HOW TO MAKE REMOTE WORK - WORK

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I. SOCIAL AND LEGAL TRENDS FOR REMOTE WORK ARRANGEMENTS

A. Statistics about employers providing remote work opportunities.

1. 85% of employers participating in IWG survey reported that productivity has increased in their business as a result of greater flexibility.[1]

2. In 2018, most employers (56%) were offering remote work, either through a hybrid approach of allowing/requiring it (40%) or by being fully remote (16%).[2]

3. Most employers use a virtual workforce in some way (63%)[3].

4. In 2017, the industries which had the greatest number of employees who worked at home on an average day included: (i) management, business, and financial operations; (ii) professional; and (iii) sales.[4]

5. The number of employees working remotely increases with the greater wages/salary earned and with advancement of education.[5]

6. Employers who are offering remote-friendly options see 25% less

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[1] *The IWG Global Workspace Survey*, International Workplace Group (available at http://assets.regus.com/pdfs/iwg-workplace-survey/iwg-workplace-survey-2019.pdf) ("IWG Global Workspace Survey").

[2] *Global State of Remote Work*, Owl Labs (available at https://www.owllabs.com/state-of-remote-work) ("Owl Labs Global State of Remote Work").

[3] *Is Remote Work Illegal?* by Laurel Farrar, *Forbes* (available at https://www.forbes.com/sites/laurelfarrer/2019/04/30/is-remote-work-illegal/#3f901e4c4442).

[4] Bureau of Labor Statistics, *Employed persons working on main job at home, workplace, and time spent working at each location by class of worker, occupation, and earnings, 2017 annual averages* (available at https://www.bls.gov/news.release/atus.t07.htm) ("BLS 2017 Remote Work Report").

[5] BLS 2017 Remote Work Report. Bureau of Labor Statistics, *Employed persons working at home, workplace, and time spent working at each location by full- and part-time status and sex, jobholding status, and educational attainment, 2017 annual averages* (available at https://www.bls.gov/news.release/atus.t06.htm).

turnover.[6]

B. Statistics about how employees view remote work opportunities.

1. Employees who work from home at least once a month are 24% more likely to feel happy and productive at work.[7]

2. The top three reasons why employees choose to work remotely include increased productivity, removing the commute, and work/life balance.[8]

3. Millennial employees are seeking fulfillment and meaning in their work, which often requires flexibility and work-life balance. This can often be achieved through remote work opportunities. 69% of millennials are reported as willing to trade other work benefits for flexible workspace options.[9]

C. The national context of cases interpreting remote work arrangements.

1. According to Bloomberg Law, which reviewed court decisions addressing whether employers are required to provide telework as an accommodation to employees with disabilities, the employee won in 30% of the cases and employer won in 70% of the cases.[10]

a. Generally speaking, the employee won (and was entitled to telework opportunities) when the remote work option was provided to non-disabled employees with the same or similar job, or when the request was for a limited duration and for a partial workweek. The employer won (and was not required to provide telework opportunities) when the request was for

[6] Owl Labs Global State of Remote Work.

[7] *Id.*

[8] *Id.*

[9] IWG Global Workspace Survey.

[10] *Work at Home Gets Skeptical Eye from Courts as Disability Issue*, Robert Iafolla (available at: https://news.bloomberglaw.com/daily-labor-report/work-at-home-gets-skeptical-eye-from-courts-as-disability-issue).

indefinite periods or in some instances when the request was for the entire work week.

D. The global context in terms of legislation promoting flexible working arrangements, according to IWG. [11]

1. Netherlands: "employees with at least one year of service with an employer with at least 20 employees are entitled to ask for a change, increase or decrease in their working hours as well as the ability to work from another location."

2. Norway: employees have "the right to flexible working hours if this can be arranged without major inconvenience to the employer."

3. UK: "all employees that have worked for the same employer for at least 26 weeks may 'make a statutory application' for flexible working."

4. Italy: "establishes the equality of workers performing the same duties even if remotely."

E. Benefits of remote work.

1. Work/life balance. Time is a busy person's greatest asset. Remote work takes out the commute and permits them to spend more time finding the balance, while still contributing at work.

2. Increased productivity. Remote work has the potential for increasing productivity, by letting employees work when they are most effective. It also permits employees to work from a place that allows them to get into the "zone."

3. Increased efficiency for positions that don't require a full time engagement. Just as companies contract out for legal assistance, so too can they contract with accountants, human resources, CFO, etc. This also has the effect of reducing related business expenses, such as

[11] *Id.*

physical office space and other benefits.

4. Retain top talent. Highly qualified workers are available, but not always on the traditional schedule. The most qualified workers also may not be located in the same place as the business.

5. Technology has enabled a virtual workplace. Even without formally adopting a remote work practice, many companies operate with employees working remotely. Think of when employees call in from different locations to participate in a conference call or video conference. Even when employees are in the same office space, they often prefer to pick up the phone, instant message, or use other chat forums.

F. Drawbacks to remote work.

1. Not all work can be performed remotely. Some work requires coordination with others at particular times, interaction in-person, handling specific products, etc.

2. Diminished in-person conversations that may decrease engagement.

3. Lack of structure to regularly promote accountability. Employers need to create alternate mechanisms to establish expectations and monitor performance.

4. Depending on where the remote work is being performed, other distractions may arise, decreasing productivity. The employee will need to manage these distractions, similar to how they manage the distractions at work.

5. Lack of trust factor can create misconceptions of reality. When an employee doesn't answer phone or e-mail remotely, there is a greater tendency to assume that employee is not engaged in work. However, even employees in the office succumb to distracting temptations to surf the web or shop online. Without established or reinforced trust, the remote work relationship may quickly end.

G. General takeaways for employers to consider.

1. Performance management must be conducted in a way that motivates employees, so they see opportunities for advancement on the horizon and meaningful work that is appreciated by others in the present.

2. Creating opportunities for employees to work remotely successfully may not only attract the more skilled workers but also increase retention (thereby reducing the cost of replacing employees), if done in an effective way that is based on a relationship of trust and good communication.

3. A 2000 study found that "those most likely to succeed at working remotely are people who have worked with others at the main worksite before, have similar work styles, like one another, have access to high-end technology that helps them collaborate and are skilled at using that technology."[12] The researchers concluded that a scenario incorporating all these factors is rare and team relationships are strained because "distance still matters."

4. Employees do not go to work to get work done.[13] Rather, they go to work early in the mornings when nobody is there or stay late at night after everybody has left or come in on the weekends. They describe the office as an "interruption factory" where meaningful, creative, and more significant projects often require larger blocks of time that permit the employee to get into "the zone."

II. STATUTES IMPLICATED BY EMPLOYEE REQUESTS TO WORK REMOTELY

A. Americans with Disabilities Act (reasonable accommodations to qualified persons with disabilities).

1. Employers with 15 or more employees must not discriminate against

[12] https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/drawbacks-to-working-at-home-.aspx

[13] *Remote: Office not Required*, Jason Fried and David Heinemeier Hansson.

qualified individuals with disabilities and must provide reasonable accommodations to such individuals, provided it does not impose an undue hardship on the company.

2. A qualified individual with a disability is "a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the 'essential functions' of the position with or without reasonable accommodation."[14]

3. A reasonable accommodation is "a modification or an adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of nondisabled employees."[15]

    a. Examples of reasonable accommodation include "making existing facilities used by employees readily accessible to and usable by an individual with a disability; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified readers or interpreters; or appropriately modifying examinations, training, or other programs."[16]

4. An undue hardship includes "'an action requiring significant difficulty or expense' when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation. Where the facility making the accommodation is part of a larger entity,

[14] *The ADA: Questions and Answers*, EEOC (available at: https://www.eeoc.gov/eeoc/publications/adaqa1.cfm).

[15] *Id*.

[16] *Id.*

the structure and overall resources of the larger organization would be considered, as well as the financial and administrative relationship of the facility to the larger organization. In general, a larger employer would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer."[17]

B. Family and Medical Leave Act (12 weeks of unpaid leave to eligible employees for covered reason).

1. Employers with 50 or more employees must provide eligible employees with 12 weeks of unpaid leave for covered reasons, which include the employee's own serious health condition, in a certain 12-month time period.

2. Eligible employees must have worked for the employer for at least 12 months (not required to be consecutive), worked 1,250 hours in the 12 months prior to the leave, and work at a location where the employer has at least 50 employees in a 75 mile radius.

3. The 12-month time period may be a calendar year, 12 months from the first time the employee takes leave, a fixed year (such as a fiscal year), or a rolling 12-month period measured back from the date of FMLA use.

4. This leave may be taken intermittently or as one continuous period.

5. Employer must provide required notices to employees.

a. Notice of Rights & Eligibility

b. Certification forms

c. Designation Notice

C. Fair Labor Standards Act (wage and hour).

1. Classification of employees as exempt or non-exempt.

[17] *Id*.

a. Exempt (requires payment on a salary basis that meets the certain salary threshold, and with the employee having particular job duties that meet exempt classifications such as executive, professional, administrative, etc.). These employees are not entitled to the premium overtime rate for hours worked in excess of 40 in any given work week.

b. Anticipated changes with DOL proposed rule will result in an increase in the salary level threshold.

c. Non-exempt (employees paid an hourly rate, paid a salary that does not meet the salary threshold, or paid a salary without having the requisite job duties to be exempt). These employees are entitled to overtime pay at a rate of 1.5 times their regular rate for any time worked over 40 hours in a given work week.

i. Consider meal and rest periods.

ii. Employers are required to track hours worked by non-exempt employees. Employers must pay for each hour worked by non-exempt employee, even if in violation of an overtime policy requiring prior approval from management.

2. Penalties for failure to pay minimum wage and overtime owed includes paying all wages owed for the past two years, plus liquidated damages in the same amount. A willful violation may result in payment of amounts owed going back three years.

D. Occupational Safety and Health Act (safe and healthful work conditions).

1. Consider whether the remote work environment complies with the safety requirements of OSHA.

2. OSHA's published instructions on Home-Based Worksites states that OSHA "will not hold employers liable for employees' home offices, and does not expect employers to inspect the home offices of their

employees."[18] If OSHA receives a complaint about a home work-site, then OSHA merely informally lets employers know about the complaints but does not conduct inspections unless they receive a complaint that indicates a violation that threatens physical harm, or indicates that an imminent danger exists, including reports of fatalities related to work.

3. According to OSHA, "Employers are responsible in home worksites for hazards caused by materials, equipment, or work processes which the employer provides or requires to be used in an employee's home."[19]

4. Employers must keep records of injuries in the home office or other remote work location, if they meet the recordability criteria.

E. Workers' Compensation (workplace injuries).

1. If the remote employee is injured in the remote environment, the employee may be entitled to workers' compensation benefits. Have a conversation with your carrier prior to approving the remote work, to identify the standards required for the remote work space and to confirm whether injuries at the remote work location would be covered under the policy.

F. Health Insurance Portability and Accountability Act

1. Covered entities (*e.g.*, health plans, health care clearinghouses, and any health care provider who transmits health information in electronic form) along with Business Associates (*i.e.*, person or entity performing certain functions or activities that involve use or disclosure of PHI on behalf of or providing services to a covered entity) are obligated to maintain privacy and security of protected health information (PHI).

G. Out-of-State laws.

[18] OSHA Instruction: Home-Based Worksites, U.S. Dept of Labor – Occupational Safety and Health Administration (available at: https://www.osha.gov/enforcement/directives/cpl-02-00-125).

[19] *Id*.

1. Foreign Qualification Requirements. Depending on applicable state law, employing a remote worker in another state may mean that the employer is considered as carrying out business in that state and thereby required to apply for foreign qualification as an out-of-state business engaging in business in that state in which the remote employee is working.

2. Income, Sales and Use Tax. When a business has a tax nexus, or presence, in another state outside the one in which it is incorporated, then the employer may be liable for income, sales, and use tax in that other state.

3. Home Occupation Permit. Depending on state and local laws, some zoning laws require permits for remote workers, depending on the circumstances.

III. BEST PRACTICES FOR HOLDING EMPLOYEES ACCOUNTABLE THROUGH REMOTE WORK POLICIES AND AGREEMENTS

A. Is the employee working in a position that can be successfully performed remotely?

1. Maintain and regularly update job descriptions.

2. Consider the amount of interaction and collaboration required.

a. If onsite presence, spontaneous conversations and availability for meetings is required as a part of the job, remote work may not be a feasible option.

b. Consider whether a portion of the employee's work is independent, in which case such work might actually be productive when at home uninterrupted.

3. Consider classification and requirements for paying hourly wage.

a. Documentation of hours worked.

B. What resources are necessary to maintain accountability and productivity?

1. Teleconferencing and videoconferencing software, including training on how to use the software.

2. Require password for logging in to any remote electronic device.

3. Enable program that allows you to wipe the electronic device remotely, if it is ever lost.

4. Obtain employee's commitment that the employee will be the only individual using the device and that no other individual shall be permitted to access or otherwise use the electronic device. The employee will also not share the username and password with any other individual.

5. Consider whether you would like to use remote monitoring software. Again, consider the trust factor and whether this extra monitoring would incentivize the employee or restrict the employee's ability to work freely without the feeling of constantly being monitored.

6. Consider using a two-factor authentication system. Create an automatic sleep factor after a certain duration of time that automatically locks the computer/device that requires a password to log in for future use.

7. Consider using screensharing technology.

C. How will supervisors measure and manage the productivity of the remote worker?

1. Consider the level of trust between the employee, coworkers, and the manager.

2. If the employee has had a longer tenure with the company and knows the procedures and operations and employees, then it is more likely that coworkers will trust that the remote worker will continue to perform the work and it will be easier to gauge whether the performance has increased or decreased or maintained at the same level.

D. Does the workplace environment meet safety standards for OSHA and workers' compensation insurance?

E. Memorialize the arrangement in a remote work agreement, supported by a company policy. Factors to consider include:

1. Establish eligibility requirements for remote work.

2. Confirm the term of remote work, when it will end, and the option to extend or otherwise modify. For example, modifications may be necessary if business needs are not met, there is a change in employment status or job requirements, if employee's performance decreases, or if clients/co-workers provide negative feedback about employee.

3. Identify remote work location, free from distractions and interruptions that may interfere with work, and that is free from hazards and other dangers to employee.

4. Explain the equipment and other technology that will be installed and maintained to ensure appropriate communication and security. Specifically identify any company equipment that is being provided or other technology which must be available at the work site (*e.g.*, computer, tablet, high-speed secured internet, printer, shredder, telephone, etc.).

5. Establish measures that will be taken to maintain security and confidentiality of company information and networks, client/customer information, and any PHI electronically transmitted.

6. Address how expenses will be reimbursed by the employer or assumed by employee, in relation to the supplies, equipment, or technology required to work remotely.

7. Establish expectations for performance, productivity, schedule, and accountability in objective, quantifiable, or otherwise measurable ways.

8. Identify method and responsibility for accurately reporting time worked.

9. Include agreement to monitoring procedures to confirm safe work space, confirm employee is working in compliance with the agreement, and for retrieving company property.

10. Address income tax responsibility.

11. Establish remedies upon breach of remote work arrangement or violation of the policy.

"LIKES" AND "DISLIKES": BEST PRACTICES FOR SOCIAL MEDIA POLICIES AND TRAINING

I. BRIEF INTRODUCTION TO PRESENTER AND TOPIC

II. INTRODUCTION TO SOCIAL MEDIA AND THE WORKPLACE

A. Show of Hands Regarding How Many Attendees Use (Facebook, LinkedIn, etc.).

B. Social Media is a vastly expanding area of growth for companies.

1. Facebook: 2.38 Billion Monthly Active Users.

2. Twitter: 126 Million Daily Active Users.

3. Snapchat: 186 Million Actively Daily Users.

4. LinkedIn: 260 Million Monthly Active Users

C. Social Media is Evolving and Changing the Workplace

1. New collaborative workplace sites such as Facebook Workplace.

2. Intra-Office Instant Messaging Systems.

III. WE "LIKE": SOCIAL MEDIA POLICIES AND TRAINING

A. Social Media Policies are Necessary:

1. *Compliance:* Social media policies will assist with compliance with various laws.

2. *Transparency:* Social media policies ensure that all employees know and understand the company's social media goals and policies.

3. *Consistency:* Social media policies assist to ensure that employees post appropriate information regarding your organization on social media.

B. Evaluate Your Social Media Needs:

1. This should be your first step in determining whether a policy is right for you and in developing a social media policy. As these key questions:

    a. Does your company utilize social media to sell its products and/or services?

    b. How does your company currently utilize social media?

    c. What are the goals for your social media policy?

    d. What are the current issues with social media usage among your employees?

C. Follow These Best Practices:

1. MH Employment Team is here to help you develop your policies.

2. We recommend the following best practices:

3. Avoid "form" or "fill in the blank" type policies which are not tailored to your particular organizational needs. These may be a good starting point, but will not necessarily capture all facets of your organization.

4. Articulate a clear message for the purpose of social media use at the outset of the policy.

    a. This should be well tailored to your organization and kept relatively simple.

    b. Articulate the goal of your company's social media page(s) and the reasons why the social media policy is being implemented.

5. Define social media clearly in the policy.

    a. The definition should be broad in scope to encompass all forms of social media utilized by the company.

    b. The definition should be clear and understandable.

6. Outline an expectation of confidentiality of corporate information that should not be shared on social media.
    a. Confidential Organization Information
    b. Proprietary Information/Trade Secrets
7. A distinction may need to be made for private versus public social media pages if your company has public social media pages.
8. Provide a policy for the corporate social media pages, if applicable.
    a. Specify which employees are authorized to post to any official company social media page(s).
    b. Specify what content is appropriate for the company's official social media page(s).
9. Provide clear and precise expectations and guidelines for private social media pages.
    a. Outline if/when social media is permitted during work hours.
    b. Determine which websites are accessible to your employees at the worksite.
    c. Describe how employees should talk about your company on private social media policies.
    d. Describe when it is appropriate to "tag" your company's social media handle.
    e. This portion of the policy must be narrowly tailored to comply with labor laws, as discussed below.
10. Reference anti-discrimination/harassment policies in social media policy.
    a. If it's not tolerated in the workplace—it should not be tolerated on social media.

b. E.g., clarify in the policy that sexual harassment of coworkers cannot occur on social media.

11. Make clear that the social media policy is not intended to deny employees' rights under the National Labor Relations Act, Title VII, ADA, ELCRA, etc.

a. Discussed in further detail *infra*.

D. Employee Signatures:

1. Have employees sign the agreement during the orientation process. This will ensure that all questions are answered at the outset of the employment.

2. This will help avoid a circumstance in which the employee alleges that the policy is being arbitrarily imposed on him/her.

3. This will assist in rebutting retaliation claims.

E. Conduct Social Media Training:

1. The training should ensure that all employees are aware of the social media policies and expectations.

2. The training may vary depending on the level of employee and the experience with social media.

a. *I.e.*, more tech savvy employees (such as IT personnel) may not require as much training on different social media as employees who are not as familiar with social media.

3. Invite and answer employee questions regarding social media usage.

4. Provide employees with examples that are concrete and useful.

5. Training should occur on a regular basis and after any changes to the policy are implemented.

6. Work with the MH Employment Team to create and conduct your social media training.

IV. WE "DISLIKE": DISCRIMINATION SUITS INVOLVING SOCIAL MEDIA

A. The law surrounding social media is changing and evolving. We have seen an increase in discrimination lawsuits involving or incorporating social media.

