

**TOP FIVE TIPS TO UPDATE YOUR EMPLOYEE HANDBOOK
AND
MANAGE UNEMPLOYMENT CLAIMS**

I. PRESENTATION OVERVIEW

- A. Are we in compliance?
- B. The Employee Handbook and the Health Care Reform Act
- C. The Employee Handbook and the National Labor Relations Act
- D. Employee Handbook: Tips and Strategies
- E. Should your Employee Handbook be Updated?

II. LEARNING OBJECTIVES

- A. Understand strategies to update your handbook to comply with the Health Care Reform Act.
- B. Learn how to determine when Employees are engaging in protected activity.
- C. Know what you should and should not be doing when employees engage in protected activity.
- D. Understand strategies to update your handbook and enforce handbook policies.
- E. Train employers and managers to reduce liability.
- F. Change the perception that HR is a business expense instead of a cost savings position.
- G. Teach new policy trends regarding social media, iPad communications, owner of Linked-In account (contacts).
- H. PTO instead of vacation/sick, working from home, etc.

- I. Identify strategies to enforce handbook policies.

III. THE HEALTH CARE REFORM ACT

- A. Officially known as the Patient Protection and Affordable Care Act of 2010

a/k/a the Affordable Care Act .

- B. Does the Act require lactation breaks for all employees that are nursing mothers?

Yes. Employers must provide reasonable break time for nursing mothers to pump for up to one year after birth. The employer must provide private space (other than a bathroom) for this purpose.

- C. What is the definition of a full-time employee for purposes of medical benefits under the Act?

Employees that average 30 hours of service per week (including paid time off).

- D. Are waiting periods for medical benefits permissible?

- 1. A health plan may not impose a waiting period that exceeds 90 days.

- 2. Employer's that have a first of the month following 90 days definition will be out of compliance.

- E. What is the definition of a "spouse" for purposes of medical benefits?

- 1. The terms "spouse", "husband and wife", include an individual married to a person of the same sex, if the individuals are lawfully married under "state" law.

- 2. "State" law includes foreign jurisdictions.

IV. TIP 1

- A. Include a non-detailed Employee Benefits Provision and a Contractual Disclaimer

(It's an Employee not Employer Handbook)

- B. An employee benefits provision should state that “employee shall be eligible to participate in such plans that are maintained by the employer in accordance with the terms and conditions of the plan documents” -- Nothing more.
- C. A contractual disclaimer provision is necessary to reduce the likelihood that an employee will sue an employer for breaching the terms and conditions of the Employee Handbook.
- D. Employees should sign a separate contract agreeing to follow the Employee Handbook.

V. TIP 2

- A. Define full-time employees separately for purposes of paid time off, etc.
 - 1. Fringe benefits are not required in Michigan .
 - 2. If you elect to provide paid time off, be aware that you are not required to use the 30 hour definition of a full-time employee.

VI. TIP 3

- A. When updating an employee handbook, be sure to review all provisions.
 - 1. Update the definition of “spouse” for purposes of the Family Medical Leave Act.
 - 2. Verify that your equal employment opportunity policy includes the following protected classes: height, weight, and genetic information.
 - 3. Expand the electronic device policy to include iPads, etc.
 - 4. Confirm compliance with Michigan’s Internet Privacy Protection Act, effective December 27, 2012.

VII. TIP 4

- A. When updating an employee handbook, be sure to review all provisions.

- B. Review the 10 standard employee handbook provisions to verify that they do not chill an employee's Section 7 Rights to engage in concerted activity.

Social Media, Video and Audio Surveillance, Confidentiality, Computer Usage, Harassment, Non-Disparagement, Off-Duty Conduct, Solicitation/Distribution, Open-Door Communication, and Arbitration.

VIII. NATIONAL LABOR RELATIONS ACT

- A. Section 7 of the Act gives Employees the right to engage in concerted activities for the purpose of mutual aid or protection.
- B. Examples include discussing wages, working conditions, policies, discipline, complaints about supervisors and/or customers.

IX. THE EMPLOYEE HANDBOOK AND THE NATIONAL LABOR RELATIONS ACT

- A. Top 10 Policies that implicate Section 7 Rights
 - 1. Social Media
 - 2. Video and Audio Surveillance
 - 3. Open Door Communication
 - 4. Off-Duty Conduct
 - 5. Solicitation/Distribution
 - 6. Computer Usage
 - 7. Harassment
 - 8. Arbitration
 - 9. Confidentiality
 - 10. Non-Disparagement

X. SOCIAL MEDIA POLICY

- A. Include a disclaimer for speech protected by law to comply with the National Labor Relations Act.

