SHOW ME THE MONEY! OPTIONS FOR RETIREMENT BENEFITS

I. RETIREMENT PLAN DOLLAR LIMITATIONS

A. The elective deferral limits under IRC §402(g) for 401(k) plans is $18,000 in 2015, with cost-of-living increases in $500 multiples.

B. The dollar limit under IRC §415(c)(1)(A) for annual additions with respect to defined contribution plans is the lesser of $53,000 or 100% of compensation for 2015, with cost-of-living increases in $1,000 multiples.

C. The compensation dollar limit under IRC §401(a)(17) is $265,000 for 2015, with cost-of-living increases in $5,000 multiples.

D. The deductible contribution under IRC §404(a)(3) is 25% of aggregated participant compensation.

E. Deferrals for 401(k) plans are separately deductible with regard to the 25% limit and do not count toward the 25% limit applicable to other employer contributions (e.g., matching contributions, non-elective contributions).

F. Participant compensation used to calculate the 25% limit under IRC §404(a)(3) is based on IRC §415 compensation, which means it is "grossed up" for elective deferrals made by participants under 401(k) plans, cafeteria plans, etc.

G. Catch-Up Contributions for Individuals Age 50 and Older. Starting in the year in which an individual reaches age 50 and subsequent years, a plan may allow the individual to make a "Catch-Up Contribution." The maximum Catch-Up Contribution for qualified plans is $6,000 in 2015, with cost-of-living adjustments in $500 multiples. The Catch-Up Contribution does <u>not</u> count against the IRC §402(g) limits pertaining to the maximum elective deferrals under 401(k) plans, the IRC §415 limits, IRC §457(b) limits, and IRC §401(k)(11), nor deduction limits under IRC §404. The right under a qualified plan to make Catch-Up Contributions must be available on a non-discriminatory basis to eligible participants. Catch-Up Contributions will not cause a plan to fail the ADP and ACP tests under 401(k) plans, the 401(a)(4) non-discrimination test of the amount of contributions or benefits provided by the employer, or the coverage test under IRC §410(b).

H. The annual addition limit is 100% of compensation for participants who earn less than $53,000; and the limit is $53,000 for participants who earn $53,000 or more. The purpose of this section is to eliminate violations of the IRC §415 limits for participants who defer significant percentages of their income through 401(k) plans.

EXAMPLE: A participant under a 401(k) plan earns $35,000 a year and is married to an individual whose employer does not offer a 401(k) arrangement. The couple decides to have the 401(k) plan participant defer $18,000 for 2015. The annual additions limit for the employer is $35,000 (i.e., 100% of compensation, determined prior to the 401(k)), so an additional $17,000 could still be allocated to the participant (e.g., matching contributions, employer non-elective contributions).

II. <u>THE NEED FOR LOANS AND IN-SERVICE DISTRIBUTIONS</u>

A. Provided a retirement plan allows for loans, a participant can avoid being taxed on the receipt of funds as a distribution if a loan is made pursuant to an enforceable agreement, and the agreement meets certain requirements with respect to the term of the loan, the repayment schedule, and the dollar amount loaned.

B. The specific requirements for a loan are as follows:

1. A loan must be evidenced by a legal enforceable agreement, which may be composed of more than one document.
2. Generally, the term of the loan must be no longer than 5 years. An exception to the 5 year rule exists for principal residence loans. A principal residence loan is used to acquire a dwelling unit which is to be, within a reasonable time, the principal residence of the participant.
3. The loan must provide for level amortization over the term of the loan with payments not less frequently than quarterly.
4. The loan must bear a reasonable rate of interest.
5. Generally, the amount of the loan (when added to the outstanding balance of all other loans, whenever made, from all plans of the employer) may not exceed the lesser of (i) $50,000 (reduced by the excess of the highest outstanding balance of plan loans during the one year period ending on the day before the date when the loan is made over the outstanding balance of plan loans, the date when the loan is made), or (ii) one-half of the present value of the employees non-forfeitable accrued benefit under such plan. A plan may provide that a minimum loan amount of up to $10,000 may be borrowed, even if it is

more than one-half of the present value of the employees non-forfeitable accrued benefit.

C. In-Service Distributions.

1. Pre-tax contributions to 401(k) plans may not be distributed prior to the occurrence of certain distributable events: severance of employment, death, disability, attainment of age 59 ½, hardship, and termination of the plan.

2. In-service distributions may be made from a qualified profit sharing plan to participants that have not separated from service upon attainment of a stated age (usually age 59½) and for emergency purposes.

3. All types of qualified plans are required to have certain participants begin receiving distributions at age 70 ½.

4. Even if a plan does allow for in-service distributions prior to age 59 ½, the distribution may be subject to a 10% premature distribution penalty.

III. <u>WHAT DO THEY WANT – MORE MONEY</u>

A. New Comparability.

1. A defined contribution plan defines the amount that will be contributed currently with no guaranty as to the amount of the benefit at the time of retirement. A defined benefit plan specifies the benefit at retirement without a predetermined annual contribution.

2. The underlying principal determining the funding of a defined benefit plan is the time value of money. For example, a participant that is age 60 needs to have a larger contribution made to a retirement plan today in order to have that amount grow to $100 at retirement compared to the contribution required for a participant that is age 20 to have their benefit grow to $100 at retirement.

3. Each year a defined benefit plan is required to have an actuary calculate the required contribution by projecting the retirement benefit to be funded.

4. In simple terms, cross testing works by looking at the contribution made to each participant currently and demonstrating that although each participant may receive a different contribution percentage compared to the other participants, the amount received is projected to be the same benefit at retirement.

5. The advantage of cross-testing is that it allows the grouping of participants so that members of each group may receive the same allocation percentage.

B. Technical Requirements. Key technical requirements must be satisfied to demonstrate that the cross-tested plan does not discriminate in favor of HCEs. This is done by demonstrating that a cross-tested plan is non-discriminatory under the general test of Treasury Regulation §1.401(a)(4)-2(c) by comparing equivalent amounts of benefits instead of contributions. A plan satisfies the general test if each "rate group" satisfies the requirements of IRC §410(b). A "rate group" is established for each HCE and consists of:

1. The HCE; and

2. All other employees (both HCEs and HNCEs) who have an equivalent accrual rate greater than or equal to the equivalent accrual rate of the HCE.

Each rate group then must either pass the ratio percentage test of Treasury Regulation §1.410(b)-2(b)(2) or the average benefit test under Treasury Regulation §1.410(b)-5.

C. Cross-tested plans must also satisfy one of two minimum contribution requirements, in addition to the technical requirements described above:

1. A minimum 5% allocation rate to each non-highly compensated employee ("NHCE"); or

2. A minimum allocation rate to the NHCEs equal to 1/3 of the highest allocation rate for any highly compensated employee ("HCE").

D. Show me the numbers! In this example a cross-tested plan is designed to allow the owner of the company to receive an allocation equal to 20% of his/her compensation while only providing a contribution of 5% to each of the other participants.

NAME	AGE	COMPENSATION	CONTRIBUTION	% OF PAY
HCE #1	57	$265,000	$53,000	20%
NHCE#1	23	$42,000	$2,100	5%
NHCE#2	34	$38,216	$1,910	5%
NHCE #3	22	$35,000	$1,750	5%
NHCE #4	46	$68,000	$3,400	5%
NHCE #5	39	$56,000	$2,800	5%
NHCE #6	36	$32,000	$1,600	5%
TOTALS		$536,216	$66,560	

IV. SHIFTING THE ECONOMIC BURDEN

A. Historically, many of our plan clients have borne the administrative costs of maintaining their retirement plans.

B. A trend has developed recently whereby employers are passing along many of the administrative costs to participants.

C. In many of these cases, it is limited to the cost directly attributable to the services that the employees utilize.

D. This may mean charging a participant's account for the cost of plan loans, Qualified Domestic Relations Orders, hardship distributions and other distributions.

E. In other instances, administrative costs such as accounting, legal, investment and other fees are charged to the accounts of plan participants.

F. In other cases, plans are being amended to provide that forfeitures are first used to pay plan expenses instead of increasing contributions or benefits to plan participants.

