1348.
[10] MCL 600.1348.

3. Personnel File Production: Michigan law requires employers to make personnel files available to employees for review two times per year. There is no requirement that the file be produced immediately upon request. Any documents that should have been maintained as part of the personnel file but were not produced to the employee may not be relied upon at a later judicial proceeding, with limited exceptions (i.e., record must not have been intentionally excluded, as determined by a judge or hearing officer, and the employee either agrees or has been given reasonable time to review the information).[11] Producing the file without having an attorney review it first may expose the company to liability by precluding certain documents from being used in support of a defense to a legal claim raised later by the employee.[12]

D. Policies which infringe on protected concerted activities expose the company to potential liability.

1. The National Labor Relations Board ("NLRB"), which is responsible for enforcing the National Labor Relations Act ("NLRA"), has the authority to prevent and remedy unfair labor practices committed by private sector employees and unions, along with the power to safeguard employee's right to organize and determine their representative. Of the potential five NLRB board members, only three seats are currently filled (two Democrats and one Republican Chairman). The composition has been either a majority of Democrat or split with one Democrat and one Republican since January 2008.[13] Recent NLRB cases have found myriad handbook provisions unlawful,

[11] MCL 423.502.
[12] Bullard-Plawecki Employee Right to Know Act.
[13] https://www.nlrb.gov/who-we-are/board/members-nlrb-1935.

resulting in potential liability of employers depending on how the policies are enforced. In the NLRB's FY 2016, 21,326 charges were filed, which resulted in 1,272 complaints issued (93% settlement rate). The NLRB prevailed, in whole or in part, in 89% of the cases litigated. During the FY 2016, there were 1,547 appeals, of which 27 were sustained (1.8%).

2. In a March 18, 2015 Report of General Counsel Concerning Employer Rules, the General Counsel for the NLRB explained, "Although I believe that most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct prohibited by the [NLRA], the law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act."[14] Under the prevailing Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004) test, an employer rule may be found as unlawfully restricting employee's protected concerted activity under Section 7 of the NLRA if (a) employees would reasonably construe the rule's language to prohibit Section 7 activity, (b) the rule was promulgated in response to union or other Section 7 activity, or (c) the rule was actually applied to restrict the exercise of Section 7 rights. The board member who dissented in this opinion, arguing that the employer's justifications for the rule should be balanced against the potential impact on protected activity, is now the Chairman. Policies identified in this memo as having tendencies for unlawfully restricting employees' Section 7 rights include the following, some of which have been further litigated since publication:

[14] https://www.aaup.org/sites/default/files/NLRB%20Handbook%20Guidance.pdf.

a. Confidentiality: The NLRB suggests that confidentiality policies may prohibit disclosure of confidential information based on an employer's legitimate interest in maintaining the privacy of certain business information, provided that they do not reference anything that may reasonably be construed as prohibiting an employee from discussing a term or condition of employment. For example, a policy restricting the use or disclosure of the employer's or client's information was lawful, but a rule prohibiting discussions about "wages and salary information" was unlawful.[15] On the other hand, a policy prohibiting disclosure of trade secret information, including information on "devices, inventions, processes and compilations of information, records, specifications, and information concerning customers, vendors or employees" was found unlawful.[16] Prohibiting disclosure of employee lists was similarly overbroad according to the NLRB.[17] A prohibition on discussing the employer's business with anyone who does not work for the employer or with anyone who does not have a direct association with the transaction was also deemed unlawfully overbroad.[18] The current Chairman has dissented in some opinions, emphasizing the need to balance the employer's justifications against the potential impact on protected concerted activity.

b. Employee Conduct Towards Employer: Policies prohibiting disrespectful, negative, inappropriate, or rude

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[15] *G4S Secure Solutions*, 364 NLRB No. 92 (August 26, 2016).
[16] *Schwan's Home Service, Inc.*, 364 NLRB No. 20 (June 10, 2016).
[17] *Blommer Chocolate Co. of California, LLC*, 32-RC-131048 (February 17, 2016).
[18] *Schwan's*, 364 NLRB No. 20 (June 10, 2016).

conduct toward the employer or management, absent sufficient clarification or context, may be found unlawful by the NLRB. Even false and defamatory statements may be protected. Based on NLRB guidance, employers may prohibit maliciously false statements and conduct amounting to insubordination.