- B. Do not prevent employees from identifying themselves as the employer's employees.
- C. Clearly identify that social media does not reflect the opinion of the Company.

XI. VIDEO AND AUDIO SURVEILLANCE POLICY

- A. Do not record any activity that could be considered Section 7 rights.
- B. Authorize third parties to conduct surveillance and receive recordings.
- C. Have the policy cover all areas except where privacy is expected (i.e. bathrooms).
- D. Include a liability disclaimer.

XII. OPEN DOOR POLICY

- A. Encourage open communication between all employees and management.
- B. In some cases Employees have a responsibility to bring issues to management's attention.

XIII. OFF-DUTY CONDUCT

- A. Do not prohibit any type of activity or conduct that does not look favorably upon the company.
- B. The employees could interpret any such activity as "chilling" their Section 7 rights.

XIV. SOLICITATION/DISTRIBUTION

May Prohibit:

1. Employees from soliciting during working hours.
2. Employees from distributing during working hours and in working areas.
3. Non employees from soliciting and distributing.

4. Define the definition of harassment and provide examples.
5. For example: repeated solicitations shall not be deemed harassment.

May Not Prohibit:

6. Employees from soliciting and distributing during breaks.
7. Employees from distributing in break rooms.
8. Employees from engaging in concerted activity or discussing unionization.

XV. COMPUTER USAGE

- A. Employer may prevent non-business use of its computers.
- B. This policy must be applied equally to prevent all non-business use and not only Section 7 activity.

XVI. HARASSMENT

- A. Define the definition of harassment and provide examples.
- B. For example: repeated solicitations shall not be deemed harassment.

XVII. ARBITRATION

- A. Although an employee can be required to arbitrate claims, there should be a carve-out for class actions claims relating to the enforcement of Section 7 rights.

XVIII. CONFIDENTIALITY

- A. Define confidentiality narrowly so that such provision does not “chill” employees right to engage in protected activity.
- B. Do not prevent employees from discussing wages and/or other working conditions.

- C. This should be contained in a separate agreement since the terms will survive the separation of employment.
- D. Michigan wages and Fringe Benefits Act, MCL 408.483a.

XIX. NON-DISPARAGEMENT

- A. There should be carve-out so that this provision is not deemed from preventing employees from discussing their working conditions or engaging in union activity.
- B. This should be contained in a separate agreement since the terms will survive the separation of employment.

XX. TIP 1 CONTRACTUAL DISCLAIMER

(It's an Employee not Employer Handbook)

- A. Such provision is necessary to reduce the likelihood that an employee will sue an employer for breaching the terms and conditions of the Employee Handbook.
- B. Employees should sign a separate contract agreeing to follow the Employee Handbook.

XXI. TIP 2 SUMMARY OF DISCUSSION

- A. Understand which provisions need to be specific in scope and which provisions need to be broad in scope.

Examples:

1. Definitions should be SPECIFIC enough so that they are not interpreted as "chilling" Section 7 activity.
2. Policies should be BROAD so the application of such policies equally applies to non-Section 7 activity.

EMPLOYEE HANDBOOK TIPS AND STRATEGIES:

Should your Employee Handbook be updated?

TOP 5 EMPLOYEE HANDBOOK TIPS

- B. Include an At-Will Employment Policy.
- C. Include a Contractual Disclaimer.
- D. Identify protected classes in an Equal Employment Opportunity Policy (State/Federal).
- E. Remove Policies that violate the law.
- F. Remove policies that are intended to govern pre or post-employment conduct.

I. TIP 1

A. At-Will Employment

Example 1:

Progressive discipline policies may be interpreted as requiring employees to be terminated for "Cause" and/or prevent employers from skipping disciplinary steps.

Example 2:

Failure to have an "At Will" policy could open the door for employees to allege that they were orally told that they could only be terminated for "Cause".

II. TIP 2

A. Contractual Disclaimer

(It's an Employee not Employer Handbook)

1. Such provision is necessary to reduce the likelihood that an employee will sue an employer for breaching the terms and conditions of the Employee Handbook.