V. SAVE AS MUCH AS YOU CAN

A. When a client realizes the traditional amounts of money being put away in defined contribution plans won't work, perhaps this is the time to approach talking to a client about a defined benefit plan or a special form of defined benefit plan called a cash balance pension plan.

B. A defined benefit plan specifies the benefit that a participant will receive at retirement.

C. The risk associated with the growth of retirement funds is borne by the employer. If the market declines, the employer must fund the shortfall in the retirement plan.

D. This is different from a defined contribution plan where if there's a decline in the market, the participant suffers the loss.

EXAMPLE ONE - You have a single owner with 9 employees. Ninety-one percent of the total contribution benefits the owner and 9% benefits the other 9 employees.

NAME	AGE	PLAN COMP.	ASSUMED DEFERRALS	SAFE HARBOR	PROFIT SHARING	CASH BALANCE	TOTAL AMOUNT
Owner	52	$265,000.00	24,000.00	$0.00	$15,600.00	$145,000.00	$161,600.00
NHCE #1	50	35,783.32	0.00	1,073.50	715.67	1,073.50	2,862.67
NHCE #2	62	38,701.36	0.00	1,161.04	774.03	1,161.04	3,096.11
NHCE #3	40	18,525.10	0.00	555.75	370.51	555.75	1,482.01
NHCE #4	35	19,282.12	0.00	578.46	385.65	578.46	1,542.57
NHCE #5	29	17,146.57	0.00	514.40	342.93	514.40	1,371.73
NHCE #6	51	38,181.36	0.00	1,145.44	763.63	1,145.44	3,054.51
NHCE #7	44	27,135.45	0.00	814.06	542.71	814.06	2,170.83
NHCE #8	30	18,261.00	0.00	547.83	365.22	547.83	1,460.88
NHCE #9	26	17,501.00	0.00	525.03	350.02	525.03	1,400.08
HCE'S	=	$265,000.00	$24,000.00	$0.00	$15,600.00	$145,000.00	$161,600.00
NHCE'S	=	$230,517.28	0.00	$6,915.51	$4,610.37	$6,915.51	$18,441.39
TOTAL	=	$495,517.28	$24,000.00	$6,915.51	$20,210.37	$151,915.51	$180,041.39

EXAMPLE TWO - You have two owners with 8 employees. Ninety-six percent of the total contribution benefits the two owners and 4% benefits the other 8 employees.

NAME	AGE	PLAN COMP.	ASSUMED DEFERRALS	SAFE HARBOR	PROFIT SHARING	CASH BALANCE	TOTAL AMOUNT
Owner #1	52	$265,000.00	$24,000.00	$0.00	$16,562.00	$145,000.00	$162,562.00
Owner #2	50	$265,000.00	24,000.00	0.00	16,562.00	$135,000.00	$152,562.00
NHCE #1	62	38,701.36	0.00	1,161.04	774.03	1,064.29	2,999.36
NHCE #2	40	18,525.10	0.00	555.75	370.51	509.44	1,435.70
NHCE #3	35	19,282.12	0.00	578.46	385.65	530.26	1,494.37
NHCE #4	29	17,146.57	0.00	514.40	342.93	471.53	1,328.86
NHCE #5	51	38,181.36	0.00	1,145.44	763.63	1,049.99	2,959.06
NHCE #6	44	27,135.45	0.00	814.06	542.71	746.22	2,102.99
NHCE #7	30	18,261.00	0.00	547.83	365.22	502.18	1,415.23
NHCE #8	26	17,501.00	0.00	525.03	350.02	481.28	1,356.33
HCE'S	=	$530,000.00	$48,000.00	$0.00	$33,124.00	$280,000.00	$315,124.00
NHCE'S	=	$194,733.96	0.00	$5,842.01	$3,894.70	$5,355.19	$15,091.90
TOTAL	=	$724,733.96	$48,000.00	$5,842.01	$37,018.70	$285,355.19	$330,215.90

VI. DEALING WITH COSTS ASSOCIATED WITH THE PLAN

A. Plan expenses may generally either be paid by the employer or paid with plan assets. Certain fees may be charged against participant accounts.

B. In many cases financial service providers may offer to subsidize administrative expenses depending on the size or amount of the assets under management.

C. It should be evaluated whether this is actually more costly or less costly with respect to the plan depending on the overall cost involved. The Department of Labor is requiring certain plans to provide fee disclosures.

SOCIAL MEDIA AND EMERGING TECHNOLOGIES
WHAT EVERY EMPLOYER NEEDS TO KNOW

I. <u>SOCIAL MEDIA IN HIRING, DISCIPLINING, AND TERMINATING EMPLOYEES</u>

A. Hiring and Interview Process

1. Protected Class Discrimination: Via Facebook, Twitter, LinkedIn, and other sites, individuals supply prospective employers with access to information beyond that found on their resumes

    a) Benefits: This information is free, easy to access, and provides an employer with insight into the individual's personality that does not often come across in an interview

    b) Traps: Access to intimate details of a candidates personal life can expose the employer to information regarding the individual's protected status by law

        (1) Protected status under Michigan and Federal law: sex, age, race, color, religion, sexual preference or orientation, marital status, national origin, ancestry, citizenship, genetic information, military status, veteran status, disability, height, weight, misdemeanor arrest record or membership in any other legally protected class

        (2) Protected classes differ based on state and municipality

        (3) Decisions based on information acquired through social media: rejecting an applicant before or after the interview process based on information concerning a protected class gathered through social media is unlawful and can expose the employer to liability

            (i) Even if information concerning protected status acquired through a social media review was not used in an employment decision, the mere fact that an employer accessed the information may be used to infer improper motive by the employer in making the employment decision

2. Recommendations: many job-seeker sites, or resume posting websites provide users the ability to upload letters of recommendation from previous employers

   a) Trap: posting and providing letters of recommendation, both positive and negative can expose an employer to potential liability

      (1) Positive Review: posting a positive review of a former employee's job performance or attitude can come back to bite an employer. If that employee later files a wrongful termination claim, the employer will have a defense when they publically display how great the employee was

      (2) Negative Review: employers open themselves up to discrimination, defamation or workplace retaliation claims by former employees

B. Accessing Employee's Accounts:

1. Prohibited Acts by Employers: under the Michigan Internet Privacy Act, employers may not request, discharge, discipline, fail or hire, or penalize an employee or prospective employee for failing to provide the employer with access to their personal account or allow observation of their personal account

   a) Employers may not ask for or required employees or prospective employees to provide their user names or passwords

   b) Employers may:

      (1) access information stored or transmitted on employer owned devises,

      (2) access an account or service provided by employer to employee for use within employee's employment,

      (3) discipline an employee for transferring the employer's proprietary or confidential information without authorization,

      (4) conduct an investigation if there are specific facts about employee's activity on personal accounts for the purpose of ensuring compliance with law, prohibitions against work related misconduct, or

information about unauthorized transfers of proprietary or confidential information

(5) *Employers may not require employees to add them as friends or force employees to change their privacy settings*

C. *Disciplining/Terminating Employees based on Social Media usage*

1. Social Media Handbook Policy: the best way to combat issues presented by employees' social media usage is through enacting a comprehensive social media policy with sufficient examples from the commencement of employment rather than when incidents occur

a) Structure and Content of Social Media Policy: tremendous scrutiny has been given to social media handbook policies under the National Labor Relations Board this year

(1) *Policies cannot have a chilling effect on an employee's Section 7 of the NLRA right to engage in concerted activity, or would be reasonably construed to prohibit and employee's Section 7 rights*

(a) Most common problems: limit employees' right to discuss terms and conditions of employment, including wages, remark about their supervisors, management, or the company

2. Discipline: employees and their social media comments about their employer are protected from adverse employment decisions if their comments are considered to be an effort to engage in concerted activity under Section 7

a) Any negative comments about the employer related to terms and conditions of employment are not grounds for employer discipline

3. Social Media as Watch Dog: employee's off duty conduct that is caught on tape and subsequently goes viral can be a way to monitor employees actions which can be grounds for termination if the proper policies are in place

II. SOCIAL MEDIA MARKETING

A. Social media sites as free marketing: social media marketing campaigns are a cost effective way to engage a target community of consumers in a user friendly way, and its easy to create