B. Social media policies and training must be tailored to comply with certain laws, including the NLRA, Civil Rights Statues, and the WPA.

C. National Labor Relations Act Concerns:

1. An employee may file a claim with the NLRB for violations of the National Labor Relations Act.

2. One consideration is whether the policy constitutes an "unfair labor practice" in violation of federal labor laws.

3. Section 7 of the National Labor Relations Act, 29 USC 151 et seq., provides all employees with a right to engage in concerted activity, including collective bargaining.

4. The NLRA protects concerted activity relating to working conditions. It does not protect individual griping. This covers activity such as discussing terms and conditions of employment, including wages, hours, and employer policies.

5. Section 8(a)(1) of the NLRA prohibits an employer from interfering with, restraining, or coercing employees from exercising their Section 7 rights.

6. Relation to Social Media Policies:

a. The NLRB first issued guidance in 2012 and issued more guidance in 2018.

b. The NLRB has concluded that Social Media Policies cannot be so broad that they prohibit activities protected by federal labor law, such as the discussion of wages or working conditions among employees.

c. Social Media Policies also cannot expressly prohibit Section 7 activities, including discussing wages, benefits or working conditions.

d. The employee complaints must take place in the context allowing communication with other employees.

7. The NLRB has provided guidance that "employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor laws" including discussing wages and working conditions.

8. Recently, the NLRB listed categories of rules that are presumptively lawful and "blanket rules" that are presumptively unlawful.[1]

9. Employers should avoid blanket prohibitions on employees:

a. talking about their jobs;

b. complaining about their jobs or company policies;

c. posting about discussing wages and hours;

d. posting about working conditions.

e. The NLRA covers statements that have "some relation to group action" or "seek to initiate, induce or prepare" group action.

i. *e.g.*, Facebook postings among coworkers intending to complain to management about their work performance;

ii. *e.g.*, Tweets about wages and hours.

10. Rules that may or may not be allowed:

a. Broad confidentially rules encompassing employer business or employee information;

b. Rules regarding disparagement/criticism of the employer;

[1]file:///C:/Users/mca/Downloads/GC%2018_04%20Guidance%20on%20Handbook%20Rules%20Post_Boeing.pdf%20(4).pdf

c. Rules prohibiting the use of the employer's name;

d. Rules restricting speaking to the media.

11. Certain prohibitions are allowed:

a. Employers can still require employees to respect IP and proprietary information.

b. Employers can still require pre-approved use of the company's logos and trademarks.

c. A ban on disparaging the company's employees or using disparaging or offensive language is allowed.

d. Prohibiting employees from discussing information concerning customers, financial data, or non-public proprietary information is allowed.

12. Social media statements are generally not protected if they are "mere gripes" not made in relation to group activity among employees.

a. The NLRA does not prohibit an employer from banning *all* forms of complaints about the company on social media.

b. There must be some relation to wages, hours, working conditions, etc.

c. *e.g.*, ABC Corp sells terrible low quality products: Not protected.

d. *e.g.*, ABC Corp doesn't care about its employees: May be protected.

D. Discrimination Lawsuit Concerns:

1. Statutes such as the Elliott Larsen Civil Rights Act, MCL 37.2101 *et seq*., and Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq*., prohibit an employer from taking an "adverse employment action" in retaliation for an employee's engagement in an "protected activity."

2. "Protected activity" for purposes of Title VII includes "opposition" to

discrimination, and this phrase has been interpreted very broadly to include a variety of actions by employees.

3. Our firm has seen a recent uptick in lawsuits relating to posts on social media. In these cases, the plaintiffs argue that posting about discrimination or harassment by an employer or coworker on social media is a "protected activity."

4. For example, if an employee complains on social media about her employer being racist, is that protected "opposition" to discrimination?

5. There has not been a definitive answer one way or another on this in the court system, so it is possible that these complaints on social media may constitute protected activity.

E. Whistleblower's Act Concerns:

1. The Michigan Whistleblower's act prohibits an employer from taking an "adverse employment action" against an employee who reports or threatens to report an alleged violation of the law to a public body.

   a. *i.e.*, the police, governmental agencies such as MIOSHA

2. This includes taking an adverse employment action against an employee for being about to report workplace issues to the government or the police.

3. This may be construed to include an employee's social media post regarding being about to report an alleged violation of the law to a public body.

4. For example, what if an employee posts on social media that he is going to report a working condition to OSHA and the employer sees the post? Does this constitute protected activity?

5. The law on this issue is also evolving just as with the discrimination context.

F. Hiring Practices and Discrimination Concerns:

1. Another consideration is discrimination in hiring. Consideration of factors such as gender, race, and religion is prohibited in hiring practices.

2. What if your organization learns of an employee's race, sexual orientation, or religion through a social media search?

3. In Gaskell v. Univ. of Kentucky, No. CIV.A. 09-244-KSF, 2010 WL 4867630, at *10 (E.D. Ky. Nov. 23, 2010), the Court held that the plaintiff had established an issue of fact of whether his religion played a role in the decision not to hire him after the employer obtained information regarding his religion on social media.

4. In *Gaskell*, there was evidence that the employer had actually considered the religious affiliation in the hiring decision, but the case opens the door to the possibility of risk just for accessing employee information on social media.

5. The takeaway is that caution must be exercised in determining what employee information is accessed and considered from social media during the hiring process.

6. In fact, a recent SHRM study indicated as few as 22% of employers utilize social media during the hiring process due to these risks.[2]

7. There are concerns about accessing private social media information due to the Federal Stored Communications Act and Michigan's Internet Privacy Protection Act (2012), MCL 37.271 *et seq.*

8. It is illegal to ask for private social media passwords from employees and applicants. Specifically, the Michigan law prohibits:

    a. Requesting an employee or an applicant to grant access to, allow observation of, or disclose information that allows access

[2] https://www.shrm.org/hr-today/news/hr-magazine/pages/0914-social-media-hiring.aspx?_ga=2.215897303.131493620.1558630552-1283654305.1554236678

to or observation of the employee's or applicant's personal internet account.

b. Discharging, disciplining, failing to hire, or otherwise penalizing an employee or applicant for employment for failure to grant access to, or disclose information that allows access to or observation of the employee's or applicant's personal internet account.

c. There are a number of exceptions:

i. "This act does not prohibit or restrict an employer from complying with a duty to screen employees or applicants prior to hiring or to monitor or retain employee communications that is established under federal law or by a self-regulatory organization, as defined in section 3(a)(26) of the securities and exchange act of 1934, 15 USC 78c(a)(26)." MCL 37.275(2).

ii. "*This act does not prohibit or restrict an employer from viewing, accessing, or utilizing information about an employee or applicant that can be obtained without any required access information or that is available in the public domain*." MCL 37.275(3).

iii. Disciplining or discharging an employee for transferring the employer's proprietary or confidential information or financial data to an employee's personal internet account without the employer's authorization. MCL 37.275(1)(b).

iv. Conducting an inv*estigation or requiring an employee to cooperate in an investigation* in any of the following circumstances:

A. If there is specific information about activity on the employee's personal internet account, for the

purpose of ensuring compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct.

B. If the employer has specific information about an unauthorized transfer of the employer's proprietary information, confidential information, or financial data to an employee's personal internet account. MCL 37.275(1)(c).

C. Restricting or prohibiting an employee's access to certain websites while using an electronic communications device paid for in whole or in part by the employer or while using an employer's network or resources, in accordance with state and federal law. MCL 37.275(1)(d).

v. Penalties:

A. Subject to a misdemeanor and a $1,000 fine. MCL 37.278(1).

B. Creates a private cause of action for violations and $1,000 in damages. MCL 37.278(2).

C. Provides an affirmative defense if "the employer or educational institution acted to comply with requirements of a federal law or a law of this state." MCL 37.278(3).

D. No caselaw in Michigan has discussed this statute.

VI. WE "LIKE": TROUBLESHOOTING THESE SOCIAL MEDIA ISSUES

A. Evaluate the social media needs of your organization.

1. Evaluate whether providing employees with a social media outlet could lead to discrimination issues and/or an outlet for complaints.

2. Work with MH employment group to determine how to best suit the needs of your particular organization.

B. Exercise caution during the hiring process.

1. Do not ask for passwords for social media pages.

2. If you decide to examine a social media page, have HR or another designated individual do so. Do not have the decision maker do this.

3. Keep clear records of hiring decisions and the reasons for the decision.

C. Incorporate labor/discrimination laws.

1. As discussed above, your social media policy should incorporate the NLRB guidance and should not be so broad as to include Section 7 protected activity.

2. Your social media policy should also not expressly prohibit employees from engaging in protected activity as defined under Title VII, ELCRA, the PWDCRA, or the WPA.

3. Your policy should refer to your anti-harassment/discrimination policy and acknowledge that the policy applies to social media.

4. Work with MH to incorporate labor/employment laws into your social media policy.

D. Inform employees of channels through which they may voice their concerns.

1. Have an "open door" policy among managers or HR to listen to employee concerns.

2. Inform employees of their channels to voice concerns.

3. Employees who feel like they have a voice within the organization will be less likely to "vent" on social media.

E. Conduct investigations into complaints of harassment/discrimination on social media.

1. Harassment/discrimination on social media between employees is

becoming more common.

2. It is important that employers investigate these claims just as they would any allegations of discrimination/harassment occurring on the worksite.

3. The investigations should follow the company's ordinary policies regarding investigations of complaints of harassment/discrimination.

4. Investigations involving "disappearing" social media may require a faster response time.

    a. i.e., Snapchat stories are only available for 24 hours.

    b. i.e., Deleted social media posts.

5. Work with the MH Employment Team to assist with investigations into allegations of harassment or discrimination on social media.

F. Take appropriate action in response to weaponization of social media.

1. Our firm has seen an increase with disgruntled employees utilizing protected activity as a weapon against possible adverse employment action.

    a. *e.g.*, an employee who knows he or she is going to be let go may post about the organization on social media to prevent the termination.

    b. *e.g.*, an employee posted on social media about her employer being racist in an attempt to avoid being fired.

2. In these situations, disciplinary action and/or termination of the employee remains necessary, but the social media posts may be considered a "protected activity" under the discrimination laws.

3. This is a difficult issue to navigate and is very fact-specific. MH's Employment Team is here to work with you in these situations to take the necessary steps while maintaining compliance with federal and state labor and employment laws.

G. Maintain transparency/clarity for any disciplinary action taken.

1. If part of a social media post constitutes concerted action or a protected activity, state that the disciplinary action does not concern the protected activity.

2. Follow the progressive disciplinary process set up for other transgressions.

H. Conduct social media training.

1. The trainings should be fun and interactive.

2. Encourage employee questions during the trainings regarding social media usage.

3. Work with MH to conduct employee social media trainings tailored to your organization.

I. Emojis and social media.

1. Emojis have become a common method of communication on social media. They are highly prevalent on social media.

2. Recent studies suggest that as many as 92% of individuals with an online presence utilize emojis.[3]

3. Emojis are taking on an increasing presence in litigation. They are changing the meaning of certain information in all contexts, including the employment setting.

4. [Bloomberg Law study of recent emojis]

5. EX: Murdoch v. Medjet Assistance, LLC, 294 F. Supp. 3d 1242, 1246 (N.D. Ala. 2018). In a Title VII sexual harassment case, the Court found that the plaintiff did not find the alleged sexual harassment by her boss unwanted or offensive when she sent him numerous text messages flirting back with him. Several of the text messages

[3] https://www.socialmediatoday.com/social-networks/7-ways-use-emojis-social-media-marketing

contained smiley faces, which the court found indicated her pattern of flirtatious conduct.

6. Issues arise when there are ambiguous emojis that have one meaning at face value but have another meaning in context.

7. Audience participation—examples that may have two meanings]

    a. Ex. Winking Face/Face with Tongue Sticking Out can change the meaning of a message.

    b. Ex. Corn cob/eggplant are both vulgar references to see.

        i. *e.g.*, in 2018, former Top Chef contestant and restaurant owner was sued for sexual harassment for calling a former manager crude names and touching her without permission.[4]

        ii. Among other claims, the plaintiff alleged that Mr. Isabella texted her "corn cob" emojis and referred to attractive female customers as "corn."

8. Takeaways:

    a. Emojis are not going anywhere and their use will only increase over time.

    b. There are more and more emojis coming out each year, meaning there is an emoji for almost anything and everything.

    c. Emojis can have sexual/discriminatory connotations and their meaning must be considered in context. During investigations, emojis should be considered based on possible sub contexts as well as face value.

    d. Emojis should be incorporated into social media training.

[4] https://www.theatlantic.com/entertainment/archive/2018/03/mike-isabella-top-chef-sexual-harassment/555977/

WORKER CLASSIFICATION: WHY IT MATTERS AND AN UPDATE ON THE LATEST TRENDS

By: Kevin M. Henry, Esq.

I. WORKER CLASSIFICATION: THE BASICS

A. Persons who are retained to render services can meet any number of classifications: employees, contractors, subcontractors, agents, and brokers. An important distinction is made between "employees" and "independent contractors."

B. Definitions: "employee" vs. "independent contractor."

1. An employee is a person retained to render services for another person or an entity in exchange for wages or salary.

2. An independent contractor is a person or entity contracted to perform work for—or provide services to—another person or entity as a nonemployee.

C. There is no single test or criteria for determining whether a worker is an employee or an independent contractor.

1. In fact, a worker may be classified as an employee for one purpose and as an independent contractor for another.

2. Different governmental agencies and the laws and regulations governing employees and independent contractors use different and sometimes (but not always) overlapping standards for determining worker classification. For example, the criteria and tests used by the IRS to determine worker classification differ from the criteria and tests used for classification under the Fair Labor Standards Act.

3. Contractual agreements and labeling of workers as "independent contractors" are not sufficient to establish that the workers are, in fact, independent contractors as opposed to employees.

D. One unifying principle in worker classification, however, is the "right to control."

1. For employees, employers control both "what" the employees do and "how" they do it. Employees typically have established hours, work at a designated location, follow a set of directives, policies and procedures established by the employer, and are paid a regular wage or salary.

2. For independent contractors, employers control only what the independent contractor will do. Control over "how" the work will be done remains with the independent contractor. In this way, independent contractors are like self-employed entities. Independent contractors typically set their own hours, determine for themselves the best way to accomplish their objectives, and are paid when their tasks are completed.

3. In short, employers retain a great deal of control over employees and much less control over independent contractors.

E. The classification of workers will impact the duties and obligations of the employer.

1. For workers classified as employees, the employer must:

   a. Collect and remit taxes, including federal and state income tax withholding, FICA (both employee and employer portions), FUTA (federal unemployment taxes), and state unemployment taxes.

   b. Comply with state and federal labor laws applicable to employees.

   c. Comply with ERISA.

2. For workers classified as independent contractors, the employer is not required to collect or remit employment taxes. Moreover, independent contractors are generally not covered by federal labor laws.

F. The IRS utilizes various tests for worker classification.

1. In 1987, the IRS published Revenue Ruling 87-41 which included a "20-Factor Test" for determining worker classification. The 20 factors are:

   a. Instructions – does the worker have to comply with instructions about when, where and how to conduct the work?

   b. Training – is the worker required to be trained as directed by the employer?

   c. Integration – does the worker's work constitute an integral part of the employer's business?

   d. Services Rendered Personally – are the services to be rendered by the worker required to be rendered personally?

   e. Hiring, Supervising, and Paying Assistants – does the employer hire, supervise and pay assistants?

   f. Continuing Relationship – is the relationship between the worker and the employer ongoing or a one-off engagement?

   g. Set Hours of Work – is the worker required to work specific hours?

   h. Full Time Required – is the worker required to devote substantially all of his/her time to the business of the employer?

   i. Doing Work on Employer's Premises – is the worker required to perform the work on the employer's premises?

   j. Order or Sequence Set – is the worker required to perform the work in an order or sequence determined by the employer?

   k. Oral or Written Reports – is the worker required to submit regular oral or written reports to the employer?

   l. Payment by Hour, Week, Month – is the worker paid at a regular interval?

m. Payment of Business and/or Traveling Expenses – does the employer ordinarily pay for the worker's business and/or traveling expenses?

n. Furnishing of Tools and Materials – does the employer furnish tools and materials to worker?

o. Significant Investment – does the worker invest in and/or maintain the facilities used by the worker in performing the work?

p. Realization of Profit or Loss – does the worker share in the profit or suffer loss as a result of the work performed?

q. Working for More Than One Firm at a Time – does the worker perform more than de minimis work for multiple, unrelated employers at the same time?

r. Making Service Available to General Public – does the worker make his or her services available to the general public on a regular and consistent basis?

s. Right to Discharge – does the employer retain the right to discharge the worker?

t. Right to Terminate – does the worker retain the right to end the relationship with the employer?

2. Simplified Three-Factor Test.

a. Behavioral Control – does the employer control:

i. When and where the work is performed?

ii. What tools or equipment is used?

iii. What workers are hired to assist?

iv. What order or sequence the work will be completed?

b. Financial Control – does the employer control:

i. The worker's reimbursement for expenses?

ii. The worker's investment in the work?

iii. The worker's ability to work for others?

iv. How and when the worker is paid?

c. Type of Relationship – between the worker and employer:

i. Is there a written agreement describing the relationship between the parties?

ii. Is the worker eligible for, and does the employer provide, benefits like insurance, pension, vacation or sick pay?

iii. Is the working relationship permanent?

iv. Are the services provide by the worker a key aspect of the regular business of the employer?

3. Statutory Employees.

a. Workers in certain occupations are considered "statutory employees":

i. Agent-drivers or commission drivers engaged in distributing meat, vegetable or bakery products; beverages (other than milk); or laundry or dry cleaning.

ii. Full-time life insurance salespersons.

iii. Home workers performing work according to furnished specifications on materials provided, which products are required to be returned to the principal.

iv. Full-time traveling or city salespersons soliciting orders from wholesalers or retailers for merchandise for resale or for supplies used in their business operations.

b. Statutory employees must be in one of four specified occupations and satisfy the following requirements:

i. Contract must specify that the worker will perform substantially all of the services.

ii. Worker shall have no substantial investment in the facilities.

iii. There is a continuing relationship between employer and worker.

G. Fair Labor Standards Act (FLSA) – worker classification is determined using the "economic realities test." The factors to be considered under this test are:

1. The extent to which the services rendered are an integral part of the employer's business.
2. The permanency of the relationship.
3. The amount of the worker's investment in facilities and equipment.
4. The nature and degree of control by the employer.
5. The worker's opportunities for profit and loss.
6. The amount of initiative, judgment or foresight in open market competition with others required for the success of the worker.
7. The degree of independent business organization and operation.

H. National Labor Relations Act (NLRA) – text of the law specifically excludes independent contractors from coverage. The National Labor Relations Board, which often makes classification decisions, uses a "right to control" standard which weighs a number of factors:

1. Extent of control by employer over the details of the work.
2. Whether the worker is engaged in a distinct occupation or business.
3. The kind of occupation and whether it is customary (in the geographic location) for the worker to do the work under direction of a supervisor.
4. The skill required for a particular occupation.
5. Whether the employer supplies the tools and place of work.
6. The length of time the worker is employed.

7. The method of payment, whether by time or by the job.

8. Whether the work is an integral part of the employer's business.

9. The intent of the parties.

I. Employee Retirement Income Security Act (ERISA) – uses similar criteria to those utilized in the NLRA worker classification analysis.