c. Employee Conduct Towards Other Employees: Policies may – and should – prohibit harassment in the workplace, but the NRLB encourages employers not to make such policies so broad as to prohibit "vigorous debate or intemperate comments regarding Section 7-protected subjects." Further, policies requiring ethical communications and prohibiting employees from discussing politics were found to violate Section 7 rights.[19] Workplace conduct rules may, however, promote respectful and professional conduct toward coworkers, clients, and competitors.

d. Employee Interaction with Third Parties: Employees may be expected to decline speaking to media about inquiries and directing such requests to the designated spokesperson for the company. The NLRB recommends that media policies should not, however, include a blanket prohibition from speaking with the media, such that employees would interpret the policy as prohibiting them from speaking with the media about wages, benefits, and other terms and conditions of employment. A recent NLRB case found that a rule prohibiting "giv[ing] or mak[ing] public statements about

[19] *Chipotle Services LLC d/b/a Chipotle Mexican Grill*, 364 NLRB 72 (August 18, 2016).

the activities or policies of the company" without written permission was unlawfully overbroad.[20]

e. Intellectual Property: The NLRB acknowledges that employers have the right to protect their intellectual property, but states that handbook policies may not prohibit employees' fair protected use of such property (e.g., use of company name and logo on picket signs and other protest material).[21] Prohibitions on "release of articles, speeches, records of operation, pictures or other material for publication, in which the company name is mentioned or indicated" without prior approval were unlawfully overbroad according to the NLRB.[22]

f. Photography and Recording: Policies implemented as a total ban on photography or recordings, or banning the use of personal cameras or recording devices may be unlawfully overbroad if read to prohibit photos or recordings on non-work time, according to the NLRB. Even policies that banned recording without prior management approval or without consent of all parties to the conversation were found as unlawfully restricting Section 7 activity.[23]

g. Leaving Work: Policies that prohibit leaving the worksite may be deemed unlawfully overbroad if they prohibit strikes or walkouts. The NLRB has found, however, that as long as such rule does not specifically mention

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[20] *G4S Secure Solutions*, 364 NLRB No. 92 (August 26, 2016).
[21] *Blommer Chocolate Co. of California, LLC*, 32-RC-131048 (February 17, 2016).
[22] *Schwan's Home Service, Inc.*, 364 NLRB No. 20 (June 10, 2016).
[23] *Whole Foods Market, Inc.*, 363 NLRB No. 87 (December 24, 2015).

strikes, walkouts, disruptions, or other protests, the policy is not unlawful.

h. Conflict of Interest: Policies prohibiting conflict-of-interests, without examples that would show such limitation would apply to legitimate business interests and not apply to prohibit a boycott or protest, are lawful according to the NLRB. An example found to be unlawful was "Conduct on or off duty which is detrimental to the best interests of the company or its employees."[24]

i. Prohibition from Disclosure of Handbook: Prohibition against disclosure of handbook policies, even if for the purpose of engaging in discussions about wages or other terms and conditions of employment, may be deemed unlawfully overbroad by the NLRB.

j. Social Media: The NLRB has found social media policies unlawfully overbroad when they prohibit employees from commenting about the employer's business, policies or employees in a way that would reflect negatively on the employer or without express permission from the legal department.[25] Even policies prohibiting social media posts of photographs, images, and video of employees in uniform or at employer's place of work have been deemed unlawfully overbroad.[26] Posting tweets on Twitter are not, without

[24] *Schwan's Home Service, Inc.*, 364 NLRB No. 20 (June 10, 2016).
[25] *G4S Secure Solutions*, 364 NLRB No. 92 (August 26, 2016).
[26] *Id*.

more, concerted action;[27] however, posting a message on Facebook where other co-workers could have seen the comment was protected concerted activity, even though it called the manager a "NASTY MOTHER F—ER" and stated "F--- his mother and his entire f---ing family!!!!", followed by "Vote YES for the Union!!!!!".[28]

k. Anonymous blogging: The NLRB found that requiring employees to self-identify in blogs was unlawfully overbroad because it posed un "unwarranted burden" on Section 7 rights.

l. Dress code: A policy prohibiting employees from wearing "insignias, emblems, buttons, or items other than those issued by [employer]" was deemed unlawfully overbroad.[29]

m. Solicitation: Prohibiting an employee from circulating a petition about the employer's break policy and maintaining a policy that prohibited solicitation during nonworking times if within the range of customers violated the employee's Section 7 rights.[30]

n. Discretionary Discipline: For employers with unions, the NLRB has held that discretionary discipline is a mandatory bargaining subject, such that employers may not impose certain types of discipline unilaterally without first engaging the union representatives.[31]