1. Risks: any campaign in which third parties or user generated content is published under an employer's name poses risks of liability for trademark and copyright infringement

2. Compliance with General Legal Standards: Federal Trade Commission Act prohibits false advertising, deceptive and misleading conduct such as misleading price comparisons, rebates, or sweepstake promotions

   a) Adds and promotions must be checked for accuracy and truthfulness before being published

   b) Third party advertising affiliates: ensure compliance with marketing laws

      (1) Should require indemnification for any liability arising out of third party's conduct on behalf of employer, require affiliate carry sufficient insurance, and execute a sufficient confidentiality agreement regarding the content and material you provide the marketer

3. Compliance with third-party platforms Terms and Conditions: every social media site require compliance with the site specific terms and conditions for employers to adversities and engage in other promotion activities

   a) Possible liability: a marketing campaign that lease consumers to violate a social media site's terms and conditions can expose the company to liability, damage its reputation among customers, cause the social media site to bar the employer's use or future marketing

B. Implement Website Use Policies: website terms and conditions and privacy policies to prevent potential liability for third party users

1. Terms and Conditions: policies governing others' use of your website, social media page, prevent company employees and third parties from using the platform in an unlawful way, which would otherwise expose the employer to liability

a) User generated content: creates legal risk for domain owners when the content infringes others intellectual property rights

(1) *Disclaimers: website owners should screen posters before content goes live, post notices disclaiming any association with the content or content creator and possibly express disapproval of the content, and that the content does not reflect the opinions of the website*

b) Privacy and Data Security policies: companies with their own blogs or that maintain their own social media platforms should maintain comprehensive policies that disclose the company's data collection, use, and storage practices, and any responsibilities that third parties have when using the site

(1) *Minors: specific disclosure and consent required for data collection from children under age 13*

(2) *Safe Harbors: Communications Decency Act and Digital Millennium Copyright Act – provide immunity for website operators for third party content published to the site which create liability*

(a) Protect website owners from all monetary and equitable relief for copyright infringement where a third party initiated infringing content

(i) Take Down procedures – immunity if provider removes and disables access to infringing content

2. Terms and Conditions as protection against scrapping:

a) Internet scrapping- using data from a website without permission, extracting large amounts of data from public websites using sophisticated analytics, commonly used on price comparison websites. Victims of internet scrapping have sought intellectual property infringement claims against scrappers – however, where website owners cannot established intellectual property rights in their published material, users can be held to the standards in the websites terms and conditions, which can prohibit scrapping

C. Sweepstakes, Contests and Promotions: can capture consumers attention, incentivize consumer conduct and increases exposure to brands

1. Compliance with general legal requirements of promotions and applicable terms and conditions:

   a) Facebook: specific consent requirements to administer a promotion through Facebook's platforms – almost all social media sites have promotional and advertising guidelines that if not followed can expose the employer to liabilities for violation

D. Endorsements and Testimonials:

1. Disclosure: consumer endorses who receive or have a material connection with the company, such a compensation arrangement, is provided with free merchandise, or services, is required to be disclosed

III. ELECTRONIC DEVISES AT WORKPLACE

A. Wage and Hours issues:

1. FLSA: requires non-exempt employees be paid at least federal minimum wage for all hours worked, non-exempt employees must be paid overtime for hours worked over 40

   a) Requiring, expecting, or when employees check work email on their own time can create wage/overtime liability for employer

2. Reimbursement: employers may reimburse for work related expenses including the cost of work related phone calls or email on personal devises, wages and reimbursement combined may not bring employee's total salary below minimum wage

B. Personal Devises used for Work:

1. Breach of confidentiality

2. Breach of legal obligations

   a) HIPPA

   b) Client information

3. Lost devises, lost information

C. *Work Devises used for personal purposes:*

1. Loss of information

   a) Contacts – employers lose control of employees relationship with customers, vendors, and others when employees use person devises, emails and phone numbers to communicate

   b) Can get around non-solicitations/compete

2. Potential for discrimination

3. Breach of privacy

4. Control: policies can require password protection, apps or services that can wipe out contents to protect confidential information

   a) Prevent or limit employees access to certain websites during working hours

D. *Vicarious Liability:*

1. Drivers: liability employees who cause traffic accidents within the scope of their employment, while on personal or employer provided devises can be transferred to employer

   a) Drivers who are required to check in

   b) Texting with driving within scope of employment

   c) Accident occurring with employer provided vehicle

IV. POLICIES MUST BE REASONABLE, REALISTIC AND PROPERLY ENFORCED TO PROTECT EMPLOYERS

AFFORDABLE CARE ACT – 5 THINGS TO KNOW FOR 2015

By: Marc S. Wise, Esq.

I. EMPLOYER RESPONSIBILITIES

A. In general, the date for compliance with the “Pay or Play” health care penalties under the Affordable Care Act (“ACA”) became effective for employers with 100 or more full-time equivalent employees (“FTE”) in 2015.

B. Under the ACA, employers with 50 or more FTEs are considered to be an Applicable Large Employers (“ALE”). Special rules may delay the “Pay or Play” health care penalties for most ALE that have between 50 and 99 FTE as of January 1, 2015 until 2016. It should be noted that this ALE determination is based on the prior calendar year and not on the health care policy year.

C. Employers with 100 or more FTE as of January 1, 2015 are eligible for certain modifications to the rules for 2015.

D. The determination as to whether an employer is eligible for the delay in the ACA is complex. A summary of the requirements is found below.

II. SPECIAL 2015 TRANSITIONAL RULES FOR EMPLOYERS WITH 50 TO 99 FTES

A. Employers that employed on average at least 50 full-time employees (including full-time equivalents) but fewer than 100 full-time employees (including full-time equivalents) on business days during 2014 will not be liable for the “Pay or Play” penalties for any calendar month during 2015 if they meet the conditions below. For employers with non-calendar-year health plans, the relief applies to any calendar month during the 2015 plan year, including months during the 2015 plan year that fall in 2016.

1. During the period beginning on February 9, 2014 and ending on December 31, 2014, the employer did not reduce the size of its workforce or the overall hours of service of its employees in order to qualify for the transition relief. However, an employer that reduced workforce size or overall hours of service for bona fide business reasons is still eligible for relief.

2. During the period beginning on February 9, 2014 and ending on December 31, 2015 (or, for employers with non-calendar-year plans, ending on the last day of the 2015 plan year), the employer does not eliminate or materially reduce the health coverage, if any,

it offered as of February 9, 2014. An employer will not be treated as eliminating or materially reducing health coverage if:

a) it continues to offer each employee who is eligible for coverage an employer contribution toward the cost of employee-only coverage that either (A) is at least 95% of the dollar amount of the contribution toward such coverage that the employer was offering on February 9, 2014, or

b) is at least the same percentage of the cost of coverage that the employer was offering to contribute toward coverage on February 9, 2014;

c) in the event of a change in benefits under the employee-only coverage offered, that coverage provides minimum value after the change; and

d) it does not alter the terms of its group health plans to narrow or reduce the class or classes of employees (or the employees' dependents) to whom coverage under those plans was offered on February 9, 2014.

B. Employers that are close to the 50 full-time employee threshold in determining if they are subject to the ESR provisions do not have to use the full twelve months of 2014 to measure whether they crossed the threshold. They may measure during any consecutive six-month period (as chosen by the employer) during 2014.

III. <u>EMPLOYERS WITH 100+ FTEs – APPLICATION OF PAY OR PLAY REQURIEMENTS AS OF JANUARY 1, 2015 OR THE FIRST DAY OF THE 2015 POLICY YEAR</u>?

A. The final IRS regulations contained many transitional rules which can delay the application of the Pay or Play penalty rules for employers with 100 or more employees until the first day of the 2015 policy year, if certain requirements are met.

B. The first requirement is that the company must have maintained a non-calendar year health plan as of December 27, 2012, and the plan year was not changed after December 27, 2012 to begin at a later date.

Example:

- **<u>Blue Cross</u>** – Policy was effective June 1, 2011. The policy year was from June 1, 2011 to May 30, 2012.
- **<u>HealthPlus</u>** – Policy was effective December 1, 2011. The initial policy year was from December 1, 2011 to November 30, 2012. This policy was

renewed with the same policy year running from December 1, 2012 to November 30, 2013.