2. Employees should sign a separate contract agreeing to follow the Employee Handbook.

III. TIP 3

- A. Equal Employment Opportunity Policy (State/Federal).
- B. The Michigan Social Security Number Privacy Act.
- C. Elliott-Larsen Civil Right Act.
Height / Weight
- D. Genetic Information Nondiscrimination Act.

IV. TIP 4

Avoid Policies that violate the law

- A. Automatic termination if an employee does not return to work within one year.
- B. Wage confidentiality policy.
- C. Garnishment responsibility.
- D. Defining all salaried employees as exempt employees.
- E. Employment of minors without necessary breaks.

V. TIP 5

- A. Policies that are intended to govern pre or post-employment conduct should be in a separate agreement.
 1. Job Applications should authorize background checks and include a dispute resolution procedure.
 2. Confidentiality, Non-solicitation and Non-compete agreements should be prepared separately.

TOP 5 METHODS TO UPDATE YOUR EMPLOYEE HANDBOOK

- A. Prepare a Social Media Policy.
- B. Expand the Electronic Device Policy.
- C. Include a video and Audio Surveillance Policy.
- D. Replace outdated terms.
- E. Define Full-time employment.

I. Method 1

A. SOCIAL MEDIA POLICY

- 1. Compliance with Michigan's Internet Privacy Protection Act, effective December 27, 2012.
- 2. Determine owner of Company's Linked-In Account.
- 3. Review regulations by the Federal Trade Commission, Securities and Exchange Commission, and the Financial Industry Regulator Authority.
- 4. Review contracts with marketing companies/third party vendors that assist with social media.
- 5. Create Social Media/Review committees.
- 6. Determine who should respond to the media.
- 7. Provide mandatory training.
- 8. Review procedures regarding company devices (that are protected) versus personal devices (that may not be protected yet).
- 9. Consider restricting recommendations, likes, endorsements, etc.
- 10. Recordkeeping requirements.
- 11. Require security/passwords.
- 12. Understand overlap with other policies.

II. Method 2

A. ELECTRONIC DEVICE POLICY

- 1. Telephone/Computer policies should be expanded to any electronic device (i.e. tablets, iPads).
- 2. Determine use policy at work for personal matters.

3. Require passwords on all devices that have access to employer information.
4. Non-exempt employees should not be allowed to do work outside of office hours without approval.

III. Method 3

A. Video and Audio Surveillance Policy

1. Authorized third parties to conduct surveillance and receive recordings.
2. Have the policy cover all areas except where privacy is expected (i.e. bathrooms).
3. Include a liability disclaimer.

IV. Method 4

A. Replace Outdated Terms

B. Replace "Handicap" with "Disability".

C. Replace "Medical Leave" policy with a "Family Medical Leave Act Policy" (if applicable).

D. Replace "Smoking Policy" with the "Dr. Ron Davis Law".

E. Delete provisions that no longer apply.

V. Method 5

A. Define Full-Time Employment

1. Health Care Reform Act (30 hours).
2. Medical benefits (see insurance policy).
3. Vacation pay, sick time (this may be different than the definition of full-time for other purposes).

HOW WELL WRITTEN POLICIES SAVE EMPLOYERS MONEY

- A. WAGE AND HOUR CLAIMS
- B. DISCRIMINATION CLAIMS
- C. NLRA CLAIMS
- D. UIA CLAIMS
- E. EMPLOYEE RETENTION

HOT ISSUES AND STRATEGIES TO MANAGE UIA TAX LIABILITY

TOP 5 TIPS

- A. EFFECTIVE OCTOBER 21, 2013, THERE ARE NEW STANDARDS FOR EMPLOYERS TO REPORT THE UIA AS REQUIRED BY THE – FEDERAL UNEMPLOYMENT INTEGRITY ACT AND THE MICHIGAN EMPLOYMENT SECURITY ACT-MCL 421.20.
 - B. THE MICHIGAN UIA INITIATED 2ND PHASE OF SOFTWARE UPDATE – CLOSED FOR 1 WEEK IN DECEMBER: MI WEB ACCOUNT– ONLINE FILING STARTED FOR EMPLOYERS WITH 25 EMPLOYEES OR MORE IN 2013 – 6 OR MORE 2014, AND – LL IN 2015.
 - C. FORM UIA 1028 REPLACED FORM 1020 AND 1017 REGARDING QUARTERLY TAX REPORTS AND WAGE DETAIL REPORT.
 - D. CHURCHES CAN BE EXEMPT PURSUANT TO MCL 421.43(o).
 - E. NON PROFIT COMPANIES CAN BE A REIMBURSING EMPLOYER AND REPAY DOLLAR-FOR-DOLLAR OF THE BENEFITS PAID OUT.
- I. Assessing the Current Unemployment Landscape
- A. Tax rate and tax base for employers in Michigan.
 - 1. Determining the tax rate for new employers.