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[27] *Chipotle Services LLC d/b/a Chipotle Mexican Grill*, 364 NLRB 72 (August 18, 2016).
[28] *NLRB v. Pier Sixty, LLC*, Nos. 15-1841 and 15-1962 (2nd Cir., April 21, 2017).
[29] *G4S Secure Solutions*, 364 NLRB No. 92 (August 26, 2016).
[30] *Chipotle Services LLC d/b/a Chipotle Mexican Grill*, 364 NLRB 72 (August 18, 2016).
[31] *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (August 26, 2016).

III. POLICIES THAT REDUCE AN EMPLOYER'S POTENTIAL LIABILITY

A. A clear and accurate statement confirming employment on an at-will basis may reduce potential liability.

1. At-will employment provisions eliminate the expectation of continued employment on specific terms and, thereby, damages that may otherwise be incurred in an employment agreement for a specified term requiring just cause for termination prior to the conclusion of the term.

2. A discrimination claim based on an alleged adverse action of increased responsibility over a two-month period was dismissed because employee signed applicant agreement and employee handbook acknowledgement, both of which stated that employment was on an "at-will" basis.[32]

3. Any policy creating a probationary period of employment should clearly state that such period remains on an at-will basis and does not create any expectation of continued employment either for the probationary period or after successful completion of the probationary period.[33]

B. A disclaimer that the employee handbook is not a contract may reduce potential liability.

1. Although there is a presumption of at-will employment in Michigan, this presumption may be overcome, based on public policy, when there is an explicit or implicit contractual promise for a definite employment term or just-cause employment or when employer policies and procedure instill "legitimate

[32] *Washington v. Securitas Sec. Servs. USA, Inc.,* 221 F. Supp. 3d 347 (W.D.N.Y. 2016).
[33] *See Peoples-Peterson v. Henry Ford Health System*, No. 293866 (Mich. App. January 18, 2011).

expectations" of job security.[34] To establish a legitimate expectations claim based on the employee handbook policies, a plaintiff must show (1) that the employer's policies and procedures are reasonably capable of making a promise; and (2) the promise is reasonably capable of instilling a legitimate expectation of just-cause employment in the employer's employees.[35] "[O]nly policies and procedures reasonably related to employee termination are capable of instilling such expectations." A claim was found to have failed as a matter of law when an employee handbook clearly stated on the first page that it is not to be construed as a contract for employment, such that the first step of being capable of making a promise was not met.[36] The contractual disclaimer has been deemed legally sufficient to overcome contrary language suggesting just-cause employment.

2. Where an employee handbook contains both at-will and just cause employment provisions (i.e., employee "could have concluded that he would not be reprimanded for his conduct or, at the very most, would receive only a verbal warning" or "No employee will be terminated without proper cause"), the question of whether just cause employment prevails is a question for the jury in a legitimate expectations claim.[37]

C. A disclaimer whereby the employer retains discretion for modification and discretionary action may reduce potential liability. Keep in mind, however, that discretionary discipline has been found to be a mandatory bargaining subject when unions are involved.

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[34] *Rood v General Dynamics Corp*, 444 Mich. 107, 117-118; 507 N.W.2d 591 (1993).
[35] *Id*. at 138-139.
[36] *Lytle v Malady,* 458 Mich 153, 166 (1998); *Woofter v. Mecosta County Medical Center*, 307208 (Nov. 27, 2012).
[37] *Dalton v Herbruck Egg Sales Corp*, 164 Mich.App. 543, 547 (1987).

1. When employer specifically retained the right to vary from any disciplinary policy in its sole discretion (i.e., "[employer] may vary from this normal disciplinary procedure in a particular case if, in the sole discretion of the hospital, the facts so warrant"), there is no legitimate expectation of just-cause employment.[38]

2. The mere existence of a disciplinary system with a systematic method for dealing with employees, including a consistent set of guidelines for managers to deal with subordinates, does not establish a question of fact that employment is terminable only for just cause.[39]

D. Retaining discretion to modify benefit at the employer's sole discretion at any time may reduce potential liability. Reference summary plan description and other plan documents for eligibility criteria and related benefits to avoid promising benefits to which employees are not actually entitled.