C. Since the company maintained a non-calendar year health plan as of December 27, 2012 and the plan year was not changed after December 27, 2012 to begin at a later date, this requirement has been met. The HealthPlus policy year change to December 1st occurred before December 27, 2012.

D. This employer can delay compliance with the ACA Pay or Play provisions until December 1, 2015, rather than January 1, 2015, **if the additional requirements found below are met**.

IV. DEFERRING COMPLIANCE

A. Since the plan year change hurdle has been met, one of the following requirements will need to be met in order to defer compliance until December 1, 2015 (first day of the 2015 plan year) rather than January 1, 2015.

1. Pre-2015 Eligibility. The "Pay or Play" penalty will not be imposed on the company between January 1, 2015 and the first day of the 2015 plan year (December 1, 2015) for any employee who was eligible to participate in the plan under its terms as of February 9, 2014 (even if the employee did not enroll or it cost more than 9.5% of pay for single coverage). This exemption from the "Pay or Play" penalty will apply for any employee who was eligible to participate in the health plan under its terms as of February 9, 2014 (even if the employee did not enroll).

   This delayed effective date only applies if, no later than the first day of the 2015 plan year (December 1, 2015), the employer offers affordable coverage (9.5% of pay for single coverage) that provides minimum value to at least 70% of the full-time employees (30 hours per week is full-time).

   If the health plan on February 9, 2014 required full-time employees to work more than 30 hours per week in order to be eligible for coverage, this special relief will not apply with respect to those employees who worked more than 30 hours per week in 2014, but worked less than the employer's threshold for health insurance eligibility or were otherwise excluded.

   It should be noted that the use of the 70% test rather than the 95% coverage test normally required may subject the company to the \$3,000 per year penalty for the failure to pay a specific amount (IRC 4980H(b)) if such excluded full-time employees (30 hours per week or more) obtain health coverage on the government exchange and receive government subsidies.

2. Significant Percentage of All Employees Test. No "Pay or Play" penalty will be imposed on the company between January 1, 2015 and the first day of the 2015 plan year (December 1, 2015 in the example) if:

   a) No later than the first day of the 2015 plan year (December 1, 2015), the company offers affordable coverage (9.5% of pay for single coverage) that provides at least minimum value to at least 70% of the full-time employees (30 hours per week); and one of the following two tests are met:

      (1) **All Employees Test:**

         aa) The health plan covered at least 25% of **all** employees (full and part-time) on any date in the prior 12 months ending on February 9, 2014, **or**

         bb) Offered coverage to 1/3 or more of all employees (full and part-time) during the most recent open enrollment before February 9, 2014; **or**

      (2) **Significant Percentage of Full-Time Employees:**

         aa) Covered at least 1/3 of the full-time employees (30 hours per week) on any date in the prior 12 months ending on February 9, 2014, **or**

         bb) Offered coverage to 50% or more of its full-time employees (30 hours per week) during the most recent open enrollment before February 9, 2014.

      Note: You should have documentation that this coverage was actually offered to full-time employee for the policy year beginning December 1, 2013.

      The best documentation would be signed waivers from the employees that coverage was offered and waived. If such employees have signed the Waiver of Health Insurance/Notice of HIPAA Special Enrollment Rights or something similar, this would be the best proof.

B. A large ALE (100+) that meets either the "All Employee" test or the "Significant Percentage" test, will be eligible for the fiscal year transition relief. However, in order to get the benefit of the relief, the company must offer health insurance coverage that is affordable and meets certain requirements to at least 70% of its full-time employees (30 hours per week or more) by the first day of the 2015 plan year (December 1, 2015 in the example). If the company does not meet this condition, the penalties will apply retroactively to January 1, 2015.

C. It should be noted that the use of the 70% test rather than the 95% coverage test normally required under the ACA may subject the company to the $3,000 per year penalty for the failure to pay a specific amount (IRC 4980H(b) if such excluded full-time employees (30 hours per week or more) obtain health coverage on the government exchange and receive government subsidies.

V. <u>"APPLICABLE LARGE EMPLOYER" DETERMINATION</u>

A. The ACA defines an "applicable large employer" for a calendar year as an employer that employed an average of at least 50 full-time employees on more than 120 business days during the preceding calendar year. For this purpose, the term "full-time employees" means the sum of the employer's full-time employees and full-time equivalent employees ("FTEs"). For this determination, employees working less than 30 hours per week are combined to determine the number of FTEs.

B. The ACA does not require employers to provide health insurance coverage to its employees. However, employers that do not provide minimum "essential health benefits" as defined by the U.S. Department of Health and Human Services ("HHS"), may be liable for an additional tax. The two new taxes ("Pay or Play") are:

1. Failure to Provide Health Insurance Coverage (IRC 4980H(a)) - Full-time (30 hours per week) employees must be offered health insurance. The additional tax for any month is $166.67 multiplied by the number of actual full-time employees employed by the employer during such month ($2,000 per year). In calculating this monthly tax, the first 30 full-time employees are subtracted from the penalty.

2. Failure to Pay a Specific Amount (IRC 4980H(b)) - Full-time (30 hours per week) employees cannot be required to pay more than 9.5% of their W-2 income for individual coverage. The employer penalty for requiring employees to pay more than 9.5% of their W-2 income is $250.00 per month ($3,000 per year). This penalty only applies to those full-time employees that use the government health exchange and receive the government health credit.

The total tax penalty may not be greater than the tax penalty that would apply if the employer offered no coverage at all.

VI. FULL-TIME EMPLOYEE ANALYSIS

A. The Pay or Play provisions of the ACA impose tax penalties (described above) on an “applicable large employer” that either fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage, or fails to offer affordable coverage or coverage that provides minimum value where one or more full-time employees is certified to receive a premium tax credit or cost-sharing reduction.

B. Although the new Pay or Play requirements are generally effective for health plan years beginning on or after January 1, 2015, the determination of “full-time” for 2015 is based on an employee’s hours in 2014.

C. The guidance from the IRS defines an applicable large employer for a calendar year as an employer that employed on average at least 50 full-time “equivalent” employees on more than 120 business days during the preceding calendar year. For this purpose, the term “full-time equivalent employees” means the sum of the employer's full-time employees and full-time equivalent employees (“FTE’s”). “Full-time” is defined as working 30 hours or more per week or 120 hours or more during a month. Monitoring the 30/120 hour requirement each month during a calendar year will create administrative complexity for large employers, especially employers with employees whose hours vary on a daily, weekly or monthly basis. In order to ease this administrative burden, the IRS issued an IRC 4980H Safe Harbor. The IRS Safe Harbor contains rules for dealing with new and existing full-time and part-time employees.

1. 4980H Safe Harbor - Determining the Full-Time Status of Hourly Employees

The IRS provided a notice of proposed rulemaking on December 28, 2012 relating to the shared responsibility requirements. Also included in this notice was a new safe harbor. The 4980H Safe Harbor is an optional method that large employers may use in determining the full-time status of its hourly employees. In order to avoid penalties, large employers will establish a measurement period during which an employee’s hours are measured. Each employee who averages 30 hours of service per week during the measurement period will then be treated as full-time for health care purposes, regardless of the hours actually worked during the subsequent period. In addition, such employee must also be offered qualifying health care coverage during the subsequent stability period. The 4980H Safe Harbor works differently depending on whether the employee is a new employee or an existing employee.

2. New Employees and the 4980H Safe Harbor

The Safe Harbor looks at two types of new employees: (i) Employees who are reasonably expected on their date of hire to work full-time ("New Full-Time Employees"); and (ii) Employees in which it cannot be determined on the date of hire whether they are reasonably expected to work full-time during the "measurement period" ("New Hourly Employees").

New Full-Time Employee: For an employee determined to be a New Full-Time Employee, the employer must offer health insurance coverage to such employee that begins after a waiting period determined by the employer that is no more than 90 days.