J. Michigan Unemployment – applies the economic realities test which weighs the following factors:

1. The employer's control of a worker's duties.

2. The payment of wages.

3. The right to hire and fire and the right to discipline.

4. The performance of duties as an integral part of the employer's business towards the accomplishment of a common goal.

K. Michigan Worker's Disability Compensation Act (MWDCA) – applies the three-part test set forth in the MCLA § 418.161(1)(n):

1. The worker does not maintain a separate business.

2. The worker does not hold himself or herself out to and render service to the public.

3. The worker is not an employer under the MWDCA.

II. <u>THE CONSEQUENCES OF WORKER MISCLASSIFICATION</u>

A. Tax Liabilities - if an employer misclassifies a worker as an independent contractor, the tax consequences can include substantial interest and penalties in addition to the principal amounts of the tax.

1. Failure to Withhold: If an employer fails to withhold, then the employer is liable for:

a. 1.5% of wages paid to employees.

b. 20% of employee's share of FICA (Social Security tax).

c. 100% of employer's share of FICA.

d. 100% of federal unemployment tax.

NOTE: If employer fails to file 1099-MISC and other reports, the amounts in a. and b. above are doubled. Also, if an employer intentionally disregards the reporting rules, the IRS will attempt to collect 20% of wages paid to employees and 100% of the FICA due, both employer's and employee's shares.

2. Personal liability for the unemployment taxes owed may be imposed on any person who has effective control over the finances of the employer.

B. Wage Claims Under FLSA.

1. FLSA requires that employers pay employees time and one-half of their regular rate of pay for every hour they work in excess of 40 hours in a given workweek.

2. If employer misclassifies its workers as independent contractors, it could give rise to wage and hour claims under FLSA.

3. The penalties under FLSA in addition to backpay, employers are liable for "liquidated damages" in an amount equal to the amount of backpay unless they can show (i) their actions were taken in good faith, and (ii) they had reasonable grounds to believe they were complying with FLSA.

C. ERISA Exposure.

1. Failure to properly classify workers as employees could lead to disqualification of a qualified retirement plan, which, in turn, could lead to adverse tax consequences to plan participants.

2. NOTE: To prevent retroactive extension of eligibility for workers who are initially classified as independent contractors, but are later reclassified as employees, benefit plans should include language that

states any worker that is reclassified shall not be retroactively deemed an employee for purposes of eligibility in the plan.

D. FMLA Violations.

1. Similar to FLSA, liquidated damages in an amount equal to the wages, salary, employment benefits or other compensation denied or lost due to the employer's violation of FMLA may be awarded to the aggrieved worker unless the employer can show their actions were taken in good faith and that they had reasonable grounds for their actions.

E. I-9 Violations.

1. Employers are responsible for obtaining and maintaining properly completed Forms I-9 for each employee.

2. Penalties for failure to complete properly or retention of the I-9 forms can range from $250-$3,000 per employee.

F. Other Potential Consequences.

1. Age Discrimination Claims.

2. WARN Act Violations.

3. Worker's Compensation Violations.

III. LATEST DEVELOPMENTS IN WORKER CLASSIFICATION CASES

A. *Jammal v. American Family Insurance Co.*, No. 17-4125 (6th Cir. Jan. 29, 2019).

1. 6th Circuit Court of Appeals reviewed the question of whether, for purposes of ERISA, insurance salespersons are employees or independent contractors.

2. The Court cited the standards for worker classification for ERISA purposes set forth in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 321 (1992).

3. The first factor under *Darden* looks to "whether the skill [required of an agent] is an independent discipline (or profession) that is separate

from the business and could be (or was) learned elsewhere." The Court noted that the skill required of insurance agents weighs in favor of independent-contractor status because "the sale of insurance is a highly specialized field" that requires "considerable training, education, and skill."

4. *Darden's* eighth factor examines "the hired party's role in hiring and paying assistants." The Court cited the fact that the insurance salespeople have primary authority over hiring and paying their own assistants, and that factor should weigh in favor of independent-contractor status.

5. The Court also noted that, although the right to control the means and manner in which the work is carried out is still an important inquiry, its importance is diminished in the worker classification analysis for ERISA purposes, where the central question is whether the employer has assumed responsibility for the person's pension status.

6. The Court ultimately determined that, because the majority of the *Darden* factors fell in favor of independent-contractor status, the insurance salespeople were properly classified by American Family as independent contractors.

B. *Hood v. Uber Techs., Inc.*, No. 1:16-cv-00998 (M.D.N.C. Jan. 3, 2019).

1. 5,200 Uber drivers filed a class action claiming they were misclassified as independent contractors and not employees. The drivers claimed further that due to their appropriate status as employees, they were owed minimum wage and overtime compensation under FLSA.

2. The case was settled for $1.3 million.

3. In their submission in support of settlement, the drivers acknowledged that the company had a "'significant chance' of either prevailing on the merits, by a finding that the drivers are independent contractors, or of achieving a reduction of liability if not required to compensate for drivers' wait time."

4. NOTE: Only about $735,000 of the $1.3 million settlement went to the drivers ($150/driver). The remainder went to attorneys' fees, court costs, and litigation and settlement expenses.

C. *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*

1. The Court examined the issue of whether truck drivers were properly classified as employees or independent contractors for purposes of California's wage and hour laws.

2. The Court found the drivers were employees by applying the ABC Test, under which a worker will be deemed an employee unless:

   a. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

   b. The worker performs work that is outside the usual course of the hiring entity's business.

   c. The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

3. The Court found that the employer retained sufficient control over the drivers, that the drivers performed work that was central to the employer's business, and that the drivers were not customarily engaged in the type of work being performed outside of their role with the employer. As such, the drivers were deemed employees and not contractors.

4. Ninth Circuit Court of Appeals issued an opinion on May 2, 2019 that would make the *Dynamex* standard for worker classification be retroactively applicable.

D. *Diva Limousine v. Uber Technologies Inc.*, No. 18-cv-05546 (N. D. Cal. Sept. 10, 2018).

1. Competing limousine company that classifies its drivers as employees sues Uber alleging that Uber's classification of its drivers as independent contractors is incorrect under California law, and such misclassification gives Uber a competitive advantage because Uber does not have to pay minimum wage or other payments under wage and hour laws, which allows Uber to undercut the competition on prices for ride services.

2. Case is pending.

E. DOL Opinion Letter (FLSA2019-6)

1. Letter arose from request for determination on service providers in "gig" economy like Uber and Lyft.

2. DOL went through the "economic realities test" factors and found that the service providers are independent contractors for purposes of FLSA, concluding that both the company and service providers have a relationship of "economic independence, rather than economic dependence."

F. *Q.D.-A, Inc. v. Indiana Dep't of Workforce Dev.*, No. 19S-EX-43 (Jan. 23, 2019).

1. Indiana Supreme Court addressed the question of how the state's three-prong ABC test used for worker classification under Indiana Unemployment Compensation Act should be properly applied.

2. Company connects drivers directly to customers needing vehicles delivered to them. Company argued that drivers were independent contractors. Indiana Department of Workforce Development disagreed.

3. Indiana Supreme Court sided with the Company, emphasizing that the drivers were not under the Company's control or direction, that the drivers performed services outside the Company's usual course of business, and that the drivers ran independently established businesses.

ROMANCE IN THE WORKPLACE AND OTHER WORKPLACE INDISCRETIONS

By: Ronald A. Sollish, Esq.

I. OVERVIEW

A. Understanding the Legal Context in Which Consensual Workplace Relationships Operate, Their Effects on the Workplace, How to Manage Them, and What Other Employers are Doing.

B. Determining When Employers Are Liable for Employee Conduct at Work-Sponsored or Related Social Events and Employer Policies and Best Practices.

C. Discussing Policies and Best Practices for Managing Employee Behavior on Social Media.

II. CONSENSUAL WORKPLACE RELATIONSHIPS

A. Workplace romance is a common issue across the United States.

1. In a 2017 Vault survey, fifty-seven percent (57%) of individuals responding said they have engaged in a romantic relationship at work.

a. This makes a lot of sense, considering people spend the majority of their time at work and are likely to share common interests with those they work with.

b. Some employers may even support employees finding romantic relationships at work.

2. However, workplace romance creates the potential for intimidation, sexual-harassment or retaliation claims, real or perceived favoritism, and a negative effect in the workplace.

B. Legal context of consensual workplace relationships.

1. There is nothing illegal about a consensual, romantic or sexual relationship between coworkers.

2. However, workplace relationships can lead to legal issues.

a. Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sex and sexual harassment. Additionally, many states have anti-harassment statutes, such as Michigan's Elliott-Larsen Civil Rights Act.

i. These laws prohibit many forms of sexual harassment that pertain to workplace relationships, including:

(a) Any unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

(b) "Hostile Work Environment" - Any offensive conduct that is based on sex or gender and is severe or pervasive enough that it creates a hostile, offensive, or intimidating work environment for the targeted person.

(c) "Quid Pro Quo" harassment, such as, people in positions of power making sexual demands in exchange for a promotion or other employment benefit.

b. Employers can be held vicariously liable under Title VII to a victimized employee for actionable discrimination caused by a supervisor. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

c. Additionally, Title VII contains an anti-retaliation provision that makes it illegal for employers to retaliate against an employee who has "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation.

C. Effects on workplace.

1. The presence of workplace relationships may have negative effects on the workplace and employees' attitudes.

a. Supervisor and subordinate relationships are a major cause of concern.

i. For example, if a subordinate employee is engaged in a romantic relationship with a supervisor and is somehow benefited (whether it be promotion, raise, or just special treatment), co-workers are bound to notice and may think "must I sleep with a supervisor to get ahead?"

ii. Relationships lead to gossip and rumors that can cause a general disturbance in the workplace that leads to lower productivity and a negative office morale.

iii. Also, what happens when the relationship ends? What if it ends badly? Will there be animosity between the parties? Will one party be retaliated against in the workplace for what happened in the relationship?

iv. All these questions pose major concerns for employers.

b. Extra-marital affairs are another major concern.

i. Nineteen percent (19%) of employees admitted to stepping out on their partner with a colleague at work.

ii. These relationships are particularly problematic for organizations because these employees will naturally want to keep the relationship secret. If the organization is unaware of the relationship, it makes it more difficult to monitor to ensure there is no favoritism and to guarantee that professionalism is maintained in the workplace.

iii. Commonly in these situations, it is the spouse of the employee that finds out about the extra-marital relationship and creates issues for the employer.

(A) The non-employee spouse may persuade their spouse to claim sexual harassment, or worst-case

scenario, might decide to commit an act of workplace violence in a fit of rage.

D. How to manage romantic relationships in the workplace.

1. Fraternization Policies

a. What is a fraternization policy?

i. Fraternization or anti-fraternization policies are also referred to as dating policies or workplace romance policies.

ii. These policies explicitly communicate to the employee the company's policies, expectations, procedures, and consequences regarding romantic relationships in the workplace.

b. A SHRM workplace romance survey found that only forty-two percent (42%) of companies have developed a formal, written, workplace romance policy.

c. Benefits of having a fraternization policy:

i. Supervisors feel better because they know what to do if a romance springs up on their team.

ii. Employees understand what is expected of them if they decide to engage in a romantic relationship with a co-worker.

iii. Such policies can also demonstrate an employer's good-faith effort to comply with sexual harassment laws.

d. Employers should consider including the following components in their fraternization policies:

i. The policy's goal of upholding appropriate boundaries between personal and business relationships.

ii. The employer's decision whether to prohibit or just discourage fraternization between managers and subordinates.

iii. The requirement to report participation in such relationships, including those with vendors and other business associates.

(a) Disclosure is an effective way to limit the potential for favoritism, retaliation and sexual harassment claims.

iv. The employer's right to modify reporting structures, such as transferring a boss who is in a relationship with a subordinate.

(a) The employer should maintain the company's discretion. The company may allow the relationship in some cases and prohibit/change reporting structure in other cases.

v. The prohibition on physical contact between employees during work hours.

(a) Encourage open communication

(i) If the company is willing to work with the couple, then it is more likely that the involved parties will communicate their problems in an appropriate manner.

e. It is not recommended that fraternization policies prohibit dating, sex, and romance entirely. Any policy that is seen as overreaching or intrusive may discourage reporting to HR.

2. Policies should be broadcasted to all employees.

a. Almost half (41%) of employees don't know their company's policy regarding office romances.

b. If more than half of the workforce has engaged in workplace romance, it's critical that organizations guide employees on how to go about pursuing romance in a professional manner.

c. Employees should know what is expected from them and what they should expect from the company in the case of a romantic relationship in the workplace.

3. Provide training to HR, supervisors, and employees.

a. Another proactive measure is to advise HR, supervisors, and managers as to how they might discreetly address romantic and sexual behavior in the workplace.

b. Companies may also consider bystander training to recognize, report, and prevent harassment in the workplace.

E. What other companies are doing:

1. Surveys by SHRM show that ninety-nine percent (99%) of employers with romance policies in place indicate that love matches between supervisors and subordinates are not allowed.

2. Many organizations forbid intimate relationships even outside supervisory relationships. Thirty-three percent (33%) of organizations forbid romances between employees who report to the same supervisor, and twelve percent (12%) won't even allow employees in different departments to date.

3. Facebook has a "no means no" policy that prohibits one worker from asking another out again if the co-worker has already said no once before.

a. Facebook has internal "Managing A Respectful Workplace" training sessions in which the nuances of employee interactions and what is considered to be appropriate behavior are discussed using examples and hypotheticals.

4. Google strongly discourages employees from involving themselves in

relationships with colleagues that they manage or report to, or if there is any question whether one individual has power over the other.

a. Google has moved employees to different roles in the event that a relationship between a supervisor and subordinate does occur.

b. Additionally, Google provides regular training to executives in order to best address the topic.

5. Some organizations now opt for 'love contracts' that set out a clear code of conduct and require employees to disclose their status as a couple to HR.

a. These 'love contracts' entail having the dating parties sign a contract stating that the relationship is consensual, explaining what the parties should do if the relationship ever ceases to be consensual, and affirms that the employees are aware of the company's policies on sexual harassment and workplace ethics and understand the consequences of failure to follow those policies.

b. These 'love contracts' protect companies from future claims that may be brought by the parties involved in the relationship against the company.

III. WORKPLACE SOCIAL EVENTS

A. Work-sponsored and work-related events.

1. Work-sponsored events refer to events such as a company holiday party, a conference, company picnics, etc.

2. Work-related events refer to work golf leagues, softball leagues, or other events that are related to the employer.

a. These events can be very beneficial for companies.

i. They are a great way for companies to show appreciation towards their employees.

ii. Employees have fun at social events.

iii. They boost team-building, morale, retention rates, and workplace relationships.

b. However, they can also impose liability onto companies for the actions of their employees.

B. When can an employer be held responsible for employee behavior?

1. Under Michigan law, an employer's vicarious liability for the acts of its employees under the doctrine of *respondeat superior* is as follows: a master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment but is not vicariously liable for acts committed by its employees outside the scope of employment, because the employee is not acting for the employer or under the employer's control. 9 Mich. Civ. Jur. Employment Relationship § 202.

a. In the context of social events, courts have explained that conduct is "within the course and scope of employment" if the employer (1) directly or implicitly endorses and may derive benefit from the social event or (2) requires or expects employee attendance at the event.

i. If the event is likely to benefit the employer in a significant way, it is more likely that the employer will be held liable for the employee's actions.

(a) For example, sending an employee to a major conference to learn and network would be seen as an event that significantly benefits the employer.

ii. Attendance at work-sponsored and related events should be voluntary.

(a) Be sure that event notices specify that the activities are not mandatory.

(i) This also prevents employees from claiming that they are entitled to overtime for attending the event.

(b) If attendance is required at an event, it is more likely that the employer will be held liable for the employee's actions.

b. This test is closely related to worker's compensation law where courts look at whether the employee's action is "within the course and scope of employment."

2. Sexual harassment at events

a. Work social events are a common place for sexual harassment to occur because it is a less formal setting than the normal workplace.

b. However, employers are potentially still liable for sexual harassment that happens at a work sponsored or related social event.

c. Tips to prevent sexual harassment at events

i. Have a separate policy that addresses conduct at employer-sponsored events.

ii. Consider not serving alcohol.

iii. Remind employees of the appropriate standards of behavior prior to the event.

iv. Permit employees to bring significant others.

(a) Employees will be discouraged from engaging in inappropriate behavior in front of their spouses or significant others.

d. Responding to reports of sexual harassment at events.

i. Take the complaint seriously, investigate quickly, and take prompt remedial action if necessary, just as you would for a traditional workplace complaint.

C. Alcohol

1. If your company does decide to serve alcohol at an event:

a. Explain to employees before the event that all company policies apply to social events, including prohibitions on harassment and inappropriate behavior.

b. Serve food, such as appetizers, so employees are not drinking on an empty stomach.

c. Provide a late-night snack buffet before employees hit the road to end a company event.

d. Offer a variety of non-alcoholic beverages, to remove the emphasis from alcohol.

e. Consider serving just beer and wine, instead of liquor.

f. Limit the number of drinks the company provides by using drink tickets or another informal method of tracking the amount of alcohol served.

g. Provide free non-alcoholic beverages, but make it a cash bar. When employees have to purchase their own drinks, they drink less.

h. Arranging transportation for employees to and from the event.

i. Recruit HR, your managers, and event planning committee members, in advance, to keep their eyes open for employees who may be overindulging.

j. Have a policy for supervisors to intervene if they see someone who is inebriated.

k. Have a clear statement that employees are prohibited from driving if they are inebriated or impaired.

2. Be aware of Dram Shop laws.

a. Michigan is one of the states that has adopted a Dram Shop law.

b. Under Michigan's "dram shop law," a person serving alcohol can be held liable for the later actions of the person they served alcohol to if:

i. the person is "visibly intoxicated" when being served alcohol, or

ii. the person is under 21 years-of-age.

iii. For example, an employee is obviously served too much alcohol at a company Christmas party. The employee attempts to drive home and gets into an accident, killing an innocent person. The employer may be held liable for that employee's actions in that case if the employee was "visibly intoxicated" and the company allowed the employee to continue drinking alcohol.

c. To prevent employer liability:

i. Making sure no one under 21 years old is drinking alcohol.

ii. Never allow employees to serve coworkers or themselves.

iii. Host the event at a restaurant or bar licensed to serve alcohol, or hire a licensed bartender to come to the event to serve alcohol.

(a) That way, the restaurant, bar, or bartender is required to comply with the Dram Shop laws and they are the ones who are liable if they do not.

iv. Make sure your bartenders are clear that they are not to serve alcohol to any person who appears to be inebriated or under age.

IV. OFF SITE EMPLOYEE BEHAVIOR ON SOCIAL MEDIA

A. Introduction

1. The majority of us have a Facebook, Twitter, Instagram, Snapchat, LinkedIn, or other social media account on which we post about our lives, thoughts, feelings, and even work.

2. Thanks to social media, we seem to be opening up and freely discussing topics, such as politics, in the public space where we might not have done so even in the recent past.

   a. However, this is leading to major issues for employers.

      i. What if an employee posts something negative about their employer?

      ii. What if an employee posts a company's confidential information onto social media?

      iii. What if an employee insults a co-worker or supervisor on social media?

   b. If any of those situations occur, it could significantly impact the workplace.