E. Including a complaint procedure and prohibition against retaliation that is generally applicable to any legal or policy violation will support an affirmative defense to some claims, especially if the employee is made aware of the employer's procedures and failed to engage or otherwise report the concern prior to resigning or seeking legal judicial or administrative recourse.

1. "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense

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[38] *Woofter v. Mecosta County Medical Center*, 307208 (November 27, 2012).
[39] *Biggs v Hilton Hotel Corp*, 194 Mich.App. 239, 241-242 (1992).

to liability or damages, subject to proof by a preponderance of the evidence.[40] The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[41]

a. "While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."[42]

b. Giving employees written notice of such policies and how they are enforced may constitute evidence of an

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[40] Fed. Rule Civ. Proc. 8(c).
[41] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-765, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633 (1998).
[42] *Id*.

adequate general preventive measure.[43] If such procedures are followed, however, the employer must act reasonably by conducting a fulsome investigation and taking appropriate responsive action necessary.[44]

F. Potential liability may be limited by including a policy establishing that employees absent for three consecutive days without permission or explanation may be considered to have voluntarily resigned.

1. An employer was not liable for violating FMLA when it was not disputed that: employee failed to return from FMLA after the approved date; employer maintained a policy in its Employee Handbook that an absence without permission or explanation for three consecutive days may be considered a voluntary resignation; employer required employees on FMLA to provide status updates every 30 days and give notice as soon as possible if leave is extended or altered; and, following expiration of FMLA leave, employer requested employee to provide an update regarding her employment status and explained that failure to do so would be considered voluntary resignation.[45]

2. If the employer learns from others (not the employee) that the absence is on account of a disability, employer should consider whether an accommodation based on such disability is necessary, such that an exception to the voluntary resignation rule may be appropriate. A family member, health professional,

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[43] *Leugers v. Pinkerton Security & Investigative Servs.*, 205 F.3d 1340, 2000 WL 191685, at *3 (6th Cir. Feb. 3, 2000) (unpublished).
[44] *Brentlinger v. Highlights for Children*, 142 Ohio App. 3d 25, 35, 753 N.E.2d 937, 945 (2001).
[45] *Smith v. Concentra, Inc.*, No. 15-CV-1386, 2017 WL 782995, at *7 (N.D. Ill. Mar. 1, 2017).

or other representative may request an accommodation on behalf of an EEOC employee or applicant.[46]

G. Employers may reduce potential liability by including in the handbook a policy that states employees are not authorized to act on behalf of the company, except as may be expressly provided in the employee's job description, orientation, training, or other milestone. Limiting the actual authority of employees to act on behalf of the employer does not prevent the employee from violating such policy and exercising apparent authority. The policy would, however, support a defense that the employer clearly limited the employee's authority and an argument that the individual employee should be responsible for the unauthorized liability. Especially after separation from employment, employers should evaluate the apparent authority of a former employee and send key business contacts written notice of the change.

IV. TRAINING EMPLOYEES AND MANAGEMENT ABOUT COMPLIANCE AND ENFORCEMENT

A. Training is an integral component of proactively preventing future claims and liability. It is also becoming a more common requirement of settlement agreements with agencies such as the Equal Employment Opportunity Commission, Michigan Occupational Safety and Health Administration, and Department of Labor.

B. For training to be most effective, it is best to complete an audit of internal processes, forms, and procedures. This includes but is not limited to:

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[46] Procedures for Providing Reasonable Accommodation For Individuals With Disabilities, EEOC publication (available at https://www.eeoc.gov/eeoc/internal/reasonable_accommodation.cfm).

1. Review of onboarding process: job description, job posting, application, proper interview questions, background check authorization form, driving record request, drug testing acknowledgement, offer letter, acceptance of offer, employment agreement, and handbook acknowledgement form.

    a. Fair Credit Reporting Act requires specific disclosures and notices prior to performing a background check (e.g., investigation of employment incidents, reports, credit history, criminal records, motor vehicle reports, driving records, consumer reports, educational records etc.) pertaining to character, general reputation, personal characteristics, creditworthiness, or mode of living for purposes of making employment decisions.

    b. Michigan's Internet Privacy Protection Act, which prohibits an employer from requesting an employee or applicant to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal internet account.

    c. Immigration Reform and Control Act requires employers to verify employees' authorization to work in the United States by completing the I-9 form. Employers may submit I-9 form through E-Verify; employers with federal contracts and subcontracts may require submission through E-Verify. Michigan law requires state and local government offices and agencies that refer employees to those offices to use E-Verify.