- a) The tax rate for all new employers, except certain construction companies involved in large projects, is 2.7%.
- b) That rate is paid on the first \$9,500.00 of wages during the calendar year for each employee.

2. Determining the tax rate for existing employers.

- a) There are three separate components that determine a fully experienced employer's tax rate. (A fully experienced employer is an employer who is in its fifth year or more of business.)
 - (1) The Chargeable Benefit Component ("CBC") is made up of the total unemployment charges against the employer for the most recent five years.
 - (2) The Account Building Component ("ABC") is a reserve account for possible payment of future benefits. The amount required in this component is based on the payroll for the most recent year.
 - (3) The Non-Chargeable Benefits Component ("NBC") is used to pay benefits that cannot be charged to a specific employer's account.
- b) All of these components are taken into consideration when determining an employer's tax rate. The maximum computed tax rate for 2014 for a fully experienced employer is 10.3%. The lowest computed tax rate is .06%. This does not include the obligation assessment [up to 2.22% for the year 2014] and/or any penalties for missing reports which could add up to another 3%.

B. Potential Charges to an employer's UIA Reserve Account.

- 1. Starting in January 2012, Michigan was first State in the country to cut unemployment benefits from 26 weeks to 20 weeks.

2. This change benefits Michigan employers by lowering the unemployment taxes they could be required to pay from a reserve account by over \$2,000.00 per employee.
3. As a basic rule for calculating unemployment benefits: (1) the Unemployment Insurance Agency ("UIA") multiplies the highest amount of wages paid in any base period quarter by 4.1 percent; (2) For each dependent claimed, the UIA adds \$6.00 per dependent up to five dependents; (3) The weekly benefit amount is capped at \$362.00 per week.
4. To determine how many weeks are available, the UIA multiplies the total base period wages by 43% and then divides by the weekly benefit amount.
5. The weekly benefit amount is cannot be less than 14 weeks or more than 20 weeks.

II. POTENTIAL LIABILITY

A. Employer's Tax Rate.

1. The maximum computed tax rate is 10.3% per \$9,500.00 of wages earned by each employee.
2. This does not include the obligation assessment [up to 2.22% for the year 2014] and/or any penalties for missing reports which could add up to another 3%.

B. Becoming a liable employer.

1. An employer that employs at least one employee for covered employment in at least 20 weeks during the calendar year and pays remuneration in the amount of at least \$1,000.00. MCL 421.41(1);
2. An employer files an employer registration report when it intends to hire one or more employees in Michigan; or

3. The UIA in the course of adjudicating an application for unemployment benefits by an individual [i.e. independent contractor] that previously performed services for the employer, determines that the employer is liable. See MCL 421.14.

C. Becoming an eligible employee.

1. The employee has the burden of proving that the employee is:
 - a) Able to work;
 - b) Available for full-time, suitable work;
 - c) Actively seeking work; and
 - d) Reporting for benefits as directed by the Agency, or had good cause for not reporting or filing as directed.
2. The employee must be unemployed and register to work by filing his/her resume with the Michigan Talent Bank and by report to the local Michigan Works! Agency service center.

D. Charging an employer's account.

1. If the separating employer paid wages of at least \$2,072.00, the separating is charged 100% of the first two weeks of benefit payments.
2. After the first two weeks of benefit payments, each employer that falls within the base period is responsible for its pro rata share of benefits.
3. If an employee left an employer to accept permanent full time work for another employer, that should be reported to the UIA because benefits charges can be transferred to the new employer.

E. Becoming a Successor Employer

1. Pursuant to MCL 421.41(2) an "Employer" is defined as:

Any individual, legal entity, or employing unit that acquires the organization, trade, or business, or 75% or more of the assets of another organization, trade, or business, which at the time of the acquisition was an employer subject to this act.