B. This raises the question of whether or not an employer can discipline an employee for something they post on social media.

1. Interestingly, private employees do not have a constitutional right to free speech at work.

   a. The First Amendment protects citizens from the government, not from private companies.

2. However, private employers cannot prevent all speech by employees.

a. Speech related to protected concerted activities is protected by Section 7 of the NLRA.

i. Protected concerted activity includes dialogue between co-workers about working conditions, pay rates, or management.

(a) This "concerted activity" is protected by federal labor law.

(b) Employees do not have to be unionized to enjoy this protection.

b. Employees also have the right to talk about possible unlawful conduct in the workplace.

i. Under various federal laws, employees may complain about harassment, discrimination, workplace safety violations and other issues without being retaliated against by an employer.

3. Employees have the right to:

a. Discuss terms/conditions of employment (wages, hours, policies, complaints).

b. Criticize employer's labor practices and treatment.

c. Discuss terms and conditions of employment with third parties, including the media.

4. Where the employer has a legitimate protectable interest, employees' posts are not protected.

a. Such legitimate protectable interests include:

i. Interaction with clients and customers.

ii. Protection of confidential information.

5. Additionally, employees are not protected when they express racist,

sexist or other discriminatory comments.

C. Policies and practices to manage employee behavior on social media.

1. Social media policies.

a. The best way to combat issues presented by employees' social media usage is through a comprehensive social media policy with sufficient examples, distributed at the commencement of employment, and enforced consistently.

i. Social media policies should:

(a) Include a definition of what the term "social media" includes.

(b) Define what is and isn't proper use of social media.

(c) Include a disclaimer for speech protected by law to comply with the National Labor Relations Act.

(d) State that the employee is solely responsible for what they post online.

(e) State that inappropriate posts that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject the employee to disciplinary action up to and including termination.

(f) Include a "no social media while at work" provision.

(g) Include an anti-retaliation provision for reporting violations.

(h) Include a requirement that employees include a disclaimer on their social media stating that any views expressed are not the views of the company.

2. Confidentiality Policies

    a. Companies should update their confidentiality policies to include prohibitions against employees sharing confidential company information on social media.

3. Open-Door Policy

    a. Employers should encourage open communication between all employees and management at work.

        i. Encourage employees to bring complaints to supervisors or HR, instead of posting on social media.

4. Tips:

    a. Supplement your policy with training. Having a policy isn't enough. Company owners, managers, and supervisors should be trained on the policy and informed of what can happen when they use social media to vent about an employee or a workplace situation.

    b. Discourage supervisors (or any other higher-ups) from being Facebook friends, becoming Twitter followers of, or connecting via social media with their subordinates.

    c. Prohibit employees from engaging in social media activities during compensable work time.

    d. Address complaints made on social media the same way you would respond to any other complaint about inappropriate workplace conduct. That means HR should thoroughly investigate the allegations and respond by taking proper corrective action.

D. Monitoring of employees' social media.

1. There are a handful of approaches that employers commonly use when monitoring their employees' use of social media:

a. No monitoring: Employee can access all social networks on company or personal devices with no monitoring or supervision.

i. The riskiest approach for an employer is to allow employees full, unmonitored and unsupervised access to all social networks.

ii. In this case, an employer is exposing their business and employees to a myriad of risks associated with social media activities including strategic, operational, legal, financial and reputational risks.

b. "Unofficial" Monitoring: Many employees, managers or leaders will connect with each other on LinkedIn or Facebook, "outside the office". This can be construed as "monitoring" their teams' personal social media activities.

i. If this is the case, make sure employees are aware of and consent to any monitoring that is taking place of their personal social media profiles.

c. Intentional Monitoring of Specific Networks: Allow and monitor employee use of "approved" social networks while monitoring employees' personal and work-related use of social media.

i. Intentional monitoring should include processes to gain monitoring consent from employees, approvals of specific social networks for use by employees, methods for employees to request an exception, and letting employees know they are being monitored.

E. Other claims an employee might bring for adverse employment actions related to social media posts.

1. Discrimination.

a. If an employee posts something about their religion, sexual orientation, ethnicity, or any other protected characterization

and then is later fired, the employee may claim they were fired for an illegal reason.

i. For example, if an employee posts something about their religion on Facebook and is later fired, the employee may claim that they were fired by their employer because of their religion (and not the actual post), which would be an illegal reason for termination under Title VII.

2. Invasion of privacy.

a. Any employee may claim that an employer invaded their privacy by checking their social media accounts.

i. However, since social media activity is available for public viewing, it is a very hard cause of action for employees to win on.

3. Michigan has enacted the Internet Privacy Protection Act.

a. Prohibits employers from:

i. Requesting an employee or an applicant for employment 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.

ii. Discharging, disciplining, failing to hire, or otherwise penalizing an employee or applicant for employment for failure 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.

4. State laws protecting employee's off duty conduct.

a. Michigan does not have a specific state law that protects employee off-duty activities and behavior.

b. However, some states like California, Colorado, New York, Nevada and North Dakota, have laws which protect the legal off-duty conduct of employees.

i. Employers in those states may be prevented from disciplining or terminating an employee for off-duty conduct that was legal, even if the message of the conduct was contrary to the values of the employer.

V. CONCLUSION

A. Consensual workplace relationships are a common issue that employers need to handle with care. Although they are not illegal, workplace relationships can lead to negative effects in the workplace and plethora of legal issues for employers. Employers should manage workplace relationships with a publicized, comprehensive, and tailored Fraternization Policy.

B. Workplace social events create liability for companies through the actions of their employees. Companies can minimize this liability by implementing comprehensive and tailored policies, responding to issues appropriately, following best practices if serving alcohol, and being aware of state and local laws such as Dram-Shop laws.

C. With the pervasive presence of social media, employers should have policies that address employee behavior on social media and are careful not to infringe on employee rights under the NLRA.

VI. POLICY TEMPLATES:

A. Disclaimer: These policies are for informational purposes only and do not constitute legal advice.

Dating and Relationship Agreement and Acknowledgement of Harassment-Free Workplace Policy

It is (the "Company's") policy to provide an equal opportunity in hiring, employment, promotion, compensation and all other employment-related decisions without regard to race, color, being over the age of 40, religion, sex, marital status, national origin, citizenship, veteran status, sexual orientation, being a qualified person with a disability; or any other basis set forth in the applicable laws or regulations relating to discrimination in employment.

The Company does not tolerate unwelcome or offensive conduct or conduct that creates a hostile work environment that is in any way based upon or related to a person having any of the characteristics described above.

In addition, the Company does not tolerate sexual harassment, which is a form of unlawful discrimination. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

a. submission to such conduct is made, explicitly or implicitly, a condition of an individual's employment or advancement;

b. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

c. such unreasonable conduct interferes with an individual's work performance or creates an intimidating, hostile or offensive working environment.

We, the undersigned employees, have entered into a personal relationship with each other. We have read and understand the Company's Harassment-Free Workplace Policy, part of which is outlined above, and we agree as follows:

1. Our relationship is entirely voluntary.

2. Our relationship will not have a negative impact on our work.

3. We will not engage in any public displays of affection or other behavior that creates a hostile work environment for others, or that makes others uncomfortable.

4. We will act professionally towards each other at all times, even after the relationship has ended.

5. We will not participate in any Company decision making processes that could affect the other's pay, promotional opportunities, performance reviews, hours, shifts, or career.

6. We will inform the Company immediately if the relationship ends, or if the conduct or advances of the other person are no longer welcome.

7. We agree that, if the relationship ends, we will respect the other person's decision to end the relationship and not pursue that person or seek to resume the relationship or engage in any other conduct towards the other person that could violate the Harassment-Free Workplace Policy.

8. We understand that, after the relationship ends, one of us may choose to date others in the workplace, and that we will not react with jealousy or spite or in any manner that is less than professional with respect thereto.

Dated this _____ day of _____ , _____.

Employees: _____ _____

Social Event Policy

Purpose

The purpose of this Social Event Policy (the "Policy") of . . . (the "Company") is to provide guidance on the expectations of the Company regarding "Social Events".

Definition

"Social Events" refer to any Company mixer, party, activity, or event, whether conducted on or off Company premises. Social Events are designed to improve Company morale and strengthen relationships. Alcohol may be served at Social Events.

Social Events are Strictly Voluntary

Your attendance at Social Events is strictly voluntary and on unpaid time. Participating in Social Events and/or consuming alcohol (if served) is optional. Employees will not be subject to any disciplinary actions or repercussions for failing to attend or participate in Social Events.

Appropriate Decorum

When attending Social Events:

- Be responsible;
- Conduct yourself in an appropriate business, non-impaired, manner;
- Consume alcoholic beverages only in moderation;
- The Company will make transportation arrangements for employees who request a ride;
- If you become impaired, ask the Company to provide a ride;
- You will not be subject to repercussions if you request a ride; and
- Stop drinking alcohol several hours before you intend to drive or request the Company to make transportation arrangements.

Updates

From time to time, the Company may update this Policy in its sole and exclusive discretion.

Acknowledgment

I have read this Policy and understand its contents. I agree to abide by this Policy and understand that my conduct will be governed by this Policy.

_____
[Employee Signature]

_____
[Print Name]

_____
[Date]

DRUGS, VIOLENCE, AND VAPING: DRAFTING EMPLOYMENT POLICIES IN THE AGE OF RECREATIONAL MARIJUANA

By: Zoey A. Mayhew, Esq.

I. OVERVIEW

A. Review considerations in drafting effective Substance Abuse Policies.

B. Understand state of Michigan and federal laws concerning smoking, vaping and fragrances in the workplace.

C. Learn how to craft effective violence prevention policies and procedures in light of state and federal law protections.

II. CRAFTING EFFECTIVE SUBSTANCE ABUSE POLICIES IN A CHANGING CLIMATE

A. Marijuana: An Overview Across the Country.

1. Federal law.

a. The federal Controlled Substances Act, 21 USC §801 *et seq*., classifies marijuana as a Schedule I drug. 21 USC §812(c). Schedule I drugs have been deemed to "lack any accepted medical use;" therefore, federal law prohibits marijuana's manufacture, distribution, and possession. 21 USC §812(b)(1); §841(a)(1).

b. There is a wave of legislation being introduced that would affect the federal government's ability to enforce the Controlled Substances Act in states that have legalized marijuana. Most recently, a bipartisan bill referred to as the STATES (Strengthening the Tenth Amendment Through Entrusting States) Act (with 13 Democratic and 13 Republican co-sponsors) was introduced.[1] It would greatly limit the federal government's

[1] *See Lawmakers Optimistic About New Federal Marijuana Bill*, Matt Laslo, https://www.rollingstone.com/culture/culture-news/marijuana-pot-federal-states-act-congress-817670/

ability to enforce the federal ban in states that have legalized and regulated the industry.

2. State law.

   a. Medical marijuana is now legal in 33 states[2], while recreational marijuana is legal in 10 states (Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont and Washington).[3]

3. Marijuana use across the country.

   a. Marijuana has become a booming industry worth approximately 10 billion dollars in 2018, and expected to grow to 16 billion by 2019.[4]

   b. A recent survey found that 1 in 7 adult Americans had used marijuana in 2017 ("12.9 percent reported smoking marijuana, 6 percent said they had consumed edibles, 4.7 percent reported

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[2] *See* California—Cal. Health & Safety Code §11362.5(a); Alaska—Alaska Stat. §17.37.010; Colorado—Colo. Rev. Stat. Ann. §18-14-1; Hawaii—Haw. Rev. Stat. §329-122; Maine—Me. Rev. Stat. Ann. tit. 22, §2383-B; Montana—Mont. Code Ann. §50-46-101; Nevada—Nev. Rev. Stat. §453A.120; New Mexico—N.M. Stat. §26-2B-1; Washington—Wash. Rev. Code §69.51A.005; Oregon—Or. Rev. Stat. §475.300; Rhode Island—R.I. Gen. Laws §21-28.6-4(a); Vermont—Vt. Stat. Ann. tit. 18 §4471; Michigan—Mich. Comp. Laws §333.26421; New Jersey—SB 119 (2010); D. C.—Amendment Act B18-622; Arizona—Proposition 203 (2010); Delaware—Senate Bill 17 (2011); Connecticut—HB 5389 (2012); Massachusetts—Ballot Question 3 (2012); Illinois—HB 1 (2013); New Hampshire—HB 573 (2013); Minnesota—SB 2470 (2014); Maryland—HB 881 (2014); New York—AB 6357 (2014); Arkansas—Ballot Measure 6 (2016); Florida—Ballot Amendment 2 (2016); North Dakota—Ballot Measure 5 (2016); Ohio—HB 523 (2016); Pennsylvania—Senate Bill 3 (2016); Louisiana—Senate Bill 271 (2016); West Virginia—Senate Bill 386 (2017); Utah—HB 3001 (2018); Missouri—Ballot Amendment 2 (2018); Oklahoma—Ballot Question 788 (2018)

[3] *See New Jersey Lawmakers Postponed a Critical Vote to Legalize Marijuana — Here Are All The States Where Pot Is Legal*, Jeremy Berke and Skye Gould, https://www.businessinsider.com/legal-marijuana-states-2018-1.

[4] *See Legal Marijuana Industry Had Banner Year in 2018 with $10B Worth of Investments*, https://www.nbcnews.com/news/us-news/legal-marijuana-industry-had-banner-year-2018-10b-worth-investments-n952256.

vaping, 1.9 percent said they had used concentrates and 0.8 percent reported using topical versions of cannabis.").[5]

c. While marijuana use has grown in the workforce, opioid use has seen a decline.

d. Approximately 4.4 percent of the U.S. workforce had positive drug tests in 2018. The number of workers and job applicants who tested positive for marijuana climbed 10 percent last year to 2.3 percent.[6] However, positive opioid tests fell 21% from 2017 to 2018.[7]

B. The state of marijuana in Michigan.

1. Medical marijuana in Michigan.

a. "The Michigan Medical Marijuana Initiative was approved by voters on November 04, 2008. It was enacted into law as the Michigan Medical Marijuana Act (MCL 333.26421 to 333.26430) and became effective on December 04, 2008. The Act allows patients to grow up to 12 marijuana plants and possess up to 2.5 ounces of usable marijuana, allows primary caregivers to grow up to 12 marijuana plants for a patient, and limits primary caregivers to a maximum of 5 patients."[8]

b. The Michigan Medical Marijuana Facilities Licenses Act (MMFLA), MCL 3332701 *et seq*., created a licensing, regulation, and tracking system for medical marijuana in Michigan. It was

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[5] *See One In Seven U.S. Adults Used Marijuana in 2017*, Linda Carroll, https://www.reuters.com/article/us-health-marijuna-us-adults/one-in-seven-us-adults-used-marijuana-in-2017-idUSKCN1LC2B7.

[6] *See Marijuana Use Up Among Workers; Opioid Use Down*, Roy Maurer, https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/marijuana-use-up-among-workers-opioid-use-down.aspx.

[7] *See id.*

[8] *See Michigan Medical Marijuana Laws*, https://www.medicalmarijuana.com/law/michigan-medical-marijuana-laws/.

approved on September 21, 2016 and made effective December 20, 2016. The MMFLA allows for five categories of licensed medical marijuana businesses including growers, processors, secured transporters, provisioning centers, and safety compliance. However, licensees must also have municipal approval before operations begin.

2. Recreational marijuana in Michigan.

   a. The Michigan Regulation and Taxation of Marijuana Act (MRTMA) was passed by the voters of the state of Michigan on November 6, 2018 and became law on December 6, 2018. The MRTMA legalized the use, possession and transfer of recreational marijuana by persons 21 and older in Michigan.

3. The projected marijuana industry in Michigan is expected to exceed 700 million dollars.[9]

C. What are employer's rights with regard to maintaining a zero-tolerance policy?

1. Neither the MMMA, MMFLA, nor the MRTMA require employers to allow marijuana use in the workplace.

   a. MMMA, MCL 333.26427, states that "An employer is not required to accommodate the ingestion of marijuana in any workplace or any employee working under the influence of marijuana." However, it then states that qualifying patients may not be subject to "penalty in any manner, or denied any right or privilege … or disciplinary action by a business … for the medical use of marijuana."

[9] *See Michigan Awards First Medical Marijuana Licenses*, Kathleen Gray, https://www.freep.com/story/news/marijuana/2018/07/12/medical-marijuana-michigan/779840002/.

b. This contradiction was addressed in *Casias v Wal-Mart Stores, Inc*, 764 F Supp2d 914, February 11, 2011, which held that "the MMMA does address—potential state prosecution or other potential adverse state action—the MMMA says nothing about private employment rights. Nowhere does the MMMA state that the statute regulates private employment, that private employees are protected from disciplinary action should they use medical marijuana, or that private employers must accommodate the use of medical marijuana outside of the workplace."

c. In 2014, the Michigan Court of Appeals held for the employees stating that the employees were not disqualified for benefits when they possessed valid medical marijuana cards, did not refuse to take drug tests and there was no evidence that they consumed marijuana or were under the influence in the workplace. *Braska v Challenge Mfg Co*, 307 Mich App 340 (2014). The Court distinguished this case from *Casias*, stating that the *Braska* case involved *state action* as opposed to a *private employer action*.

d. The MRTMA does not require an employer to "permit or accommodate conduct otherwise allowed by this act in any workplace or on the employer's property;" nor does it "prohibit an employer from disciplining an employee for a workplace drug policy or working under the influence of marijuana." In addition, the act does not "prevent an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person because of that person's violation of a work-place drug policy or because that person was working under the influence of marijuana." MCL 333.27954(3).

e. Therefore, employers are still within their rights to refuse to allow marijuana consumption by employees and to take adverse employment action if such prohibitions are violated.

2. Most recent Michigan Court of Appeals case.

a. One Michigan employee recently challenged such an adverse employment action based on marijuana use.[10] The employee challenged a potential employer's decision to rescinded a job offer after she tested positive for marijuana (she had a medical marijuana card as required under state law). Again, dealing with the state as the employer, the court held that the MMMA "does not create affirmative rights but instead provides immunity from penalties and the denial of rights or privileges based on the medical use of marijuana…." and "does not provide an independent right protecting the medical use of marijuana in all circumstances, nor does it create a protected class for users of medical marijuana." [11]

D. Is a zero-tolerance policy right for your company?

1. The growing number of American marijuana users paired with a competitive market and low unemployment rates means that a zero-tolerance policy will reduce the pool of candidates. Large companies are taking this into consideration. For example, Target has "stopped across-the-board screening and instead began focusing only on safety-sensitive positions such as security guards and warehouse machinery operators."[12] Meanwhile, Kroger, has "narrowed its drug screens to

[10] *See Eplee v City of Lansing,* 2019 WL 691699, (unpublished opinion, Court of Appeals, Docket No. 342404, February 19, 2019); *Medical Marijuana User Loses Workplace Case in Court of Appeals*, Kathleen Gray, https://www.freep.com/story/news/marijuana/2019/02/20/medical-marijuana-workplace/2931942002/.

[11] *Id.* at 9–10.

[12] *See Marijuana Use Up Among Workers; Opioid Use Down*, Roy Maurer, https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/marijuana-use-up-among-workers-opioid-use-down.aspx.

just one-fifth of its job candidates, including managers and pharmacy workers."[13]

2. Some industries may be more prone to substance abuse problems.

    a. Food preparation and service, construction, extraction, health care, health care support, personal care, transportation and manufacturing.

    b. Healthcare has heightened opioid abuse vulnerability due to easy access.