New Hourly Employees: For employees determined to be New Hourly Employees, the employer may establish an initial measurement period during which the new employee's hours are measured. Health insurance coverage does not need to be offered to such new employees during the initial measurement period, which may range from 3 to 12 months, as determined by the employer. The initial measurement period can begin on the date of hire, or the employer can establish an administrative period before the initial measurement period begins. A likely beginning date would be the first day of the month following the date of hire.

If the New Hourly Employee is determined during the initial measurement period to be working full-time (30 hours), then the employee's stability period must be no shorter than the initial measurement period used, but in no event less than 6 months. The health insurance coverage would be required to begin as soon as the initial measurement period ends, or following an administrative period.

If the New Hourly Employee is determined during the initial measurement period to not be working full-time, the employee may then be treated as not working full-time during the stability period. No 4980H penalty would apply for failing to offer such employee health insurance. The stability period for a new employee who is determined not to be a full-time employee cannot be more than 1 month longer in duration than the initial measurement period. Furthermore, the stability period for the New Hourly Employee cannot be longer than the "standard measurement period" (discussed below) that is applicable to ongoing employees.

In establishing an administrative period before or after the initial measurement period, the total administrative period cannot exceed 90 days. Furthermore, the administrative period and the initial measurement period cannot extend beyond the last day of the first calendar month after the employees date of hire.

3. Ongoing Employees and the 4980H Safe Harbor

An ongoing employee is an employee who has been employed for one entire "standard measurement period." A "standard measurement period" is defined as a period determined by the employer for measuring hours of service for existing employees. This period may range from 3 to 12 months.

Once an employee is determined to work full-time during the standard measurement period, the stability period for such employee must be no shorter than the standard measurement period, but not less than 6 months. The stability period must begin immediately after the standard measurement period or an administrative period of not more than 90 days.

An ongoing employee who is determined to not be a full-time employee during the standard measurement period can be treated as not being a full-time employee during the following stability period.

VII. PEO AND STAFFING COMPANY ISSUES

A. The final IRS Pay or Play regulations determine an individual's status as an "employee" by applying the "common law" standard. When an employer obtains workers through a PEO or staffing company, it must be determine who is the proper employer for purposes of the Affordable Care Act.

1. Employees from Short-Term Staffing Companies

In the preamble to the final regulations, the IRS drew a distinction between "temporary staffing firms" and "staffing firms." In the preamble, the IRS referenced workers from temporary staffing firm as the common law employee of the temporary staffing firm. This may be due to short-term staffing companies normally exercises greater control over the employee than is normally seen in the PEO context. Thus, it appears that when workers are obtained for short periods of time the IRS seems agreeable that the workers are the common law employees of the temporary staffing firm, leaving the temporary staffing firm responsible for offering coverage and liable for paying penalties if coverage is not offered.

2. Employees from PEOs

Later in the final regulation preamble, the IRS references professional employer organizations and other staffing agencies and states that, in the typical case, the professional employer organization or staffing firm is not the common law employer.

The IRS appears to imply that if you use a worker from a staffing firm or PEO for anything other than a short-term, temporary assignment, the IRS will view that worker as the common law employee of the worksite employer. Thus, the worksite employer would have to count that worker in determining if the worksite employer is subject to the play or pay requirements and whether it owes any penalties for the failure to cover the requisite percentage of employees.

3. IRS Safe Harbor

The preamble to the regulations provides that if certain conditions are met, an offer of coverage to an employee performing services for an employer that is a client of a professional employer organization or other staffing firm made by the staffing firm on behalf of the client employer under a plan established or maintained by the staffing firm, is treated as an offer of coverage made by the client employer for purposes of section 4980H ("Pay or Play" requirements).

For this purpose, an offer of coverage is treated as made on behalf of a client employer only if the fee the client employer would pay to the staffing firm for an employee enrolled in health coverage under the plan is higher than the fee the client employer would pay to the staffing firm for the same employee if the employee did not enroll in health coverage under the plan.

a) Frequency of Additional Fee. No guidance has been provided as to the amount of the additional fee or its frequency. Informally, the IRS has indicated that the fee should be a specified health care fee on periodic invoices for each employee receiving health coverage. Some commentators have stated that a lesser permissible method would be to have an aggregate charge for the employees that have elected health coverage.

b) Amount of Additional Fee. No guidance has been provided as to the amount or calculation of an appropriate fee. In theory, this could be a nominal amount or it could be the full employer share of the cost of the health care with the employee paying the remaining amount.

c) Playing it Safe. It may be advisable to structure agreements with PEOs and longer term staffing companies to comply with the IRS safe harbor if the employees would put the employer over the 50 person threshold or if it would reduce the employer's coverage to fall below the 70% offer threshold.

VIII. EMPLOYEE DISCLOSURES

A. Insurance Marketplace

1. General Information. The ACA amends the Fair Labor Standards Act ("FLSA") to require that employers provide all new hires and current employees with a written notice about the health benefit Exchange and some of the consequences if an employee decides to purchase a qualified health plan through the Exchange in lieu of employer-sponsored coverage.

   Employers were required to provide the notice to each new employee at the time of hiring beginning October 1, 2013. For 2014, the Department of Labor permitted the notice to be provided within 14 days of an employee's start date. The notice is required to be provided automatically. For 2015 and thereafter, the 14 day period does not apply and the notice should be provided on or before the hire date.

   The notice must be provided in writing in a manner calculated to be understood by the average employee. It may be hand delivered or provided by first-class mail. Alternatively, the notice may be provided electronically if the requirements of the DOL electronic disclosure safe harbor are met.

2. Content Requirements. The DOL has issued a model notice for the employer to complete. The Notice:

   a) Informs the employees of the existence of an Marketplace and how to contact the Exchange to request assistance,

   b) Informs the employees that they may be eligible for a premium tax credit (under Code § 36B) or a cost-sharing reduction (under ACA § 1402) through the Marketplace if the employer plan's share of the total cost of benefits under the plan is less than 60%; and

   c) If the employees purchase a qualified health plan through the marketplace they may lose any employer contribution toward the cost of employer-provided coverage and that all or a portion of employer contributions to employer-provided coverage may be excludable for federal income tax purposes.

B. <u>60 Day Advance Notice</u>

The ACA requires plans and issuers to provide at least 60 days' advance notice of any material modification in plan terms or coverage that are not described in the most recent SBC. The DOL's proposed regulations offer additional guidance on when plans and issuers must provide the 60-day advance notice to enrollees.

1. The proposed regulations state that plans and issuers are required to issue the 60-day advance notice when:

   A material modification is made that would affect the content of the SBC;

   The change is not already included in the most recently provided SBC; and

   The change is a mid-plan year change (that is, it does not occur in connection with a renewal of coverage).

<u>Note</u>: Under the proposed regulations, plans and issuers must provide the SBC before the beginning of each plan year. Changes that occur in connection with a new plan year should be described in an updated SBC provided before the beginning of the plan year.

   When a plan timely provides the 60-day advance notice in connection with a material modification, the proposed regulations state that the plan will also satisfy ERISA's requirement to provide an SMM.

2. Guidance on Material Modifications. The proposed regulations describe a "material modification" as any change to a plan's coverage that independently, or in connection with other changes taking place at the same time, would be considered by the average plan participant to be an important change in covered benefits or other terms of coverage.

   A material modification may include:

   An enhancement in covered benefits or services or other more generous plan or policy terms (for example, reduced cost-sharing or coverage of previously excluded benefits); or

   A reduction in covered services or benefits or more strict requirements for receiving benefits (for example, a new referral requirement or increased premiums or cost-sharing).

C. <u>Summary Plan Description ("SPD") Issues</u>

ERISA health and welfare benefit plans (other than governmental plans and church plans) must distribute an SPD to each participant covered under the plan.

<u>The documents distributed by most employers sponsoring health and welfare plans to its employees do not meet the ERISA requirements for and SPD.</u>

The plan administrator generally must furnish the SPD within 90 days after a participant first becomes covered under the plan. For new plans, the plan administrator must furnish the SPD to covered participants within 120 days after the plan's establishment.

The summary plan description (SPD) is the primary vehicle for informing participants and beneficiaries about their rights and benefits under the employee benefit plans in which they participate. Consequently, ERISA is quite specific about the content requirements for an SPD and establishes extensive and detailed requirements regarding the information that must be disclosed.