2. Pursuant to MCL 421.22, there will be a mandatory transfer of the transferor-employer's experience account to the transferee-employer if the commission deems a "transfer of business" has occurred. A transfer of business requires both:
 - a) That the transferee is an employer subject to this act on the transfer date, has become subject to this act as of the transfer date under section 41(2)(a) or elects to become subject to this act as of the transfer date under section 25.
 - b) That the transferee has acquired and used the transferor's trade name or good will, or that the transferee has continued or within 12 months after the transfer resumed all or part of the business of the transferor either in the same establishment or elsewhere.

When read in conjunction, the laws say that there will be a mandatory transfer of experience accounts and thus a "transfer of business" if:

1. The new owner was already an "employer" liable for the payment of unemployment taxes, becomes an "employer" on the date of the transfer, or elects to become liable; AND
2. The new owner has used the trade name or good will of the former business, OR has continue all or part of the business of the former owner; AND
3. There was a transfer of 75% or more of the assets of the former business to the new owner.¹

¹ Unemployment Insurance Agency, *Transfer of Business (Successorship)*, Department of Licensing and Regulatory Affairs.

F. Disclosure of Liability Pursuant to MCL 421.15

1. Timing of Disclosure:

At least 2 calendar days . . . before the acceptance of an offer, the transferor . . . shall disclose to the transferee on a form provided by the unemployment agency, the amounts of the transferor's outstanding liability, and tax payments, tax rate, and cumulative benefit charges for the most recent 5 years

2. Failure to Disclose:

Failure of the transferor to provide accurate information required by this subsection is a misdemeanor punishable by imprisonment for not more than 90 days, or a fine of not more than \$2,500, or both. In addition, the transferor . . . is liable to the transferee for any consequential damages resulting from the failure to comply with this subsection.

III. CIRCUMVENTING REQUIREMENTS TO MAKE UNEMPLOYMENT CONTRIBUTIONS MAY RESULT IN SEVERE LIABILITY

A. State Unemployment Tax Act ("SUTA") Dumping.

1. SUTA Dumping is defined as transferring a trade or business, or a party of a trade or business for the purpose of reducing the contribution rate or reimbursement payments in lieu of contributions required under the Michigan Employment Security Act. It is characterized by the abandonment of an employer's unemployment insurance history.

2. A person that engages in SUTA Dumping is subject to personal liability.

a) A person that knowingly transfers a trade or business or a portion of the trade or business to another employer for the sole or primary purpose of reducing the contribution rate or reimbursement payments in lieu of contributions required under this act is liable. See MCL 421.22b;

- b) An officer of agent an employing unit that conspires with one or more persons to take the above action in effort to reduce the employer's contribution rate is liable. See MCL 421.54b; or
 - c) A person that knowingly advises another person to transfer a trade or business to reduce the employer's contribution rate is liable. See MCL 421.22b(2)(c)(ii).
3. SUTA Dumping liability is significant.
- a) Liability will include the amount owed plus damages equal to three times that amount. (MCL 421.53(a)(i));
 - b) If the amount obtained or withheld from payment as a result of the intentional failure to comply is \$25,000.00 or more but less than \$100,000.00, then liability may include one of the following:
 - (1) If Imprisonment for not more than two years.
 - (2) The performance of community service of not more than two years but, not to exceed 4,160 hours.
 - (3) A combination of the above that does not exceed two years (MCL 421.54b(1)(b)(i)).
 - c) If the amount obtained or withheld from payment as a result of the intentional failure to comply is more than \$100,000.00, then liability may include one of the following:
 - (1) Imprisonment of not more than five years.
 - (2) The performance of community service of not more than five years but not to exceed 10,400 hours.
 - (3) A combination of the above that does not exceed five years (MCL 421.54b(1)(b)(ii)).

B. In addition to the foregoing, a civil fine up to the amount of \$5,000.00 may be imposed. (MCL 421.22b(2)(c)(ii)).

IV. EMPLOYEE MISCLASSIFICATION

- A. Employers that utilize the services of independent contractors may be subject severe penalties if such independent contractors are misclassified employees.
- B. The State has determined that Michigan employers are all too often misclassifying the individuals they hire as independent contractors rather than employees.
- C. Executive Order 2008-1 created an Interagency Task Force to target employers who may be misclassifying their employees.
- D. The Task Force (a) evaluates and examines Michigan businesses for employee misclassification; (b) refers employers who are misclassifying employees to the Michigan Attorney General or local and federal prosecutors; and (c) enforces harsh penalties relating to employee misclassification, including paying quadruple the amount of taxes owed on any misclassified wages.