2. Audit of wage records: Employers should periodically audit wage records to identify any deviations in pay between men

and women (and other protected classifications), document the legitimate business reason supporting the difference, and make appropriate modifications to balance pay when necessary. Human Resource software is available to automatically generate these reports to identify discrepancies. The software may also identify managers responsible for such disparate treatment, which would prompt either targeted training for the specific manager or general training for all managers about how to be more consistent in their hiring, disciplinary, advancement, and discharge practices.

3. Review employment related contracts: confidentiality, conflict of interest disclosure form, non-competition, non-solicitation, non-disparagement, non-disclosure, electronic communications, company property, operation of vehicles on behalf of company, removal of company property from premises.

    a. Waiver of Class Action Litigation or Collective Arbitration: According to Sixth Circuit decision in May 2017, "Mandatory arbitration provisions that permit only individual arbitration of employment-related claims are illegal pursuant to the NLRA."[47] This decision resulted in an even 3-3 split among Circuit Courts as to whether such waivers are lawful in the employment context. The Supreme Court of the United States has already agreed to hear the issue, which is expected to be briefed and argued this fall.[48]

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[47] *Nat'l Labor Relations Bd. v. Alternative Entm't, Inc.*, No. 16-1385, 2017 WL 2297620, at *7 (6th Cir. May 26, 2017).
[48] *Nat'l Labor Relations Bd. v. Murphy Oil USA, Inc.*, No. 16-307 (October 2017 term).

4. Review orientation procedure: evaluate the training that employees receive regarding their responsibility to record hours worked, submit update to human resources about changes in insurance and payroll information (*e.g.*, dependents, exemptions, address/phone number), requesting paid time off, submitting expense reimbursements, reporting an injury or illness, requesting permission to take company property off premises, obtaining authorization to receive and obligation to report gifts, requesting permission to solicit or post on company premises, etc.

    a. Confirm existence of an accident and prevention program, list of personal protection equipment, process for complaining about workplace accidents, and investigation procedure for responding to accidents (including near-miss incidents).

    b. Confirm that employee is aware of company forms required and resources available.

C. Employee handbook training to explain employee rights and obligations under employee handbook. Employees and managers should understand legal requirements, company expectations, and other policies tailored to the business, including but not limited to:

1. Equal Employment Opportunity, Discrimination, and Harassment: Understand the difference between disparate treatment and disparate impact discrimination; understand the difference between quid pro quo and hostile work environment, based on all protected classes (not just sexual harassment); explain obligations to report, how to prevent, appropriate responses, and commitment to investigate and remediate any

unlawful conduct in the workplace; emphasize importance of protection against retaliation.

2. Religious Accommodations: Employees may request accommodations based on sincerely held religious beliefs. Managers must know how to respond to these requests and evaluate whether an accommodation would pose an undue burden on the company. A reasonable accommodation is one that "eliminates the conflict between employment requirements and religious practices."[49] It is intended to "assure the individual additional opportunity to observe religious practices, but it [does] not impose a duty on the employer to accommodate at all costs."[50]

   a. An employer may refuse to offer a reasonable accommodation only when offering an accommodation would cause it to incur an undue hardship.[51] An undue hardship exists, as a matter of law, when an employer incurs anything more than a de minimis cost to reasonably accommodate an employee's religious beliefs.[52]

   b. An employer is not required to offer an accommodation that permits an employee to work as many hours as they otherwise would be entitled to without the religious accommodation.[53] A reasonable accommodation need not be an employee's preferred accommodation or the most beneficial accommodation for the employee; once

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[49] *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986).
[50] *Id.*
[51] *Trans World Airlines v. Hardison*, 432 U.S. 63, 68–69, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977)
[52] *Id.* at 84.
[53] *Smith v. Concentra, Inc.,* No. 15-CV-1386, 2017 WL 782995, at *4 (N.D. Ill. Mar. 1, 2017).

the employer offers an alternative that reasonably accommodates the employee's religious needs the statutory inquiry is at an end.[54]