Some of the required information that must be contained in the SPD or in related documents for health and welfare plans that we see missing include the following:

1. Name of the plan

2. Sponsor Information including full name and address, EIN, Plan Number and the Plan Year.

3. Type of Plan (ex. group health plan, disability, prepaid legal services, etc.).

4. Administration (ex. contract administration, insurer administration, etc.).

5. Plan Administrator information such as the name, business address, and telephone number of the plan administrator. This is usually the plan sponsor.

6. Service of Process - Name and address of the person designated as agent for service of legal process, and a statement that service can be made on a plan trustee or the plan administrator.

7. Collective-Bargaining Agreement - For collectively bargained plans, a statement referencing the collective-bargaining agreement, and a

statement that the collective-bargaining agreement is available for examination and that a copy may be obtained by written request to the plan administrator.

8. Eligibility - A description of the plan's requirements for eligibility to participate and to receive benefits, such as waiting periods, class or classes of eligible participants, and how variable hour employees under the ACA may become eligible for participation.

9. Amendment and Termination information.

10. COBRA Continuation Rights information.

11. Funding Medium - The SPD must disclose the identity of the funding medium used to accumulate assets and pay benefits, along with the name of any insurance company, trust fund, or other institution which maintains the fund. If a health insurance issuer is responsible, in whole or in part, for the financing or administration of a group health plan, the SPD must disclose the name and address of the insurer, whether and to what extent benefits under the plan are guaranteed under the policy or contract, and the nature of any administrative services provided (for example, contract administrator or claims payer).

12. Maternity or Newborn Coverage - The SPD must contain a statement describing the federal or state law requirements applicable to the plan (or any health insurance coverage offered under the plan) relating to hospital length-of-stay in connection with childbirth for the mother or newborn child.

13. Foreign Language Statement - An employer subject to a foreign language disclosure requirement should include a statement, prominently displayed and in the appropriate, non-English language, telling how, when, and where participants can receive an oral, non-English explanation of the plan.

14. HIPAA Special Enrollment Rights - for medical and other HIPAA plans, the SPD must include an explanation of events that trigger a special enrollment right and the time limits that apply to such enrollment rights.

15. Mastectomy Reconstruction - Health plan SPDs must contain a statement regarding the limits of the mastectomy reconstruction benefit.

16. Qualified Medical Child Support Orders (QMCSOs) - Health plan SPDs must contain either the procedures for handling QMCSOs or

a statement indicating that participants and beneficiaries can obtain, free of charge, a copy of the procedures.

17. ERISA Rights - All SPDs must include the statement of ERISA rights.

D. Insurance Refunds

1. General Information. The ACA established medical loss ratio (MLR) standards for health insurance issuers. Issuers are required to provide rebates when their spending for the benefit of policyholders on reimbursement for various health care services, in relation to the premiums charged, is less than the MLR standards established pursuant to the statute. Rebates are based upon aggregated market data in each State and not upon a particular group health plan's experience.

   To the extent that distributions, such as premium rebates, are considered to be plan assets of employer-sponsored health care plan, they become subject to the requirements of Title I of ERISA. Anyone with authority or control over plan assets is a "fiduciary," and subject to, among other things, the fiduciary responsibility and prohibited transaction provisions of ERISA. The DOL issued Technical Release 2011-04 to provide employers and plan fiduciaries guidance on handling any insurance company rebates received.

2. Who is Entitled to the Refund? Under ERISA section 401(b)(2), if the health care plan is the policyholder, the policy would be an asset of the plan, and in the absence of specific plan or policy language to the contrary, the employer would have no interest in the distribution. The policy for most small plans is in the name of the employer.

   It is the DOL's position that the employer named as the policyholder or the owner of the policy would not, by itself, indicate that the employer may retain the distributions. In determining who is entitled to the distribution, the DOL requires a careful analysis of terms of the governing plan documents and the parties' understandings and representations.

   Under ordinary notions of property rights, if a contract is ambiguous, other evidence may be used to determine the intent of the parties. In the absence of more direct evidence, the DOL has looked to the sources of the insurance policies' premium payments. For example, where the premium is paid entirely out of trust assets, it is the view of the Department that the entire amount received from the insurer by the policyholder constitutes plan assets.

3. Allocating the Refund. Assuming the plan documents and other extrinsic evidence do not resolve the allocation issue:

   a) the portion of a rebate that is attributable to participant contributions would be considered plan assets. Thus, if the employer paid the entire cost of the insurance coverage, then no part of the rebate with respect to this particular policy would be attributable to participant contributions.

   b) if participants paid the entire cost of the insurance coverage, then the entire amount of the rebate would be attributable to participant contributions and considered to be plan assets.

   c) if the participants and the employer each paid a fixed percentage of the cost, a percentage of the rebate equal to the percentage of the cost paid by participants would be attributable to participant contributions.

   d) if the employer was required to pay a fixed amount and participants were responsible for paying any additional costs, then the portion of the rebate under such a policy that does not exceed the participants' total amount of prior contributions during the relevant period would be attributable to participant contributions.

   e) if participants paid a fixed amount and the employer was responsible for paying any additional costs, then the portion of the rebate under such a policy that did not exceed the employer's total amount of prior contributions during the relevant period would not be attributable to participant contributions.

   f) In any case, employers that sponsor group health plans that use insurance policies to provide benefits would be prohibited by ERISA section 403(c)(1) from receiving a rebate amount greater than the total amount of premiums and other plan expenses paid by the employer. To the extent that an employer's portion of the rebate exceeds the amount of such employer's total amount of premiums and other plan expenses paid, that excess amount must be held in trust for the exclusive benefit of participants and beneficiaries.

E. <u>W-2 Reporting</u>

The ACA requires employers to report the cost of coverage under an employer-sponsored group health plan on Form W-2. Until further guidance is issued, this requirement will only apply to employers that issue 250 or more Forms W-2 for the calendar year. All employers of the controlled group are aggregated for this 250 Forms W-2 requirement.

1. What is Required to Be Reported?

Code Section 6051(a)(14) provides that the aggregate cost of employer-sponsored health insurance coverage must be included on the Form W-2. The reported costs are generally as used for COBRA purposes for "Applicable Employer-Sponsored Coverage".

Applicable Employer-Sponsored Coverage does not include:

a) Coverage only for accident, or disability income insurance, or any combination thereof;

b) Stand-alone dental and vision coverage (ex. Employees can choose dental and/or vision and not health coverage);

c) Coverage issued as a supplement to liability insurance;

d) Liability insurance, including general liability insurance and automobile liability insurance;

e) Workers' compensation or similar insurance;

f) Automobile medical payment insurance;

g) Credit-only insurance;

h) Other similar insurance coverage, specified in regulations, under which benefits for medical care are secondary or incidental to other insurance benefits;

i) Coverage for specific diseases or illness (ex. cancer insurance); or

j) Hospital indemnity or other fixed indemnity insurance.

2. Calculating the Cost of Coverage.

a) Insured Plans – Use the premium charged by the insurance company rate for the employee's selected coverage. The costs reported on the Form W-2 are calendar year payments and not the payments for the insurance policy year.

b) Self-Insured Plans – Use the method currently used for COBRA purposes for the employee's selected coverage, except that the reported costs must be determined on a calendar year basis. The costs reported on the Form W-2 are calendar year payments and not the payments based on the self-insured plan's fiscal year. You will need to discuss this issue further with Employee Benefit Concepts.

c) Mid-Year Employee Coverage Changes - If an employee changes coverage during the year, the reportable cost under the plan for the employee for the year must take into account the change in coverage by reflecting the different reportable costs for the coverage elected by the employee for the periods for which such coverage is elected.

d) Controlled Group Rules – Until further guidance is provided, the 250 Form W-2 count is determined <u>without</u> application of any entity aggregation rules for related employers.

F. <u>Summary of Benefits and Coverage</u>

The ACA mandates the creation and distribution to health plan participants of a document entitled Summary of Benefits and Coverage ("SBC").

Non-compliance with SBC regulations can result in a civil penalty of up to $100 per day per affected individual; an excise tax of $100 per day per affected individual; and fines of up to $1,000 per affected individual for willful violations.