3. Safety considerations.

    a. An employer will need to evaluate the safety risks to its workforce if anything less than a zero-tolerance policy is being considered. This is an industry-specific analysis.

4. Public image and the progressive workplace.

    a. More employers are feeling pressure to stray from the traditional zero-tolerance policy based on public perception and the growing wave of marijuana support across the country.

5. Comparisons with off-duty use and alcohol.

    a. Some employers feel that they are creating a double standard, pitting employees who choose to imbibe alcohol in their off-duty time against those that ingest marijuana off-the-job.

E. Coming technologies for real-time marijuana use testing.

1. As legalization of marijuana continues to expand across the country, law makers and law enforcement are growing more concerned about real-time impairment. Tests are being created and research to determine actual impairment of drivers, similar to breathalyzers and field sobriety tests for alcohol. Such tests could prove applicable for

[13] *See id.*

employers seeking to test for real-time, on-the-job impairment as opposed to prior use of marijuana.

a. Currently, law enforcement has to rely largely on field sobriety tests and general observations in order to determine marijuana impairment, however, several technologies are currently in development.

i. The marijuana breathalyzer: designed to detect THC on an individual's breath.[14] According to one manufacturer, Hound Labs, THC only stays in breath during the "peak window of impairment," or one to two hours after smoking or consuming marijuana.[15]

ii. The saliva test: less likely to indicate actual impairment, but still being considered by law enforcement. [16]

F. What to consider in crafting your Substance Abuse Policy.

1. The challenges of lawful and unlawful substance abuse.

a. ADA and FMLA protections for legal vs. illegal use.

b. An employee is not protected by the ADA for marijuana use, even when prescribed by a physician due to the fact that marijuana is still illegal under federal law (but state laws vary).

c. Recovering and recovered substance abusers may be considered "disabled".

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[14] *See The Pot Breathalyzer Is Here. Maybe,* https://www.npr.org/2018/08/04/634992695/the-pot-breathalyzer-is-here-maybe; *Marijuana Breathalyzer Aims to Detect High Drivers 'Without Unjustly Accusing', Lilly* Price, https://www.cnbc.com/2018/08/07/marijuana-breathalyzer-test-aims-to-detect-drivers-who-are-high.html

[15] *See id.*

[16] *See Roadside Saliva Testing for Marijuana Use Gets House Hearing in Michigan*, Rick Thompson, https://www.safeaccessnow.org/roadside_saliva_testing_for_marijuana_use_gets_house_hearing_in_michigan.

i. As such, leaves of absence for treatment could be considered a reasonable accommodation.

d. There is potential for a claim under the Michigan Persons with Disabilities Civil Rights Act, although there is no specific accommodation provision.

2. Other state and federal laws that may be implicated.

a. Employers in multiple states must know all state and local laws.

b. ADA and FMLA may be implicated when substances are lawfully used. However, marijuana is still unlawful under federal law.

c. There are no employee protections for illegal drugs or misuse of lawfully prescribed drugs.

G. What to include in crafting your Substance Abuse Policy.

1. Prohibition on use of intoxicating substances while on duty, including:

a. Alcohol.

b. Illegal drugs.

c. Certain legal drugs (marijuana).

d. OTC and prescription drugs that could impair performance and affect safety.

2. Drug testing requirements.

a. Pre-employment.

b. Random testing.

c. Post injury or accident (**upon reasonable suspicion**).[17]

d. As required by law (for example, under certain state Workers' Compensation laws or the U.S. Department of Transportation requirements).

e. Consequences of refusing to submit to testing or positive test results.

3. The company's right to inspect/privacy expectations.

4. Rehabilitation assistance (if offered) and reinstatement.

a. Information regarding the company Employee Assistance Programs.

b. Resources regarding substance abuse programs.

c. Return to work, probationary periods, and other reinstatement requirements

III. SMOKING, VAPING & FRIENDLY FRAGRANCE POLICIES

A. Smoking and the current state of the law.

1. Federal Law.

a. It used to be that many businesses allowed workers to smoke indoors. However, those days are long gone, and now you will be hard-pressed to find any public building that allows people to smoke inside. While there are no federal laws regarding smoking tobacco in the workplace, many states have picked up the slack and have instituted their own laws on the subject. You

[17] *See* https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11 (Permitting "Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries."); *see also* https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/osha-clarifies-when-post-accident-drug-testing-is-permitted.aspx.

should check the laws in whatever state you reside to make sure everyone working for you is protected.

2. Michigan.

a. Amendments to the Michigan Clean Indoor Air Act ("Act") that became effective on May 1, 2010, require that all employers prohibit smoking of "any substance that contains a tobacco product in all public and private enclosed indoor places of employment."[18]

b. The Act also requires that employers:

i. "Clearly and conspicuously post "No Smoking" signs or the international no smoking symbol where smoking is prohibited, including at the entrances to buildings or work places.

ii. Remove all ashtrays and smoking paraphernalia from all areas where smoking is prohibited.

iii. Ask any person smoking in violation of the Act to stop and, if they refuse, request the violator to leave, as well as inform them that they are in violation of state law and subject to penalties, and refuse to serve the violator."[19]

B. Drafting effective smoking policies.

1. "Cigarette smoking is the leading cause of illness and death in the U.S. In a study of U.S. adults, results showed 19.6% of workers smoked overall. Current cigarette smoking was highest among the following groups: Workers with less than a high school education (28.4%), Workers with no health insurance (28.6%), Workers living below the

[18] *See Michigan's New Law Banning Smoking in the Workplace*, https://saginawchamberleadingbusiness.wordpress.com/2010/06/18/michigan%E2%80%99s-new-law-banning-smoking-including-in/

[19] *Id.*

federal poverty level (27.7%), Workers aged 18–24 years (23.8%). Cigarette smoking by industry ranged from 9.7% in education services to 30.0% in mining. For occupations, smoking ranged from 8.7% in education, training, and library to 31.4% in construction and extraction. Of an estimated 19 million workers in healthcare and social assistance, 16% reported cigarette smoking, while 25.9% of an estimated 9.3 million workers reported smoking in the accommodation and food services." [20]

a. Of all smokers in the workplace, approximately 22.8% were men and 18.3% were women.[21]

b. Even with growing smoke-free workplaces and policies, one in ten U.S. workers report "regular exposure to secondhand smoke while at work."[22]

2. Accordingly, the National Institute for Occupational Safety and Health (NIOSH) recommends that employers take the numerous actions related to employee tobacco use:

a. "Establish and maintain smoke-free workplaces that protect those in workplaces from involuntary, secondhand exposures to tobacco smoke and air borne emissions from e-cigarettes and other electronic nicotine delivery systems. Smoke-free workplaces should be established in concert with tobacco cessation support programs. Smoke-free zones should include:

i. all indoor areas without exceptions (i.e., no indoor smoking areas of any kind, even if separately enclosed and/or ventilated).

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[20] *Tobacco Smoking: Smoking by Industry, Occupation, & Gender*, The National Institute for Occupational Safety and Health (NIOSH) https://www.cdc.gov/niosh/topics/tobacco/tobaccosmoking.html

[21] *Id.*

[22] *Id.*

ii. all areas immediately outside building entrances and air intakes.

iii. all work vehicles.[23]

b. Given available data on the safety of exposure to e-cigarette emissions, these products should be included in indoor smoking policies.

c. Establish and maintain entirely tobacco-free workplaces, allowing no use of any tobacco products across the entire workplace campus.

d. Comply with current OSHA and MSHA regulations that prohibit or limit smoking, smoking materials, and/or use of other tobacco products in work areas characterized by the presence of explosive or highly flammable materials or potential exposure to toxic materials.

e. Provide information on tobacco-related health risks and on benefits of quitting to all employees and other workers at the worksite (e.g., contractors and volunteers).

f. Provide information on employer-provided and publicly available tobacco cessation services to all employees and other workers at the worksite (e.g., contractors and volunteers).

g. Offer and promote comprehensive tobacco cessation support to all tobacco-using workers and, where feasible, to their dependents. Provide employer-sponsored cessation programs at no cost or subsidize cessation programs for lower-wage workers to enhance the likelihood of their participation.

h. Develop, implement, and modify tobacco-related policies, interventions, and controls in a stepwise and participatory

[23] *Id.*

manner. Get input from employees, labor representatives, line management, occupational safety/health and wellness staff, and human resources professionals.

i. Make sure that any differential employment benefits policies that are based on tobacco use or participation in tobacco cessation programs are designed with a primary intent to improve worker health and comply with all applicable federal, state, and local laws and regulations.

j. Ensure that all workers (smokers and nonsmokers) are aware of the occupational safety and health risks associated with their work, including those that can be made worse by personal tobacco use, and how to limit those risks."

C. Vaping in the workplace – considerations.

1. Approximately 11 million adults use e-cigarettes.[24] Although many sources state that e-cigarettes are safer than cigarettes, they are still not safe. In fact, they are considered a gateway into smoking, especially for teens and those that have never smoked.

2. "The Food and Drug Administration (FDA) has issued a proposed rule that would extend the agency's tobacco authority to cover additional products that meet the legal definition of a tobacco product, such as e-cigarettes. FDA's Extending Authorities to Additional Tobacco Products webpage offers more information on the proposed rule."[25]

3. While some of states have passed anti-vaping laws, Michigan has yet to formally address the issue.

4. More and more employers are opting to apply the same rules to vaping

[24] *See 3 Things to Know about Workplace Smoking Policies for Vaping*, Jessie Saul, https://www.theexprogram.com/resources/blog/workplace-smoking-policy-vaping/.

[25] *See Vaping in the Workplace: Do You Need a Policy on E-Cigarettes?* https://www.aseonline.org/News/Articles/ArtMID/628/ArticleID/161/Vaping-in-the-Workplace-Do-You-Need-a-Policy-on-E-Cigarettes

as apply to smoking cigarettes.

a. "Productivity lost during smoke breaks accounts for approximately $3,077 in losses per year per smoker, based on an estimate of 5 smoke breaks throughout the workday."[26] This figure could be even higher for vaping.

b. Heath concerns still exist with vaping, contrary to popular belief.

D. The friendly fragrance policy – more than just a courtesy.

1. A reasonable accommodation under the ADA?

a. If someone with a fragrance sensitivity asks for a fragrance policy to be implemented in the workplace, the request should be evaluated as a reasonable accommodation under the Americans with Disabilities Act (ADA).

b. Although the request may not appear to be related to a disability at first blush, the employer should take the request seriously, even if an accommodation isn't readily apparent or available.

c. The employer should engage in the interactive process with the employee to see if a reasonable accommodation is possible without posing an undue hardship on the employer.

2. Allergies and Other Medical Reasons.[27]

a. Employers should remember that requests for friendly fragrance policies may be related to underlying medical conditions.

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[26] *See 3 Things to Know about Workplace Smoking Policies for Vaping*, Jessie Saul, https://www.theexprogram.com/resources/blog/workplace-smoking-policy-vaping/.

[27] *See How to Tell Employees Not to Wear Excessive Perfume*, Colleen Reinhart, https://smallbusiness.chron.com/tell-employees-not-wear-excessive-perfume-17615.html

("Some reactions, like shortness of breath, are particularly severe for people with preexisting respiratory conditions, such as asthma and chronic obstructive pulmonary disease.").

b. Inquiries should be limited accordingly so that the employee is not being interrogated about his or her medical condition, but rather the accommodation they are seeking.

3. Encouraging sensitivity and flexibility.

a. Even if not for a disability related reason, friendly fragrance policies can be incorporated into overall appearance and hygiene policies.

b. Employees should be educated as to how their personal grooming and hygiene practices may affect others in the workplace.[28]

IV. VIOLENCE PREVENTION, GUNS AND OTHER WEAPONS IN THE WORKPLACE

A. Balancing violence prevention with employee rights.

1. The Michigan Constitution proclaims "Every person has a right to keep and bear arms for the defense of himself and the state." Mich. Const 1963, Art 1, §6.

2. Concealed pistol license – state of the law in Michigan.

a. "It is the intent of the legislature to create a standardized system for issuing concealed pistol licenses to … allow law abiding residents to obtain a license to carry a concealed pistol, and to prescribe the rights and responsibilities of individuals

[28] *See id.* ("Sit down with the worker and discuss the sensitivities that some people have to artificially scented products. If the employee is wearing excessive amounts of product regularly, it's unlikely they have encountered someone with such a problem previously. Explain that perfumes can cause sniffling, dizziness, headaches, nausea and breathing problems for other workers . . . Tell employees that perfumes aren't necessarily the only culprit. Heavily scented makeups, soaps, shampoos and even laundry detergents cause problems for some people. If you're clear about this fact, a worker who likes fragrant soaps can't make the mistake of thinking she's fine just because she doesn't use scented sprays. Educate your workforce on how to find products without heavy scents. Look for "parfum" or "fragrance" in cosmetic ingredient lists, even when a product is labeled "unscented." . . . When a direct conversation isn't the best course forward - perhaps there are multiple offenders during pumpkin spice product season - send a scent-free workplace memo to remind employees of any basic guidelines.).

who have obtained a license to carry a concealed pistol." MCL 28.421a. In fact, Michigan is an "open-carry" state, whereby citizens do not need a license to carry a firearm openly (so long as the firearm has been legally obtained) *See Combs v City of Birmingham*, 2013 U.S. Dist. LEXIS 124335 (ED Mich., August 30, 2013).

b. The Michigan Firearms Act, MCL 28.421 *et seq*., regulates the carrying of firearms, including concealed pistols.

c. Approximately 1 in 12 Michigan residents carry a concealed weapon.[29] To obtain a concealed pistol license, you must be 21 years old, a United States citizen or legal alien, a legal resident of Michigan who has resided in Michigan for at least six months before applying for a CPL (with certain exceptions), and have completed a pistol safety training course. MCL 28.425b(7)(a)–(c).

d. A licensee is permitted to "carry a pistol concealed ***on or about his or her person*** anywhere in this state . . . [and to] carry a pistol in a **vehicle**, whether concealed or not, anywhere in this state." MCL 28.425c(3)(a)–(b).

3. The "Pistol Free Zone".

a. There are certain areas where a concealed weapon is not permitted, including schools, sport arenas, hospitals, bars, etc. A person's workplace is not explicitly included as a "pistol free zone" in the statue.

[29] *See Where Can You Carry a Gun in Michigan? It's Complicated*, Ron Frenchhttps://www.grandhaventribune.com/State/2018/02/21/Where-can-you-carry-a-gun-in-Michigan-It-s-complicated ("According to the most recent data from the Michigan State Police, 617,000 Michigan residents age 21 or older have a concealed carry license. That's one in 11.7 adults across the state. The rate ranges from one in every 6.7 adults in Keweenaw County in the Upper Peninsula, to one in every 19.5 adults in Kent County.")

b. However, an employer who is not necessarily a designated "pistol free zone" can prohibit an employee from carrying a concealed pistol in "the course of his or her employment". MCL 425n(2)(a)–(b).

c. What about employer parking lots? Much would depend on whether they are accessible to the public at large or just employees. However, an employer can likely prohibit the pistol if the employee is in a company-owned vehicle when the employee is in the course of his or her employment.

d. While the Sixth Circuit has held that an employer need not have a written policy prohibiting the employee from carrying a concealed pistol, *Hoven v. Walgreen Co*, 751 F3d 778, 786 at fn 3 (CA 6, 2014), it is always best to include important policies in a written handbook or other manual distributed to employees.

B. Workplace violence statistics.

1. Workplace violence is a "growing concern for employers and employees," according to OSHA. According to the Bureau of Labor Statistics, in 2016, workplace homicides increased by 83 cases to 500, the highest homicide figure since 2010.[30]

2. According to OSHA, approximately 2 million workers are victims of workplace violence each year.[31]

3. OSHA recommends that "The employer [] establish a workplace violence prevention program or incorporate the information into an existing accident prevention program, employee handbook or manual of standard operating procedures."[32]

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[30] *See Workplace Violence: Steps for Prevention*, https://www.safetyandhealthmagazine.com/articles/17596-workplace-violence-steps-for-prevention

[31] *Id.*

[32] *Id.*

C. Violence Prevention: Policies and Training.

1. Drafting comprehensive violence prevention policies.

a. Must address all prohibited conduct, including threats and intimidation.

b. List items deemed "weapons" by employer.

c. Provide carve-out and exceptions, if any.

i. Required as part of the job?

ii. Potential weapons.

iii. Company or personal vehicles?

d. Detail consequences for violations.

2. Training and drills.

a. Much like active-shooter drills in schools, more and workplaces are seeing the benefits of including response drill as part of their prevention plan.

V. CONCLUSION

A. The workplace is ever-evolving and it important for employers to stay current on developments in employment law, including changes to employer and employee rights. At times this means balancing company values with those more progressive workplace attributes most valued by the workforce.

B. Although the law may be clear as to certain things that can be banned in the workplace, the changing climate has created other "gray areas." It is always important to analyze new issues outside of the vacuum and consider whether other laws and protections may be at play before taking definitive action.

C. Protecting the safety of employees in the most important priority for employers. This involves a careful weighing of employee rights and the goals of creating a safe and healthy environment for all employees. Prevention is

always the best avenue and policies, trainings, and drills can help to prepare employers for the worst.

FORM I-9 COMPLIANCE AND UPDATES

By: John MacKenzie, Esq.

I. FORM I-9 AUDIT AND INSPECTION UPDATES

A. Immigration and Nationality Act

1. Section 274A (b) of the Immigration and Nationality Act (INA), codified in 8 U.S.C. § 1324a (b), requires employers to verify the identity and employment eligibility of all individuals hired in the United States after November 6, 1986.

2. 8 C.F.R. § 274a.2 designates the Employment Eligibility Verification Form I-9 (Form I-9) as the means of documenting this verification.

3. The employer must ensure that the individual properly completes the following:

   a. Completes section 1 - "Employee Information and Verification" - on the Form I-9 at the time of hire and signs the attestation with a handwritten or electronic signature; and

   b. Present to the employer documentation establishing his or her identity and employment authorization.

4. Within three business days of the hire, an employer must complete the following:

   a. Physically examine the documentation presented by the individual establishing identity and employment authorization and ensure that the documents presented appear to be genuine and to relate to the individual; and

   b. Complete section 2 - "Employer Review and Verification" - on the Form I-9 within three business days of the hire and sign the attestation with a handwritten signature or electronic signature.

5. Employers are required to maintain for inspection original Forms I-9 for all current employees.

6. For former employees, retention of Forms I-9 are required for a period of at least three years from the date of hire or for one year after the employee is no longer employed, whichever is longer.