3. Disability Accommodations: Qualified individuals with a disability may request a reasonable accommodation that would permit them to perform the essential functions of their job. Managers must know how to engage in an interactive dialogue and evaluate whether an accommodation would pose an undue hardship on the company.[55] Employers are not required to accommodate an employee in the specific preferred manner requested. For employees who qualify for leave under FMLA, managers and human resources professionals must know about the interplay between rights under FMLA and the Americans with Disabilities Act ("ADA"). When evaluating a request for an accommodation of a disability under the ADA, managers must evaluate whether the impairment is a disability and whether the employee can perform the essential functions of the job with or without a reasonable accommodation. In addition, Michigan law requires the employee to provide written notice of any need for an accommodation within 182 days of when the employee knew or should have known about the need.[56]

   a. The ADA defines disability as (1) a physical or mental impairment that substantially limits one or more major life activities as compared to most people in the general population; (2) a record of such impairment, or (3)

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[54] *Id*. (citing *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70, (1986)).
[55] 42 U.S.C. § 12112(b)(5)(A).
[56] Michigan's Persons with Disabilities Civil Rights Act (PWDCRA).

regarded as having such impairment.[57] The EEOC's post-ADAAA regulations state that the term "'substantially limits' is not meant to be a demanding standard," and shall be "broadly construed in favor of expansive coverage".[58] Thus, the ADAAA has lowered the bar for establishing a disability in general. Major life activities include, but are not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[59] Factors to be considered in determining whether an individual is substantially limited in a major life activity include the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long term impact of the impairment.[60]

b. Under the ADA, the term "reasonable accommodation" may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."[61]

4. National Labor Relations Act: Employees have a right to engage in protected concerted activity for the purpose of

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[57] 29 C.F.R. § 1630.2(j)(1)(ii).
[58] 29 C.F.R. § 1630.2(j)(1)(i).
[59] 42 U.S.C. § 12102(2)(A).
[60] 29 C.F.R. § 1630.2(j)(2).
[61] 42 U.S.C. § 12111(9)(B).

mutual aid and protection, regardless of whether union members. Managers must not impede or restrict these rights when enforcing policies contained in the employee handbook.

5. Fair Labor Standards Act: Employees and managers must understand what constitutes hours worked for purposes of non-exempt employees recording time. In addition, managers must understand the importance of how to approve overtime and respond when overtime is worked without prior authorization.

D. Separate training with managers should explain company expectations to promote consistency in enforcement of policies and procedures and introduce standard company forms (e.g., performance review, incident report, performance improvement). For example, without guidance, managers may inappropriately enforce (or fail to enforce) zero tolerance policies:

1. In a race discrimination case, employer's assertion that the employee violated multiple policies in the Employee Handbook was sufficient to establish a legitimate, non-discriminatory business reason for disciplining the employee, but pretext was established to support discrimination by evidence that management was aware of conduct by African American employees that violated the zero-tolerance policy and inferred that black employees were excepted from enforcement of the harassment policies.[62]

2. Maximum leave policies are permissible, but employers must make an exception to such rules to accommodate a qualified

[62] *Hecht v. National Heritage Academies*, Inc., 499 Mich 586, 617 (2016).

individual with a disability unless doing so would cause an undue hardship.[63]

3. Michigan Medical Marijuana Act permits employers to maintain a zero-tolerance policy that includes discharge for a positive drug test, even if the employee has a medical marijuana card. Such discharge may, however, result in an award of unemployment benefits to the discharged employee.[64]

E. Managing Employee Performance: Managers should make a concerted effort to be consistent in their routine feedback and more targeted reviews, to hold themselves and their employees accountable. Incorporate company forms and documents into the training to ensure consistency.

F. Responding to Complaints and Concerns: "The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified."[65] "By doing so, 'the employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace.'"[66]

G. Maintaining Personnel Files and the Importance of Confidentiality: The Bullard-Plawecki Employee Right to Know Act mandates what should be included and excluded from an employee's personnel record.[67] Managers and Human Resources professionals must know what to maintain, where to maintain it, and how to produce it.

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[63] Employer-Provided Leave and the Americans with Disabilities Act, EEOC publication (May 9, 2016), *available at https://www.eeoc.gov/eeoc/publications/ada-leave.cfm.*
[64] Michigan Medical Marihuana Act.
[65] *Collette v. Stein–Mart, Inc.*, 126 Fed.Appx. 678, 686 (6th Cir. 2005) (quoting *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001).
[66] *Id*. (quoting *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001).
[67] MCL 423.501(c).