1. Plans Covered

Government regulations provide that the SBC requirements apply to the following types of plans:

a. Self-funded and insured medical plans

b. Individual plans

c. Limited benefit plans

d. Student health insurance

e. Expatriate plans (U.S.-based benefits only)

f. Certain other plan types (e.g., HRAs, pharmacy and EAP if considered a group health plan)

The purpose of the SBC is to give eligible employees and beneficiaries information about a health insurance plan's benefits in "plain language," so they can make appropriate purchasing, enrollment and coverage decisions. All customers and insurers must use the SBC document format prescribed by the final DOL regulations.

2. Who needs to provide the SBC?

All group health plans and health insurance issuers are required to provide an SBC. The requirement also applies to grandfathered health plans.

Responsibility for the preparation of the SBC depends on the nature of the plan. For self-insured group health plans, the plan (including the plan administrator) will be responsible for providing an SBC.

For fully-insured plans, both the insurer and the plan are jointly responsible. Generally, SBCs will be drafted by insurers and third-party administrators. The plan or insurer is not liable for enforcement if they have an arrangement with a TPA, they monitor the TPA, and they take action in the event of a violation.

The rules also apply to health reimbursement arrangements. However, if the health reimbursement arrangement is coordinated with another major medical plan, two separate SBCs will not be required.

The SBC requirements will also not apply to stand-alone retiree health plans.

3. When must SBCs be provided?

For group health plan coverage, the regulations provide that, for disclosures with respect to participants and beneficiaries who enroll or re-enroll through an open enrollment period (including late enrollees and re-enrollees), the SBC must be provided beginning on the first day of the first open enrollment period that begins on or after September 23, 2012.

For disclosures with respect to participants and beneficiaries who enroll in coverage other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), the SBC must be provided beginning on the first day of the first plan year that begins on or after September 23, 2012.

The SBC is going to be a part of the annual enrollment processes going forward.

There are basically five circumstances in which the document and the glossary will need to be provided:

a) At enrollment (i.e., initial enrollment) - with any written enrollment application materials the plan provides. If no such materials are provided, then no later than the first date the participant is eligible to enroll himself or any beneficiary in coverage.

b) If there are changes to the SBC - no later than the first day of coverage

c) HIPAA special enrollees - no later than 90 days following enrollment. This time period is coordinated with the requirement for providing the group health plan SPD.

d) Early delivery required upon enrollee's request.

e) Upon renewal (i.e., annual enrollment) - if applicable, only for those benefit options in which the participant or beneficiary is enrolled, by either the date the written renewal application materials are distributed to the plan sponsor or, in the case of automatic renewal, no later than 30 days prior to the first day of the new plan year.

   A participant or beneficiary can also request an SBC during renewal for an option in which they are not enrolled.

f) Upon request – no later than seven business days.

IX. FORM 1094/1095 REPORTING AND DISCLOSURES

A. General Information

The Affordable Care Act imposes significant information reporting responsibilities on employers starting with the 2015 calendar year. This new reporting requirement is the most significant increase in employer reporting since W-2 reporting began.

The new reporting requirement will be similar to the current Form W-2 reporting since an information return (IRS Forms 1095-B or 1095-C) will be prepared for each applicable employee. These Forms will be filed with the IRS using a single transmittal form (Form 1094-B or 1094-C).

Employers must report information to the IRS about the health care coverage provided to full-time employees no later than February 29, 2016, or March 31, 2015, if filed electronically). Electronic filing with the IRS is required for 250 or more Forms 1095-B or 1095-C

A copy of the Form 1095, or a substitute statement, must be given to the employee by January 31, 2016 and can be provided electronically with the employee's consent. Employers will be subject to penalties of up to $200 per return for failing to timely file the returns or furnish statements to employees.

B. Full-Insured Health Plans

The filing requirements are based on an employer's health plan and number of employees. Form 1095-B (Health Coverage) and Form 1094-B (Transmittal of Health Coverage Information Returns) will be filed by insurance companies to report individuals covered by insured employer-sponsored group health plans.

C. Small Self-Insured Health Plans

Small employers with self-insured health plans will also use Form 1095-B and Form 1094-B to report the name, address, and Social Security number (or date of birth) of the employees and their family members who have coverage under the self-insured plan. Employees who are offered coverage, but decline the coverage, are not reported on this form.

D. Large Employers – Full-Insured and Self-Insured Plans

Form 1095-C (Employer-Provided Health Insurance Offer and Coverage) and Form 1094-C (Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns) will be filed by applicable large employers. These forms will be required if the employer offers an insured or self-insured health plan, or does not offer any group health plan.

Applicable large employers are those that had, on average, at least 50 full-time employees (including full-time equivalent employees) during the preceding calendar year. Full-time employees are those who work, on average, at least 30 hours per week. The controlled group/affiliated service group rules apply.

Applicable large employer group members must prepare a Form 1095-C for each full-time employee regardless of whether the employee is participating in an employer-sponsored group health plan. In addition, the employer will complete a Form 1095-C for each non-full-time employee who is in the plan. The employer will not prepare Form 1095-C for non-full-time employees who are not in the plan.

Form 1095-C will report the following information to the IRS:

- The employee's name, address and Social Security number

"ADMINISTRATIVE CHARGE OF DISCRIMINATION - LAWYERING UP"

By: Kathleen H. Klaus, Esq.

I. SERVED WITH CHARGE OF DISCRIMINATION

A. EEOC and MDCR jurisdiction.

B. Requests for information related to investigation.

II. THE WRONG RESPONSE

A. We didn't do anything wrong.

B. Seems straightforward.

C. The investigator was friendly.

D. Don't want to spend any money.

E. We'll handle it ourselves.

III. WHAT YOU DIDN'T KNOW

A. Terms of art.

B. Complainant is probably represented by counsel.

C. EEOC/MDCR investigation can be used against you in subsequent suit.

IV. THE RIGHT RESPONSE

A. Discuss the complaint with an attorney.

1. EPL insurance will assign one.

2. Make sure your general counsel knows employment law.

B. The attorney will:

1. Investigate what is alleged and what could be alleged.
2. Add objectivity to process and response.
3. Assess risk.
4. Recommend changes in employment practices.

- The employer's name, address and employer identification number
- Whether the employee and family members were offered health coverage each month that met the minimum value standard
- The employee's share of the monthly premium for the lowest-cost minimum value health coverage offered
- Whether the employee was a full-time employee each month
- The affordability safe harbor applicable for the employee
- Whether the employee was enrolled in the health plan
- If the health plan was self-insured, the name and Social Security number (or birth date if the Social Security number is unavailable) of each employee and family member covered by the plan by month

Members of an applicable large employer group that has fewer than 100 full-time employees are generally eligible for transition relief from the employer shared responsibility penalty for their 2015 plan year. Nonetheless, these employers are required to file Forms 1095-C and 1094-C for the 2015 calendar year.

Each applicable large employer group member is required to file Forms 1095-C and 1094-C for its own employees, even if it participates in a health plan with other employers (e.g., when the parent company sponsors a plan in which all subsidies participate).

PRIVATE/NON-UNIONIZED EMPLOYERS – BE PREPARED FOR THE NLRB'S BROAD EXPANSION OF EMPLOYEE RIGHTS AND CO-EMPLOYMENT LIABILITY

Introduction: Section 7 of the National Labor Relations Act gives Employees the right to engage in concerted activities for the purpose of mutual aid or protection. This includes private/non-unionized companies.

I. 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

D. Compliance with Michigan's Internet Privacy Protection Act, effective December 27, 2012

E. Determine owner of Company's Linked-In Account

II. 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

III. 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

IV. <u>OFF-DUTY CONDUCT</u>

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

V. <u>SOLICITATION / DISTRIBUTION</u>

A. 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

B. May Not Prohibit:

1. Employees from soliciting and distributing during breaks

2. Employees from distributing in break rooms

3. Employees from engaging in concerted activity or discussing unionization

VI. <u>COMPUTER USAGE</u>

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

VII. <u>HARASSMENT</u>

A. Define the definition of harassment and provide examples

B. For example: repeated solicitations shall **<u>not</u>** be deemed harassment

VIII. <u>ARBITRATION</u>

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

IX. 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

E. Rules Regarding Confidentiality. Confidential Information is: "All information in which its [sic] loss, undue use or unauthorized disclosure could adversely affect the [Employer's] interests, image and reputation or compromise personal and private information of its members.