B. 2018 ICE Audit Surge - https://www.ice.gov/news/releases/ice-worksite-enforcement-investigations-fy18-surge

1. Immigration and Customs Enforcement ("ICE") opened 6,848 worksite investigations compared to 1,691 in 2017;

2. ICE initiated 5,981 I-9 audits in 2018, compared to 1,360 in 2017;

3. ICE made 779 criminal and 1,525 administrative worksite-related arrests IN 2018, compared to 139 and 172 in 2017,

4. All of the above statistics surged by 300 to 750 percent from 2017 to 2018.

5. U.S. businesses were ordered to pay more than $10.2 million in fines as a result of Form I-9 violations.

6. Home Land Security ("HSI") Executive Associate Director, Derek Benner, made recent statements indicating the ICE's Form I-9 inspections will continue to be a priority in the future:

a. "Reducing illegal employment helps build another layer of border security, and reduces the continuum of crime that illegal labor facilitates, from the human smuggling networks that facilitate illegal border crossings to the associated collateral crimes, like identity theft, document and benefit fraud and worker exploitation."

b. "Employers who use an illegal workforce as part of their business model put businesses that do follow the law at a competitive disadvantage. HSI is committed to upholding the laws that govern worksite enforcement. These laws help protect

jobs for U.S. citizens and others who are lawfully employed, reduce the incentive of illegal migration, eliminate unfair competitive advantages for companies that hire an illegal workforce, and ultimately help strengthen public safety and national security."

c. HSI's worksite enforcement strategy continues to focus on the criminal prosecution of employers who knowingly break the law, and the use of I-9 audits and civil fines to encourage compliance with the law.

C. 2018 Big Raids

1. In April 2018, HSI executed a federal search warrant at a slaughterhouse in Bean Station, Tennessee, and arrested 104 aliens on immigration violations. The owner of the company pled guilty to tax fraud, wire fraud and employing illegal aliens. He faces various prison time and fines, and he has agreed to pay $1.4 million in restitution before his sentencing.

2. In August 2018, HSI executed a series of criminal arrest warrants for 17 individuals connected to an alleged criminal conspiracy to exploit illegal alien laborers for profit, fraud, wire fraud and money laundering, and served search warrants for worksite violations at agricultural firms in Nebraska, Minnesota and Nevada.

3. In August 2018, HSI executed criminal search warrants at a trailer manufacturer in Sumner, Texas, and arrested 160 people on immigration violations, many who were using stolen identities of U.S. citizens.

D. Tips for compliance and inspections

1. Implement a system as part of the hiring process that includes full completion of Form I-9 for each new hire.

a. Be sure that Section 1 is completed by the employee on the date of hire and Section 2 is completed by the employer within three days of the date of hire.

b. We often see Form I-9s that are only partially completed and then fall through the cracks. This often results in fines being incurred during an ICE inspection.

2. Incorporate a calendaring system to re-verify employees working on temporary authorizations.

a. Employers often forget to re-verify employees. For example, if you have an employee that has been working pursuant to a temporary work authorization that is renewed yearly for the last ten years, but you only completed a Form I-9 on the initial hire date, then you will be cited for nine violations for that employee and fined accordingly during an ICE inspection.

b. Currently, we are seeing several employment authorizations not being renewed or taking several months, leaving the employee in an expired state. This may subject you to a significant fine for a knowing violation for employing an unauthorized alien.

3. Organized records

a. Each employee should have a folder with the Form I-9 and copies of the identifying documents used in Section 2.

4. Yearly audits

a. All of your Form I-9 records should be reviewed at least once yearly to ensure you are remaining compliant. This will avoid significant fines and alleviate substantial stress

if/when you receive that Notice of Inspection ("NOI") from ICE.

5. Responsive documents to an ICE NOI must be properly reviewed before producing and organized.

6. Do not consent to an immediate inspection if ICE agents show up without warning. You have up to three days to respond to an NOI.

7. Carefully review the NOI and only produce exactly what is asked for. Caution – ICE may fine you for Form I-9 violations even if you accidentally produce Form I-9 records outside the scope of the NOI.

E. Types of Violations

1. Procedural / Technical (terms are used interchangeably)

a. Minor violations that do not prohibit ICE from determining the employment eligibility status of the employee.

b. Common technical violations include the following (this list is not exhaustive, but includes common examples):

i. Use of the Spanish version of the I-9, except in Puerto Rico;

ii. Failure to ensure an individual provides her maiden name, address, or birth date in Section 1;

iii. Failure to ensure a Lawful Permanent Resident or alien authorized to work provides his alien number ("A" Number) in Section 1 of the I-9 (it will be technical only if the "A" Number is provided in Sections 2 or 3 of the Form I-9 or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection);

iv. Failure to ensure the individual dates Section 1 at the time employment begins;

v. Failure to ensure a preparer and/or translator provide his or her name, address, signature, or date;

vi. Failure to provide the document title, identification number(s) and/or expiration date(s) of a proper List A document or proper List B and List C documents in Section 2 or 3, **but only if a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection**;

vii. Failure to provide the title, business name and address in Section 2;

viii. Failure to state "Individual underage 18" in Column B, for employees under the age of 18 using only a List C document; and

ix. Failure to provide the date of rehire in Section 3.

c. When technical or procedural violations are found, an employer is given ten business days to make corrections.

d. If corrections are properly made within the ten-day period, the violations will not be fined. However, uncorrected technical or procedural violations will be deemed substantive violations and subject to fines.

e. In situations where the employee cannot be located to make the correction, a written explanation should be provided to ICE as to why the correction cannot be made. If ICE determines that the explanation is reasonable, it may avoid a fine.

2. Substantive violations

a. Violations that prevent ICE from determining the employment eligibility status of the employee.

b. Common substantive violations include the following (this list is not exhaustive, but includes common examples):

i. Failure to timely prepare or present the I-9;

ii. Failure to ensure that the individual provides his or her printed name in Section 1 of the Form I-9;

iii. Failure to ensure the individual checks a box in Section 1 of the Form I-9 attesting to whether he is a citizen or national of the United States, a lawful permanent resident (LPR), or an alien authorized to work until a specified date, or checking multiple boxes;

iv. Failure to ensure an LPR or alien authorized to work provides his or her "A" Number in Section 1 of the Form I-9 (only applies if the "A" Number is not provided in Sections 2 or 3 of the Form I-9 or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection);

v. Failure to ensure the individual signs the attestation in Section 1;

vi. Failure to complete Section 2 within 3 business days of hire;

vii. Failure to review and verify a proper List A document or proper List B or List C documents in Section 2 or Section 3;

viii. Failure to provide the document title, identification number(s) and/or expiration date(s) of a proper List A or proper List B and List C documents in

Section 2 or 3, unless a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection;

ix. Failure to provide the date employment begins in Section 2 of the I-9;

x. Failure to sign the attestation in Section 2 of the Form I-9;

xi. Failure on the part of the employer to print his/her name in the attestation portion of Section 2;

xii. Failure to date Section 2 of the Form I-9;

xiii. Failure to date Section 2 within three business days of the date the individual begins employment;

xiv. Failure to sign Section 3 of the Form I-9;

xv. Failure to date Section 3 of the Form I-9; and

xvi. Failure to date Section 3 of the Form I-9 not later than the date of the expiration of the work authorization.

c. A ten-day period is not permitted to correct substantive violations.

d. Knowing violation – knowingly hired, or to have knowingly recruited or referred for a fee, an unauthorized alien for employment in the United States or to have knowingly continued to employ an unauthorized alien in the United States.

F. Penalties

1. The five factors that ICE (supposedly) considers when issuing a fine:

a. Size of the business;

b. Good faith effort to comply (not a defense to substantive violations);

c. Seriousness of violation;

d. Whether the violation involved unauthorized workers; and

e. History of previous violations.

2. Substantive verification violations (and uncured technical violations) – fines range from $220 to $2,191 per violation.

a. Aggravating circumstances may increase fine to exceed $2,191 per violation.

b. Examples of aggravating circumstances

i. Large percentages of employee Forms I-9 are non-complaint with 8 CFR 274A

ii. Multiple knowing violations

iii. Repeat offenses

3. Knowingly hire and continuing to employ violations – fines range from $548 to $21,916 per violation (depending on severity), with repeat offenders receiving penalties at the higher end.

G. Defending a post-inspection fine from ICE

1. Substantial Compliance

a. Substantial Compliance is an affirmative defense designed to avoid hardship on a party that does all that can be reasonably expected of it to comply with Form I-9 requirements.

b. Substantial Compliance will not protect an employer if the verification errors could lead to the hiring of unauthorized aliens.

c. To succeed with a Substantial Compliance defense, the following criteria must be met:

i. The use of an INS Form I-9 to determine an employee's identity and employment eligibility;

ii. The employer's or agent's signature in Section 2 under the penalty of perjury;

iii. The employee's signature in Section 1;

iv. In section 1, a check mark or some other means attesting under the penalty of perjury the employee is either a citizen or national of the United States or a lawful permanent resident or an alien authorized to work until specified date; and

v. Some type of information or reference to a document spelled out in Section 2, List A, or Lists B and C must be provided.

2. Good Faith Defense – knowing violations only

a. An employer who shows good faith compliance with the employment verification requirements of 274a.2(b) shall have established a rebuttable affirmative defense that the person or entity has not violated section 274A(a)(1)(A) of the Act with respect to such hiring. At the very least it will serve as a mitigating circumstance.

b. This defense will not apply to paperwork violations (technical and substantive violations discussed above), which includes failure to properly prepare an I-9 form.

3. The Eighth Amendment excessive fines clause

a. A fine that is so excessive that it outweighs the gravitational relationship to the offense it is designed to punish violates the Excessive Fines Clause of the Eighth

Amendment. The question is one of proportionality.

b. Argue the five factors – the size of the business of the employer being charged; the good faith of the employer; the seriousness of the violation; whether or not the individual was an unauthorized alien; and the history of previous violations of the employer.

II. COMPLETING AND CORRECTING FORM I-9

A. Section 1 – employee

1. Every new hire must fill out Section 1.

2. If you or anyone else assists the employee with Section 1, the translator box must be filled-out.

3. Email, phone, and SSN are optional in Section 1.

4. Full name, address, and date of birth are required.

5. Check correct citizenship status box:

a. If employee is on work authorization, expiration date must be provided and Alien Registration Number (or USCIS #).

6. Employee must sign and date on or before first day of working for wages or remuneration.

7. **Caution** – do not forget to complete translator section if you assist the employee with any part of Section 1. ICE agents compare handwriting between Section 1 and Section 2 and it is easy to catch. Failure to follow procedure could subject you to criminal penalties.

B. Section 2 – employer

1. Employer must **physically** review and confirm the identifying information provided by the employee.

a. This means that you must have a practice and procedure in-place to physically inspect and confirm the identifying information for all employees in the employee's presence.

b. Issues arise for remote hires.

c. You may hire an authorized representative, such as a notary, to handle section 2 for remote hires.

2. Person completing section 2 must be person that reviewed identifying information.

3. List A or List B and List C must be properly recorded. For a complete list of appropriate documents, visit https://www.uscis.gov/i-9-central/acceptable-documents.

a. Common list A documents – establishes both identity and employment authorization.

i. Passport

ii. Permanent resident alien card

iii. Employment authorization care

b. Common list B documents – establishes identity only.

i. Driver license

ii. State identification card

iii. Voter identification card

iv. School identification card

c. Common list C documents – establishes employment authorization only.

i. Social security card

ii. Birth certificate

4. You must use your judgment when reviewing the employee's

documentation – if the documentation appears genuine, then accept it as is. If the documentation appears fraudulent, you must request something more or reject the applicant for hire.

5. Employer must record date of hire and sign Section 2 and records date of execution.

C. Section 3 – Re-Verification

1. Required when an employee's work authorization expires (aliens on temporary work authorization) or for rehires that are rehired within three years of completion of original I-9.

2. Must be completed on or before expiration date.

3. Must use most recent Form I-9.

4. Must be completed when employee on temporary work authorization has a name change.

5. US citizens and Lawful Permanent Residents are exempt.

6. Caution – Put a system in place to calendar re-verification dates.

7. Seasonal employees

a. If the seasonal employee has a continuing expectation of employment, then Section 3 nor a new Form I-9 are required when the employee returns to work.

b. If the seasonal employee does not have a continuing expectation of employment, and the rehire is within three years of the original Form I-9, then Section 3 may be used.

c. If the seasonal employee is rehired after three years from original Form I-9, then a new Form I-9 is required.

D. Making corrections to Form I-9

1. Only the employee can correct Section 1.

    a. Reminder – if the employee no longer works for the company and cannot be located, write a note to the file explaining that the defect was recognized, but could not be cured.

2. Use a different color pen and initial all changes.

3. Use a new Form I-9 if necessary, but do not dispose of or destroy old Form I-9s. Simply attach the new revised Form I-9 to the old Form I-9.

4. Do not back date Form I-9s.

5. Note your HR file that you conducted an internal audit and address corrections that were identified, but could not be made. This may avoid a fine and result in leniency from ICE during an inspection.

E. Form I-9 retention requirements

1. For former employees, the employer may destroy employee I-9s three years after date of hire or one year post-termination, whichever is longer.

III. <u>EVERIFY AND FORM I-9</u>

A. E-Verify basics

1. E-Verify is an internet-based system that compares information from Form I-9 (SSN and photo ID) to government records to confirm that an employee is authorized to work in the U.S.

2. E-Verify is not mandatory in Michigan (E-Verify is mandatory in certain states).

3. E-Verify is not a substitute for Form I-9. Rather, it is a safeguard that will provide a presumption of innocence to a knowing violation.

B. E-Verify results and employer options

1. Result is "Employment Authorized"

a. Means that the Form I-9 information matches Department of Homeland Security ("DHS") and Social Security Administration ("SSA") Records.

2. Result is "Tentative Nonconfirmation"

a. Means that the Form I-9 information does not match DHS or SSA records.

3. Employer options if result is "Tentative Noninformation"

a. If the employee contests the result, then the employer may not take any adverse action against the employee until it received a "Final Nonconfirmation" result.

b. If the employee does not contest the result, then the employer may terminate the employee.

IV. HANDLING FORM I-9 DURING MERGERS AND ACQUISITIONS

A. Two Options

1. Treat employee as a "new hire"

a. Employer may choose to treat employees who are continuing their employment with the related, successor, or reorganized employer as new hires and complete a new Form I-9.

b. Employers who choose to complete a new Form I-9 may do so before the merger or acquisition takes place as long as the employer has offered the acquired employee a job and the employee has accepted the offer.

c. The employee must complete Section 1 no later than the first day of employment and the employer or the authorized representative must complete Section 2 within

3 business days of the employee's first day of employment.

d. Employers should enter the effective date of the acquisition or merger as the date each of these employees began employment in Section 2 of their new Form I-9.

2. Treat employee as "continuing employment"

a. Employers may treat the employee as continuing in employment, in which case, employers must obtain and maintain the previously completed Form I-9.

b. **Buyer Beware** - Employers who choose to keep the previously completed Form I-9 **accept responsibility** for any errors or omissions on those forms.

c. **Caution** - Employers should review each Form I-9 with the employee and update or reverify the employee's information, as necessary.

V. WHAT ARE WE SEEING?

A. A significant increase in ICE inspections since January 1, 2018.

B. Large and small scale inspections – companies with 15 employees to several hundred employees.

C. Significant and excessive fines issued by ICE after an inspection is performed.

D. A substantial delay in responses from ICE after a fine is challenged.

E. ICE will negotiate if the fine is properly challenged.

F. ICE's inspection results often include errors or leave the door open for appeal.

G. ICE looks favorably upon companies that are proactive about Form I-9 compliance. It is imperative to conduct annual internal from I-9 audits.

LEAVE LAWS: COMPLIANCE, COORDINATION, AND BEST PRACTICES

By: Stephanie C. Mellin, Esq.

I. LEGALLY REQUIRED LEAVE POLICIES

A. What are the various leave laws?

1. Minimum required under the law and more generous policies.

a. FMLA

b. ADA

c. PMLA

2. Paid and unpaid.

3. Best practices in managing these policies and business reasons for having generous leave policies.

B. Family and Medical Leave Act (FMLA)

1. Covered Employer: employs 50 or more employees within a 75-mile radius of the worksite during a 20 week period of the calendar year or the previous calendar year.

a. This is the TOTAL number of employees, regardless of whether the employees are part-time, temporary, or seasonal.

b. Once an employer meets the requirements of a covered employer they are covered as long as it has 50 or more employees for at least 20 work weeks in the current or previous calendar year.

2. Eligible Employee: works for a covered employer, has worked for at least 12 months and for at least 1250 hours.

a. Historically in Michigan the courts have held that if an employer, regardless of whether it is covered under FMLA, offers FMLA. benefits, it can be subject to FMLA job protection requirements

and notification guidelines. This position may change with a recent DOL opinion which held that states an employee who does not meet FMLA requirements cannot be designated as receiving FMLA benefits.

i. Example: A pregnant employee has been with an employer for 11 months at the time of the birth of her child. She has otherwise met the eligibility requirements for FMLA, except the 12 months of service requirement. The employee takes leave for the birth of her child prior to becoming eligible for FMLA at 11 months of service. One month later, upon reaching 12 months of service, the employee is eligible for 12 weeks of job-protected leave.

ii. This is not the law in Michigan yet, but there is clearly a split in circuits and between the DOL and Michigan's application of the rules.

3. Qualifying Reasons for Leave: Birth or placement of a child for adoption (applies to women and men equally), a serious health condition, to care for certain family members with a serious health condition, qualifying exigency arising out of employee's select family members is a member of the military on covered active duty.

a. Department of Labor Opinion August 28, 2018 – Organ Donation is a Serious Health Condition.

i. The last DOL opinion letter on FMLA was from 2009 and it has issued three in the last year.

ii. Because organ donation requires an overnight stay in a hospital and requires ongoing care.

iii. Even elective surgery that requires overnight stay in a hospital meets the definition of a serious health condition.

b. Seeing a rise in employees using FMLA for treatment and recovery from mental illness and claims for FMLA interference from employers. Important for employers to treat this use of FMLA as any other and maintain confidentiality, and treat it as any other permissible use of FMLA. If there is a concern about the legitimacy of the use of FMLA for a particular reason, follow the procedure of requesting certification no more than every 30 days, apply existing policies uniformly to all employees and keep accurate records.

4. Obligation on the part of an employer to provide timely notice of FMLA eligibility after acquiring knowledge that an employee's leave may be for an FMLA qualifying reason.

   a. 5 days to provide the employee an eligibility notice and rights and responsibilities notice and FMLA designation notice.

   b. An employer's request for medical certification must also be included in the notice of rights and responsibilities.

   c. The employee has 15 days to return the medical certification.

   d. The employer may require, at its own expense, a 2nd and 3rd opinion if there are concerns about the validity of the certification. The 3rd opinion is permissible when the 1st and 2nd opinion differ.

   e. If the employee fails to produce a medical certification, the leave is not considered protected under FMLA.

      i. Employers risk exposing themselves to FMLA interference claims by failing to timely provide an eligibility determination.

5. Coordination of other leaves with FMLA.

a. FMLA is not required to be paid. Employers may be more generous than the minimum requirement of the law and pay employees for some or all of an FMLA leave.

b. Employers are also allowed to require that other paid leave run concurrently with FMLA.

    i. Employers must be careful to apply the standard uniformly.

        (a) Example: If a female employee receives 6 weeks of paid FMLA leave after the birth of a child, the employer should also extend that same benefit to another employee who uses FMLA for a different, qualifying reason, or a male employee who is using FMLA to bond with a newborn child.

c. Employers should have a return to work policy.

    i. This is not required under FMLA, but is permitted.

    ii. This sub-policy to FMLA and other leave polices allows employers the option to require workers to provide certification from their health care provider of their ability to return to work – and perform the essential functions of their job

        (a) Employers should have job descriptions that contain the essential job functions for a position. Being able to provide this to an employee to give their physician to review in determining the employee's ability to return to work is also a good idea, as job titles sometimes do not reflect all of the duties an employee is expected to perform.

            (i) It's important for employers to be careful to only request certification for the health

condition that led the employee to use FMLA leave.

(ii) Employers also want to be careful about requiring an employee obtain a certification to return to "full duty" work. As discussed below, this can get an employer into trouble with ADA compliance.

(iii) If requiring a return to work certification its important to apply the policy uniformly to avoid discrimination or harassment claims.

d. DOL Opinion Letter: Employers may not designate extended job protected leave as FMLA.

i. This is inconsistent with how Michigan courts have applied the law.

ii. March 14, 2019 DOL Opinion Letter.

(a) Some employers are more generous than the requirements of FMLA by allowing employees to exhaust some or all of their paid leave (vacation, PTO, sick time) and extend the period of leave under FMLA.

(b) FMLA allows for other paid leaves to run concurrently with FMLA so that the employee may receive income while on leave. It does not allow for the extension of the period of time that an employee has job-protected leave.

(c) Under FMLA an eligible employee is entitled to 12 weeks of job-protected leave. If an employer chooses to offer another type of leave as its own policy, that is permissible, and it can run

concurrently with FMLA, or start after the 12 weeks has ended, however, an employer must be cognizant that once it becomes aware of an employee's potential eligibility under FMLA, it must be designated as FMLA and the clock starts to run on documentation requirements and failure to follow the notice requirements may constitute an interference, restrains, or denial of the exercise of an employees' FMLA rights.

(d) This is in conflict with the equitable argument that has been accepted in Michigan which allows FMLA to apply to employees who were treated as being eligible but were technically ineligible.

(i) We always caution clients against inadvertently extending FMLA benefits to ineligible employees because if offered they will have to honor those benefits. This new DOL opinion may help Michigan courts change that

(ii) *Dobro's v. Jay Dee Contractors, Inc. 6th Cir.* case holding that in an equitable argument the employer can be prevented from challenging eligibility and entitlement to FMLA benefits. This case is from 2009, so this rule has been in place for 10 years and may soon be challenged with the DOL position letter.

(a) Employee took leave for surgery and recovery from surgery. Employer provided FMLA notices and

documentation and for all purposes treated the lease as FMLA leave and told the employee his job was protected for at least 12 weeks pursuant to FMLA. Upon early return from leave the employee was terminated for the reason his job was eliminated. In the resulting lawsuit the company argued that the employee was not eligible for FMLA protections because it employed fewer than 50 people in 75 mile radius. Court held that because the company offered FMLA benefits it was bound by FMLA requirements.

(b) Note that DOL opinion letters do not carry the same weight as court decisions but courts often use them to guide their decisions.

(e) The DOL opinion letter serves as a reminder of how technical the FMLA is and how little room there is for deviation from its requirements. If there is any deviation, it must be classified as non-FMLA.

(f) The DOL letter specifically states that "neither the employer nor the employee may decline FMLA leave if the leave is needed for an FMLA-qualifying reason."

e. Employers' points-based attendance policies do not violate FMLA

i. August 28, 2018 DOL Opinion Letter

(a) If an employer has an attendance policy that awards points when an employee is late, leaves early, etc. does that violate FMLA?

(i) As long as the point system is applied in a non-discriminatory manner, it is lawful.

(ii) If employees on FMLA are not awarded points because they are taking FMLA – being penalized for taking FMLA, Employers cannot consider using FMLA leave as a "negative factor" in employment actions.

(iii) If employees taking other types of leave are treated similarly, i.e., points "frozen" while on leave, any renewal period calculation is continued upon return to work.

(iv) Employees cannot be treated more favorably for taking FMLA – attendance points cannot be wiped away; best practice is to simply freeze the points system while on leave.

f. Employers can deny an employee who uses FMLA an attendance-based bonus.

i. An employer that has a policy that awards a bonus to employees who meet a certain attendance goal can deny the bonus to an employee who used FMLA leave IF the employer applied the policy uniformly and denied other employees who used an equivalent leave for a reason that does not qualify for FMLA.

ii. The key here is treating similarly situated employees the same when applying policies, and being able to prove this if investigated.

C. Americans with Disability Act (ADA) and Michigan Persons with Disabilities Civil Rights Act.

1. ADA Applies to employers with 15 or more employees.

2. The MI Persons with Disabilities Civil Rights Act applies to all employers in Michigan with 1 or more employees.

    a. Specifically excludes anyone employed in domestic service.

3. Title I of ADA requires covered employers to provide reasonable accommodation to employees/applicants with a disability unless the employer can demonstrate that doing so creates an undue hardship to the employer or poses a direct threat to the safety of the employee or others in the workplace.

    a. Determining what a reasonable accommodation is for a disabled employee requires the employer, employee, and their health care provider to engage in an interactive process to determine what the accommodation would be and whether it would impose an undue hardship/safety issue on the employer.

        i. This interactive process should include an evaluation of whether the employee is disabled for purposes of the ADA

            (a) Definition of disabled has been expanded to include those who are regarded as disabled or have a physical or mental impairment that limits a major life activity.

        ii. Interactive process should also include an evaluation of the essential functions of an employee's job.

            (a) It's important to make sure that the actual essential functions of the job are listed and not non-essential job duties.

            (b) Example: Listing a lifting requirement of 50 lbs. when in practice lifting is limited to 20 lbs.

Especially important if there are other safety rules in place that would contradict the heavier lifting requirement (i.e., a requirement that a lifting equipment be used or a team lift be utilized for items over a certain weight).

(c) Example: Limitation on how long someone can sit. Possible accommodation would be a sit/stand desk or restructuring of responsibilities so the employee can walk periodically during the day.

b. In reviewing possible "reasonable" accommodations under the ADA an employer should look at the cost and the financial stability of the company.

i. According to the EEOC, unreasonable accommodations are those that are "unduly expensive or disruptive, or those that would fundamentally alter the nature or operation of the job or business."

(a) *Johns v. Brennan* 9th Cir. where the court held that the Postal Service did not engage in an interactive process when it determined that the employee's accommodation request was *per se* unreasonable.

(b) McDonald v. UAS-GM Center for Human Resources

(i) The court rejected an employee's claim that the employer violated the ADA by not allowing her to extend her lunch breaks or add a separate 10 minute break so she could work out longer at the on-site gym. The employee did have a genetic disorder that was improved with exercise. When making the request the employee did not mention her disability or indicate that a longer period

of time would help her perform her job. The request was denied and the employee subsequently resubmitted her request with a letter from her physician requesting that the employee be allowed to engage in strengthening exercises daily for 30 to 60 minutes. Before the decision based on the medical documentation was made the employee was disciplined for behavior reasons and ultimate resigned. Employee then sued for discrimination under the ADA. The employer prevailed at both levels of court proceedings. The courts held that the doctor's note was too vague to show a need for an extended lunch break and determined that a decision was never rendered regarding the second request before the employee resigned.

(ii) Takeaway: A case by case analysis of accommodation requests is key for compliance.

c. After determining whether an accommodation will be made, communicate this decision to the employee.

i. It is imperative that employers document the entire process and make sure the decision is documented.

ii. Be aware that a period of leave, or a reduced schedule, but not indefinite leave, is considered to potentially be a reasonable accommodation.

iii. *Hostettler v. Wooster College*

(a) Employee started work 4 months pregnant and negotiated a 12 week unpaid maternity leave (did not qualify for FMLA). Prior to returning she experienced severe post-partum depression and anxiety and received a physician recommendation for a reduced schedule. The employer allowed the reduced schedule and ultimately terminated for the reason that a full-time schedule is an essential function of the job. The lower court sided with Wooster College. The employee appealed and the court found in favor of the employee, holding that "an employer cannot deny a modified work schedule as unreasonable unless the employer can show why the employer needed a full-time schedule. Merely stating that anything less than full-time is per se unreasonable does not relieve the employer of its ADA responsibilities." *Hostettler.*

(b) If an employee uses leave as an accommodation, when the employee returns to work, it's important to require documentation stating that the employee is cleared to return to work and is able to perform their essential job functions.

4. The Michigan Persons with Disabilities Civil Rights Act applies to employers with 1 or more employees in Michigan.

   a. The analysis of reasonable accommodation and interactive process is similar to the ADA, and interestingly, the Michigan statute speaks directly to what is considered to be an undue hardship on employers of various sizes.

i. The law breaks employers down in to categories based on number of employees. Depending on which category the company falls into dictates the cost of the accommodation that will be considered reasonable.

(a) The cost is based on a percentage of the average weekly wage in Michigan.

(b) In 2019 the Michigan Workers' Compensation Agency lists the average weekly wage as $1,022.92.

(i) Example: If an employer has 4-15 employees and is required to purchase equipment for a disabled employee, the reasonableness test would cap the cost of equipment at 1.5 times the average weekly wage or $1,534.48.

(ii) This is a more definitive test than that in the ADA and provides clear guidelines for employers. Whether this is good or bad depends on the situation.

b. Best Practices under the Michigan Persons with Disabilities Civil Rights Act is to engage in the interactive process, document the process, and be aware that the statute contains clear language on reasonable costs of equipment based on the size of the employer. If challenged the disabled employee has the burden of proof of first showing that there was a failure to accommodate. After that showing the employer has the burden of showing an undue hardship. This is where the cost analysis set forth in the statute would come into play.

D. Paid Medical Leave Act

1. Took effect on March 29, 2019.

2. Applies to employers in Michigan with 50 or more employees.

    a. Employees are defined in the statute by their exceptions.

        i. Note: Exempt employees, covered by a CBA, federal employees, employees of another state, employees subject to the Railway Labor Act or Railway Unemployment Insurance Act, employees whose primary work location is not in Michigan, employees who receive a trainee wage under applicable law, temporary employees, variable hour employees, and employees who worked less than 25 hours per week in the preceding calendar year.

        ii. Essentially, covered employees are non-exempt, regular, employees who have averaged at least 25 hours per week during the preceding calendar year.

            (a) Receive a lot of questions about how to handle new employees.

                (i) They are not specifically addressed in the statute. This may be revised in an amendment to the law. At this point there are two approaches we have identified. Under the letter of the law the new employee did not average at least 25 hours during the preceding calendar year and so they arguably are not eligible until they have met that 25 hour average, presumably in the next calendar year.

                (ii) The other approach is to allow new employees who are expected to average 25 hours per week to accrue/receive paid leave

either in the weeks they actually work 25 hours or after a look-back period.

(iii) It's important to apply your approach uniformly.

(iv) Remember that when completing the analysis of whether the employee meets the hourly requirement you will use the "calendar year" and not benefit year. Benefit year could be the employee's anniversary date.

(v) Also, important to remember that eligible employees should start accruing paid leave on the first day of employment, and not starting on the 90th day of employment, if using an introductory period.

II. DISCRETIONARY LEAVE POLICIES

A. What types of policies are out there?

1. Maternity/Parental Leave.

2. Leave of Absence.

3. Paid time off.

B. In addition to legally required leave policies, employers have options for providing additional time off benefits to employees. As the job market becomes increasingly competitive, we are seeing an increase in employers revising their leave policies to entice talent to stay with their organization and to also keep up with competitors in terms of the benefits that are offered.

1. Maternity or Parental Leave.

a. In the United States, parental leave is not required under the law. There is culturally a big push in the past 15 years of increasing work – life balance. Parental leave policies are an excellent example of where companies can show employees they value that balance.

b. Often times employers consider FMLA to be synonymous with maternity leave. While bonding with a child is a covered reason for using FMLA, employers should not end their review of parental leave policies at FMLA eligibility.

c. The younger workforce that is rising through the ranks is demanding more in terms of parental leave options. This means offering competitive maternity leave as well as paternity leave that include compensation while on leave.

    i. Competitive employers are offering enticing leave options that are often times in excess of the 12 weeks that many employees have come to expect as the maximum allowable under FMLA, continued payment of full compensation while on leave, and a change in the culture regarding men utilizing leave.

    ii. These benefits are significant and often the difference between an employee choosing to stay with a company or choosing between two offers.

d. There are often questions regarding how maternity leave and FMLA interact.

    i. As explained earlier, FMLA is a federal law that requires covered employers to provide up to 12 weeks of job-protected unpaid leave to eligible employees. Bonding with a child after birth is a covered reason to use FMLA. Women and men are equally entitled to use FMLA for this purpose.

ii. The EEOC has taken this issue on and has held it an unlawful practice to offer inferior parental leave benefits to male employees.

iii. Maternity/Parental Leave can be offered by any employer, regardless of size.

(a) Employees are not subject to the same protections as under FMLA.

i. If an employer is subject to FMLA, maternity/parental leave can run concurrently for up to 12 weeks.

ii. This is a good place to add value to the benefits package that you offer and retain valuable employees.

iv. Leaves of Absence.

(a) Outside of federally-required leaves such as FMLA, ADA, and USERRA, employers may also provide the benefit of a discretionary leave of absence.

(b) We often see employers look to their leave of absence policy (if they have one) when an employee has exhausted their 12 week FMLA leave and needs additional time from work.

(c) A leave of absence policy is an important policy to have in the employee handbook because it will provide employers something to look to and guidance when faced with an employee who is seeking more leave.

(1) Employers need to take ADA considerations into account.

(a) If faced with a request to extend leave beyond FMLA requirements, the employer must evaluate the request under an ADA framework.

(i) This is the reasonable accommodation analysis that discussed earlier.

(ii) This can be a difficult analysis. Courts have held that a short leave, beyond FMLA leave, could be a reasonable accommodation, but an indefinite or even multi-month leave would remove an employee from the class protected by the ADA.

(2) *Severson v. Heartland Woodcraft.*

(a) Employee took FMLA due to back pain. At the end of FMLA he advised employer that he needed additional time away from work for surgery. Employer terminated employee immediately after end of FMLA and invited employee to reapply when able to perform work. Employee was ready to return several months later but rather than reapply, filed an ADA lawsuit claiming employer failed to provide a reasonable accommodation. Court held that ADA is not a leave of

absence statute and extended months-long leave is not a reasonable accommodation. This decision is from the 7th Circuit, so not controlling in MI, but persuasive.

(3) *Golden v IHA*

(a) This is also a 7th Circuit case that held that a multi-month leave is not a reasonable accommodation under the ADA.

(b) Employee needed additional, indefinite time off beyond FMLA. The employer agreed to provide an additional 4 weeks and terminated the employee after the end of the 4 additional weeks of leave. 7th Circuit held that indefinite leave is not reasonable.

e. These cases are not controlling in Michigan but are persuasive. If the subject of a complaint, the EEOC looks closely at whether the employer was to blame in any breakdown in the interactive process. Best practice is to diligently engage in the process and document each phase of the process to show compliance, and make sure it is an individualized process.

2. We often recommend that employers include an unpaid leave of absence policy that addresses leave beyond other leave programs (FMLA or PTO) and for non-medical reasons. The policy states that it is not job-protected leave, is up to the discretion of the company to determine whether to grant it, requires a specific amount of notice prior to the leave, and addresses how an employee who does not return when expected is handled.

a. Having solid policies that reflect the practices of the company are important in assisting the organization in communicating expectations to employees and having something to fall back on when an action is questioned.

3. Paid Time Off.

a. This is a combination of multiple paid leave policies: sick time, vacation, personal days, floating holidays, and in some cases, legally required Paid Medical Leave.

i. Having a single policy is more convenient for employers and employees to manage.

ii. Studies supporting finding that combined paid leave policy reduces unplanned absences.

b. In the current employment climate there is a valid argument for taking a second look at your PTO policy. The demand for talent is high, and employers are seeing the value in offering competitive time off benefits.

c. We've all heard stories of extreme paid time off policies from startups and tech companies on the West Coast. While not as extreme, the idea of offering an enhanced benefits beyond two weeks and 8 holidays is taking hold across the country in all industries.

i. How a company approaches a PTO policy depends on the workforce, business demands, and the benefit that the company wishes to ultimately realize.

ii. Additionally, having a generous PTO policy can alleviate a companies' need to have multiple statutorily required policies for paid leave, such as PMLA in Michigan. A covered employer is presumed to be compliant if it offers

the minimum required by the PMLA under a different paid leave policy.

d. Employees' desire for more flexibility in their time off options spans generations within the workforce. After the lean recession years employees want a balance between work and play.

e. Other than the amount of time that an employee receives, employers should also look at their longevity requirements. Employees are more transient, staying in jobs 18-36 months on average. Policies that require certain seniority before using paid time off don't reflect the reality of the current workforce. They also may contradict policies like PMLA that require employees to start accruing paid leave on the first day of employment.

HOW TO PREPARE YOUR ORGANIZATION TO STAY OFF THE EEOC'S TARGET LIST

By: James M. Reid, IV, Esq.

I. OVERVIEW

A. A Brief Overview of the EEOC, Its Process, Recent Statistics, and How It Differs from the Michigan Department of Civil Rights.

B. Recognizing Recent Changes to the Laws, Caselaw, and the Internal Structure of the EEOC.

C. Understanding How These Changes Affect Employers.

D. Tips: Dos and Don'ts to Stay Off the EEOC's Target List.

II. A BRIEF OVERVIEW OF THE EEOC

A. The Equal Employment Opportunity Commission (EEOC) is a federal governmental agency created by the Civil Rights Act of 1964, tasked with interpreting and enforcing Title VII's prohibitions against employment discrimination, harassment, and retaliation.

1. Under the laws enforced by EEOC, it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

2. It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

B. The EEOC's process.

1. EEOC receives a charge from an employee, whether it be discrimination, sexual harassment, hostile work environment, or retaliation.

a. Tip: if an employee requests a copy of their personnel file under Michigan's Bullard Plawecki Act, employers should treat the request as the employee's first step in suing the employer.

i. Employers should take the time to review the personnel file and make sure all other documents are in order in case a lawsuit is filed.

2. Within 10 days, the charge is sent to the employer, along with a request to respond in writing.

a. An employer generally has 30 days to gather the information requested and to submit its position statement and attachments to the EEOC.

i. Tip: It is easy to ask the EEOC for a 30 day extension to respond.

3. The EEOC may investigate by visiting the employer, gathering documents, and interviewing employees.

a. Tip: Onsite investigations and interviews are rare if a detailed position statement is provided.

4. Mediation options are offered by the EEOC during this process.

a. Tip: Don't mediate unless you want to settle or you want to learn more about the employee's potential evidence.

5. The EEOC may give the employee a Notice-of-Right-to-Sue, which allows the employee to file a lawsuit themselves.

a. The employee has a 90 day deadline to file a lawsuit after receiving the Notice-of-Right-to-Sue.

6. If violations are found, the EEOC will try to reach an agreement with the employer.

a. If the two sides cannot reach an agreement, the EEOC can either file a lawsuit on behalf of the employee or give the

employee a Notice-of-Right-to-Sue, so they can file the lawsuit themselves.

i. Tip: The EEOC rarely files a lawsuit.

C. In 2018 the EEOC received 76,418 charges.

1. These litigation statics are for FY 2018 ended September 30, 2018.

2. The EEOC resolved 90,558 charges of discrimination.

a. They secured $505 million for victims.

b. They handled over 519,000 calls, 34,600 emails and more than 200,000 inquiries, reflecting a significant public demand.

D. Data shows that as of FY 2018, retaliation continued to be the most frequently filed charge with the agency, followed by sex, disability and race.

1. The EEOC received 7,609 sexual harassment charges.

a. This is a 13.6% increase from 2017.

2. The charge numbers are as follows:

a. Retaliation: 39,469 (51.6 percent of all charges filed)

b. Sex: 24,655 (32.3 percent)

c. Disability: 24,605 (32.2 percent)

d. Race: 24,600 (32.2 percent)

e. Age: 16,911 (22.1 percent)

f. National Origin: 7,106 (9.3 percent)

g. Color: 3,166 (4.1 percent)

h. Religion: 2,859 (3.7 percent)

i. Equal Pay Act: 1,066 (1.4 percent)

j. Genetic Information: 220 (.3 percent)

i. The total is greater than 100% because some charges allege multiple bases.

3. The EEOC legal staff filed 199 merit-based lawsuits alleging discrimination in 2018. This included:

   a. 117 individual suits, 45 suits involving multiple victims or discriminatory policies, and 37 systemic discrimination cases.

   b. At the end of the fiscal year, the EEOC had 302 cases on its active docket.

   c. The EEOC achieved a successful outcome in 95.7 percent of all district court resolutions.

   d. The EEOC obtained $56.6 million in monetary benefits for victims of sexual harassment.

E. The difference between the EEOC and the Michigan Department of Civil Rights.

1. The EEOC enforces federal law, such as Title VII of the US Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA).

   a. The EEOC takes charges from employees in every state in the United States.

   b. The EEOC has a strong presence in the employment law community.

2. The Michigan Department of Civil Rights investigates and resolves discrimination complaints and works to prevent discrimination through educational programs that promote voluntary compliance with civil rights laws.

   a. Michigan Department of Civil Rights only takes charges from employees in the state of Michigan.

   b. The Michigan Department of Civil Rights enforces two state laws:

      i. The Elliott-Larsen Civil Rights Act #453, Public Acts of 1976, as amended.

(a) Because the Elliott-Larsen Civil Rights Act covers some of the same jurisdictions as Title VII of the US Civil Rights Act of 1964 and the Age Discrimination in Employment Act, the Michigan Department of Civil Rights is also authorized to take and investigate complaints under those acts through an agreement with the EEOC.

ii. The Persons with Disabilities Civil Rights Act #220, Public Acts 1976, as amended.

3. The EEOC and the Michigan Department of Civil Rights often work in tandem with each other.

a. Commonly, if one entity dismissed a claim, the other will do the same.

4. Tips:

a. Federal law only applies to employers with 15 or more employees for Title VII claims, and 20 or more employees for age discrimination claims. The Michigan anti-discrimination law covers employers of any size.

b. With a federal claim, the employee must go through the EEOC first. With a state claim, the employee is not required to go through the EEOC and can go directly to the court to file a lawsuit.

c. The statute of limitations is often longer for state claims than for federal claims. For a federal claim, an employee has either 180-days or 300-days after the discrimination took place to file a charge with the EEOC. In Michigan, the statute of limitations for an employment discrimination claim under the Elliot-Larsen Civil Rights Act is three years. MCL 600.5805(10).

III. <u>RECENT CHANGES IN THE EEOC AND HOW THEY WILL AFFECT EMPLOYERS.</u>

A. The #MeToo Movement has had a significant impact on the EEOC.

1. From 2017 to 2018:

    a. Sexual harassment charges with the EEOC increased by over 12%; the first increase in year-to-year harassment complaints in a decade.

    b. Sexual harassment lawsuits filed by the EEOC increased by 50%.

    c. Total recovery for sexual harassment complainants jumped from $47.5 million to approximately $70 million.

2. With the EEOC receiving significantly more charges of sexual harassment, they are increasing the number of lawsuits filed against employers.

    a. Employers need to take steps to prevent sexual harassment in the workplace.

        i. This includes updating policies, providing training, and creating a safe environment.

    b. When a complaint of sexual harassment is brought to an employer by an employee, the complaint should be handled with the utmost seriousness, care, and diligence.

B. The EEOC has experienced recent, rapid changes in internal culture.

1. On May 15, 2019, Janet Dhillon was sworn in as the new Chair of the U.S. Equal Employment Opportunity Commission (EEOC).

    a. Dhillon replaces Victoria A. Lipnic, who served as Acting Chair since January 2017.

        i. Dhillon was appointed by President Donald J. Trump.

        ii. Previously, Dhillon served as Executive Vice President, General Counsel and Corporate Secretary of JC Penney Company, Inc., and before that, as Senior Vice President, General Counsel and Chief Compliance Officer of US Airways Group, Inc.

b. With senior staff changes, the culture changes too.

i. Under Dhillon's control, the EEOC may choose to take on more or less of one area of discrimination compared to others.

ii. New laws affecting employers may be enacted.

iii. New regulations affecting employers may be enacted.

c. Also, with new staff changes, the depth of knowledge is changed.

i. Tenured staff with experience and knowledge has left and it takes time for new employees to learn their roles and responsibilities.

d. This may lead to changes in how "available" and responsive EEOC is.

C. New EEO-1 reporting requirements.

1. In September 2016, the EEOC approved a revised EEO-1 form that would require private employers and federal contractors that met certain criteria to provide the EEOC with additional data regarding workforce pay and hours worked broken down by job categories, race, ethnicity and sex.

a. This new wage and hour data is intended to assist the EEOC in identifying potential discriminatory compensation practices.

b. In August 2017, the White House Office of Management and Budget indefinitely suspended the pay data reporting requirement.

Some considered it burdensome to collect and an invasion of privacy.

i. Others supported the collection.

c. Several civil rights groups sued to enforce the revised EEO-1 form and on March 4, 2019, a federal court found the stay to be unlawful and ordered the revised EEO-1 form take effect immediately.

The EEOC sought to delay the pay reporting until 2020.

i. At the April 3, 2019 hearing, the EEOC indicated that it could implement the pay reporting component by September 30, 2019.

ii. Their plan was to utilize an outside contractor at a cost in excess of $3 million dollars.

d. On May 3, 2019, the Department of Justice filed a Notice of Appeal in the case; however, no stay has been issued on the district court's ruling.

e. Currently the standard EEO-1 reporting of race, sex, and ethnicity by job category was due May 31, 2019.

2. EEO-1's new reporting requirement's effect on employers.

a. Employers with at least 100 employees and certain federal contractors with 50 or more employees must file a Standard Form 100, Employer Identification Report (EEO-1 Form) annually identifying the number of employees who work for the organization by job category, race, sex, and ethnicity.

b. In the past, employers submitted the EEO-1 Form annually by September 30th reflecting the make-up of their workforce for a designated pay period during the preceding months.

c. The new EEO-1 reporting requirements will have an impact on employers if it continues to stand.

i. EEO-1 filers should be prepared to submit Component 2 data for calendar year 2017, in addition to data for calendar year 2018, by September 30, 2019, in light of

the court's recent decision in *National Women's Law Center, et al., v. Office of Management and Budget, et al.*, Civil Action No. 17-cv-2458 (D.D.C.).

ii. Because of the short timeline and increased amount of data gathering, employers will have more work and costs in order to comply with the requirement.

(a) The new requirements pose significant practical challenges to collect and process the payroll data.

(b) Employers may wish to seek outside vendors to complete the data gathering.

(c) Employers may also wish to seek legal counsel to understand and ensure they are in compliance with the new requirements.

D. Recent Caselaw.

1. Recent caselaw has broadened the scope of Title VII to include sexual orientation and gender identity.

a. Zarda v. Altitude Express, Inc.

i. Gay former employee of a skydiving company brought an action against his employer alleging that he was fired because he failed to conform to male sex stereotypes by referring to his sexual orientation. The former employee argued he was fired in violation of Title VII and New York law.

ii. Although it is well-settled that gender stereotyping violates Title VII's prohibition on discrimination "because of ... sex," the Second Circuit Court of Appeals had previously held that sexual orientation discrimination claims, including claims that being gay or lesbian constitutes nonconformity with a gender stereotype, are not cognizable under Title VII. *See Simonton v. Runyon*,

232 F.3d 33, 35 (2d Cir. 2000); *see also Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–23 (2d Cir. 2005).

iii. However, in *Zarda*, the Second Circuit overturned its previous decisions and found that sexual orientation discrimination is a subset of sex discrimination because it is discrimination "because of … sex"; and therefore, is a violation of Title VII.

iv. On April 22, 2019, the US Supreme Court granted certiorari to hear the case, consolidated with *Bostock v. Clayton County, Georgia*. A final decision on the case should be coming within a year or so from the court.

b. E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.

i. The EEOC brought a Title VII action against an employer alleging that employer fired a transitioning, transgender employee based on gender stereotypes and that employer administered a discriminatory clothing allowance policy.

ii. Employee was terminated from her employment in a funeral home by the owner and operator shortly after the employee informed the owner that she intended to transition from male to female and would represent herself and dress as a woman while at work.

iii. The Sixth Circuit Court of Appeals ruled that "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing [the employee] because she is transgender and transitioning from male to female." *Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018),

cert. granted, *R.G. & G.R. Harris Funeral Homes, Inc.* v. E.E.O.C., 139 S. Ct. 1599 (2019).

iv. On April 22, 2019, the US Supreme Court granted certiorari to hear the case and decide whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender (2) sex stereotyping under *Price Waterhouse v. Hopkins,* 490 U.S. 228, (1989).

c. Fort Bend County, Texas v Davis

i. On June 3, 2019, the United States Supreme Court ruled that Title VII's requirement to file a charge with the EEOC is not jurisdictional*. Fort Bend Cty., Texas v. Davis*, No. 18-525, 2019 WL 2331306, at *2 (U.S. June 3, 2019).

ii. Davis, the plaintiff was an employee of Fort Bend County. In 2010, Davis reported to Fort Bend's human resource department that her boss was sexually harassing her. Davis' boss resigned after the allegations had been reported and was replaced by another supervisor who Davis claims retaliated against her for reporting the sexual harassment. In 2011, Davis submitted a charge to the EEOC asserting claims of harassment and retaliation. While the EEOC charge was pending, Davis was told to report to work on a Sunday. After informing her supervisors that she would be unable to be at work due to a prior commitment at her church, Davis did not show up to work and was fired. Attempting to supplement the allegations in her charge, Davis handwrote "religion" on the "Employment Harms or Actions" part of her intake questionnaire, and she checked boxes for "discharge" and "reasonable accommodation" on that form. She made no change, however, in the formal charge document. A few

months later, the Department of Justice notified Davis of her right to sue.

iii. Davis filed suit in federal district court in 2012. Years into the litigation, Fort Bend asserted for the first time that the District Court lacked jurisdiction to adjudicate Davis' religion-based discrimination claim because she had not stated such a claim in her EEOC charge. Granting the motion, the District Court held that Davis had not satisfied the charge-filing requirement with respect to her claim of religion-based discrimination, and that the requirement qualified as "jurisdictional," which made it nonforfeitable. The 5th Circuit reversed and the Supreme Court granted certiorari on the issue of whether Title VII's charge-filing requirement was jurisdictional.

iv. Justice Ginsburg, writing for the court, ruled that Title VII's charge-filing requirement is mandatory, but not jurisdictional. The court reasoned that the requirement to file a charge with the EEOC was a procedural obligation and "not a jurisdictional prescription delineating the adjudicatory authority of courts." *Fort Bend Cty., Texas v. Davis*, No. 18-525, 2019 WL 2331306, at *6 (U.S. June 3, 2019).

2. The EEOC will enforce laws in accordance with these cases, which broadens the scope of Title VII, which will also broaden employers' liability.

   a. Employers will now be held accountable for sexual orientation and gender identity discrimination and harassment, as well as for any retaliation for reporting discrimination or harassment.

   b. Employers may need to adapt their policies to include prohibitions against sexual orientation and gender identity discrimination and harassment.

c. Any discrimination or harassment based on gender identity or sexual orientation will be a violation of the law and will subject the employer to litigation by the EEOC or a private party.

d. Employers should also be aware of when they need to raise defenses, such as when an employee does not properly file a claim with the EEOC before bringing a lawsuit.

IV. DOS AND DON'TS TO STAY OFF THE EEOC'S TARGET LIST

A. Dos:

1. Stick to the 7 "W" facts:

   a. Who

   b. What

   c. Where

   d. When

   e. Why

   f. Witness

   g. Want (What do you want)

2. In the event of an investigation, follow the 6 "Rs":

   a. Respect: Listen to various perspectives to learn the facts with an open mind.

   b. Restraint: Prevent any unlawful conduct from continuing and disclose information on a need-to-know basis to maintain confidentiality to the extent possible.

   c. Rules: Evaluate application of the handbook.

   d. Respond: Be swift in investigation and taking appropriate remedial action, if necessary.

   e. Record: Document, document, document.

f. (No) Retaliation: Do not take adverse action against complainant (who makes claim in good faith) or witness participating in investigation.

3. Hire an attorney to have the benefit of attorney-client privilege.

a. Other benefits of hiring legal representation:

i. Representation will be able to guide employers through the complicated processes and bureaucracy of the EEOC.

(a) Legal representation will understand the general expectations and requirements of discovery.

(b) Legal representation will know what information to share and with whom.

ii. Representation can assess the strength of your case.

(a) Local benches are more plaintiff friendly.

(b) State court tend to be faster.

(c) Advantageous if witness's timeframe is limited.

(d) Speed varies county to county.

iii. Representation should be able to give an accurate estimate of the possible damages in a case.

(a) This is valuable information when determining whether or not to settle a case.

iv. Knowledgeable representation will be able to prepare air tight position statement using the proper language.

v. Representation can also prepare employers to not use incriminating language.

vi. Representation can appropriately respond and defend if the EEOC decides to rewrite charges.

vii. Counsel will be able to clearly argue your case and its merits.

viii. These cases are often very complex and depended on various factors, which proper counsel will know how to deal with.

ix. Counsel can help to get you the best settlement as possible.

x. Settlements can range from $100 to millions of dollars.

xi. Counsel can also help with other issues such as the publicity of the case.

b. Employment Practice Liability (EPL) Insurance counsel.

i. Companies should consider whether they have or want this insurance.

ii. If employers decide to have this insurance, employers should figure out which deducible plan best suits their needs.

iii. Tip: Maddin Hauser is on the pre-approved list of EPL Insurance counsel.

4. Have comprehensive and effective policies to prevent, manage, and respond to problems that may lead to EEOC charges.

a. Employers should broaden their discrimination and harassment policies to include prohibitions against sexual orientation and gender identity discrimination and harassment.

b. Sexual Harassment Policies.

i. Employers should adopt a sexual harassment policy that explains prohibited conduct, provides for a confidential complaint process, and protects against retaliation.

ii. Investigation proceedings should be laid out in the policy, as well as possible consequences for an employee that violates the policy.

iii. Employers should have multiple avenues for employees to report complaints. One of these avenues should be an outside party.

c. Employers should establish a gender-neutral dress code policy.

5. Publicize and make the company's policies available to all employees.

6. Take precautions when drafting employment documents.

a. Applications for employment should avoid asking certain questions that would give the appearance of discrimination.

i. Types of questions to avoid asking:

ii. Questions about the applicant's age.

iii. Questions about the applicant's race.

iv. Questions about the applicant's marital status.

v. Questions about the applicant's religion.

vi. Questions about the applicant's citizenship status.

vii. The I-9 form is the appropriate place to determine citizenship status.

b. Include private arbitration provisions into employment agreements.

i. Employers should include provisions that require employees to litigate any claims they have against the employer in private arbitration.

ii. However, the Supreme Court ruled in *E.E.O.C. v. Waffle House, Inc.*, if the EEOC does decide to bring a case themselves, an arbitration agreement between an employer and an employee does not prevent the EEOC

from bringing the claim in court. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002).

c. Limits on the Statue of Limitations.

i. Employers may contractually limit that number of days an employee has to bring a claim against the employer.

ii. However, an employer cannot contractually prohibit an employee from filing a claim with the EEOC.

d. Class action waiver

i. Employers can contractually limit an employee's right to bring a class action lawsuit.

ii. This protects employers by limiting their liability to only the employee bringing the claim and not a class of employees.

7. Employers should require that every employee complete a training orientation.

a. This is important to show that the company took steps to comply with the law. The employer looks good in the sense that they took preventative measures to prevent discrimination and harassment.

b. Also, it is important to be able to show that employees know what the law is.

8. Employers should make sure that they and their HR departments are up to date on new federal and state laws, EEOC regulations, and developments in the law.

9. Promote an inclusive culture in the workplace by fostering an environment of professionalism and respect for personal differences.

10. Promote open communication and early dispute resolution. This may minimize the chance of misunderstandings escalating into legally actionable EEOC problems.

11. Establish neutral and objective criteria for evaluating candidates to avoid personal stereotypes or hidden biases when making employment decisions.

12. Monitor compensation practices and performance appraisal systems for patterns of potential discrimination.

13. Attempt to withdraw EEOC claims if possible, instead of settling them.

    a. Employers should try to settle with the employee outside of the EEOC and have the employee withdraw the charge.

    b. Settling in the EEOC context gives the impression that the employer is guilty of the charge.

    c. It looks much better for the employer to have a claim withdrawn than settled.

14. In Severance Agreements, employers should offer employment benefits or unused PTO to the employee in exchange for a release of all claims against the employer.

    a. A waiver in a severance agreement generally is valid when an employee knowingly and voluntarily consents to the waiver.

        i. The rules regarding whether a waiver is knowing and voluntary depend on the statute under which suit has been, or may be, brought.

    b. In addition to being knowingly and voluntarily signed, a valid agreement also must:

        i. Offer some sort of consideration, such as additional compensation, in exchange for the employee's waiver of the right to sue;

        ii. The consideration offered for the waiver of the right to sue cannot simply be a pension benefit or payment for earned vacation or sick leave to which the employee is

already entitled but, rather, must be something of value in addition to any of the employee's existing entitlements.

iii. Not require the employee to waive future rights; and

iv. Comply with applicable state and federal laws.

c. This does not prevent the employee from reporting to the EEOC; however, the employee would not be entitled to any monetary damages, even if the EEOC does bring a case against the employer.

B. Don'ts:

1. Don't discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age, disability or genetic information.

2. Don't tolerate actions by employees of discrimination or harassment.

3. Don't retaliate against an employee for complaining about discrimination or harassment or asserting their rights in relation to discrimination or harassment, including filing a charge with the EEOC.

4. Don't ignore complaints of discrimination or harassment.

   a. Employers need to take complaints seriously and complete a thorough investigation.

5. Don't include a provision in a severance agreement that prevents the employee from reporting to the EEOC.

   a. Employers cannot contractually prohibit employees from reporting to the EEOC.

6. Don't be rude or difficult towards EEOC investigators.

7. Don't assume that the charge contains all the information that the investigator has. Most times, the investigator has a lot more information that is not in the charge.

a. Tip: Plaintiff's attorneys may "ghost write" charges in order to use the EEOC process to gain information to decide if they want to take the case.

8. Don't make agreements that reduce the statute of limitations with regard to the timeline for filing charges with the EEOC, as opposed to the ability to bring a suit in court.

a. Tip: Different statutes have different time requirements for filing a claim. For example, an employee claiming employment discrimination must file a charge with the EEOC in either 180 or 300 days, as compared to an employee who is claiming a whistleblowing action only has 90 days to file a claim.

V. CONCLUSION

A. The EEOC plays an important role in enforcing Title VII's prohibitions against employment discrimination, harassment, and retaliation.

B. Because of this important role, employers need to be aware of changes in the law, caselaw, and internal structure of the EEOC. Employers also need to be aware of how these changes will affect them.

C. Employers should follow the "dos and don'ts" listed above to stay off of the EEOC's target list.