1. Unlawful Confidentiality Rules

a. Do not discuss "customer or employee information" outside of work, including "phone numbers and addresses."

b. You must not disclose proprietary or confidential information about the Employer, or other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy).

c. Never publish or disclose the Employer's or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to the Employer.

d. Prohibiting employees from disclosing details about the Employer.

e. Sharing of overheard conversations at the work site with your coworkers, the public, or anyone outside of your immediate work group is strictly prohibited.

f. Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information. Do not discuss work matters in public places.

g. If something is not public information, you must not share it.

2. Lawful Confidentiality Rules

a. No unauthorized disclosure of "business 'secrets' or other confidential information."

b. Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside Employer is cause for disciplinary action, including termination.

c. Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.

d. Prohibition on disclosure of all "information acquired in the course of one's work."

XI. <u>NON-DISPARAGEMENT</u>

A. There should be a 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

XII. <u>EMPLOYEE CONDUCT TOWARD THE COMPANY AND SUPERVISORS</u>

A. Unlawful Rules Regulating Employee Conduct towards the Employer

1. Be respectful to the company, other employees, customers, partners, and competitors.

2. Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors.

3. Be respectful of others and the Company.

4. No defamatory, libelous, slanderous or discriminatory comments about the Company, its customers and/or competitors, its employees or management.

5. Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative.

6. Chronic resistance to proper work-related orders or discipline, even though not overt insubordination" will result in discipline.

7. Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation."

8. It is important that employees practice caution and discretion when posting content [on social media] that could affect the Employer's business operation or reputation."

9. Do not make "statements" that damage the company or the company's reputation or that disrupt or damage the company's business relationships.

10. Never engage in behavior that would undermine the reputation of the Employer, your peers or yourself.

B. Lawful Rules Regulating Employee Conduct towards the Employer

1. No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.

2. Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of company business.

3. Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors.

4. Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake.

5. Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in" discipline.

XIII. <u>RULES REGULATING CONDUCT TOWARDS FELLOW EMPLOYEES</u>

A. Unlawful Employee-Employee Conduct Rules

1. "Don't pick fights" online.

2. Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments."

3. Show proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion.

4. Do not send "unwanted, offensive, or inappropriate" e-mails.

5. Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail.

B. Lawful Employee-Employee Conduct Rules

1. Making inappropriate gestures, including visual staring.

2. Any logos or graphics worn by employees "must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message.

3. Threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.

4. No "harassment of employees, patients or facility visitors.

5. No "use of racial slurs, derogatory comments, or insults.

XIV. RULES REGARDING EMPLOYEE INTERACTION WITH THIRD PARTIES

A. Unlawful Rules Regulating Third Party Communications

1. Employees are not "authorized to speak to any representatives of the print and/or electronic media about company matters" unless designated to do so by HR, and must refer all media inquiries to the company media hotline.

2. Associates are not authorized to answer questions from the news media. When approached for information, you should refer the person to the Employer's Media Relations Department.

3. All inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions.

4. If you are contacted by any government agency you should contact the Law Department immediately for assistance.

B. Lawful Rules Regulating Employee Communications with Outside Parties

1. The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner only through the designated spokespersons.

2. Events may occur at our stores that will draw immediate attention from the news media. It is imperative that one person speaks for the Company to deliver an appropriate message and to avoid giving misinformation in any media inquiry. While reporters frequently shop as customers and may ask questions about a matter, good reporters identify themselves prior to asking questions. Every employee is expected to adhere to the following media policy: Answer all media/reporter questions like this: "I am not authorized to comment for the Employer (or I don't have the information you want). Let me have our public affairs office contact you."

XV. <u>RULES RESTRICTING USE OF COMPANY LOGOS, COPYRIGHTS, AND TRADEMARKS</u>

A. Unlawful Rules Banning Employee Use of Logos, Copyrights, or Trademarks

1. Do "not use any Company logos, trademarks, graphics, or advertising materials" in social media.

2. Do not use "other people's property," such as trademarks, without permission in social media.

3. Use of the Employer's name, address or other information in your personal profile is banned. In addition, it is prohibited to use the Employer's logos, trademarks or any other copyrighted material.

4. Company logos and trademarks may not be used without written consent.

B. Lawful Rules Protecting Employer Logos, Copyrights, and Trademarks

1. Respect all copyright and other intellectual property laws. For the Employer's protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks and

other intellectual property, including the Employer's own copyrights, trademarks and brands.

2. DO respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights. To minimize the risk of a copyright violation, you should provide references to the source(s) of information you use and accurately cite copyrighted works you identify in your online communications. Do not infringe on Employer logos, brand names, taglines, slogans, or other trademarks.

XVI. RULES RESTRICTING PHOTOGRAPHY AND RECORDING

A. Unlawful Rules Banning Photography, Recordings, or Personal Electronic Devices

1. "Taking unauthorized pictures or video on company property" is prohibited.

2. No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any Employer, employee or Employer operation.

3. A total ban on use or possession of personal electronic equipment on Employer property.

4. A prohibition on personal computers or data storage devices on employer property.

5. Prohibition from wearing cell phones, making personal calls or viewing or sending texts "while on duty."

B. Lawful Rules Regulating Pictures and Recording Equipment

1. No cameras are to be allowed in the store or parking lot without prior approval from the corporate office.

XVII. RULES RESTRICTING EMPLOYEES FROM LEAVING WORK

A. Unlawful Handbook Rules Relating to Restrictions on Leaving Work

1. "Failure to report to your scheduled shift for more than three consecutive days without prior authorization or 'walking off the job' during a scheduled shift" is prohibited.

2. "Walking off the job" is prohibited.

B. Lawful Handbook Rules Relating to Restrictions on Leaving Work

1. Entering or leaving Company property without permission may result in discharge.

2. Walking off shift, failing to report for a scheduled shift and leaving early without supervisor permission are also grounds for immediate termination.

XVIII. EMPLOYER CONFLICT-OF-INTEREST RULES

A. Unlawful Conflict-of-Interest Rules

1. Employees may not engage in "any action" that is "not in the best interest of the Employer."

B. Lawful Conflict-of-Interest Rules

1. Do not "give, offer or promise, directly or indirectly, anything of value to any representative of an Outside Business," where "Outside Business" is defined as "any person, firm, corporation, or government agency that sells or provides a service to, purchases from, or competes with the Employer." Examples of violations include "holding an ownership or financial interest in an Outside Business" and "accepting gifts, money, or services from an Outside Business."

2. As an employee, "I will not engage in any activity that might create a conflict of interest for me or the company," where the conflict of interest policy devoted two pages to examples such as "avoid outside employment with an Employer, customer, supplier, or competitor, or having a significant financial interest with one of these entities."

3. Employees must refrain "from any activity or having any financial interest that is inconsistent with the Company's best interest" and also must refrain from "activities, investments or associations that compete with the Company, interferes with one's judgment concerning the Company's best interests, or exploits one's position with the Company for personal gains."

XIX. TIP 1 – CONTRACTUAL DISCLAIMER (IT'S AN EMPLOY**EE** NOT EMPLOY**ER** 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

XX. TIP 2 – SUMMARY OF DISCUSSION

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

B. 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

XXI. CO-EMPLOYMENT/JOINT EMPLOYER LIABILITY

A. The NLRB ruled that McDonald's (as opposed to only the franchisees) could be held jointly liable for labor and wage violations by its franchise operators. McDonald's allegedly supplied software (telling how many employees to use at a given hour) and at one point mentioned a franchisee was paying employees too much.

B. "Control"-This issue is whether the franchisor requires franchisees to strictly follow employment practices determined by the franchisor. In 1982, a federal appeals court ruled that a company was considered a joint employer in situations where two or more employers exerted "significant control" over the same employees. The NLRB adopted a narrower standard that applies when there is "direct control" of employment practices of a franchisee, temp agency, etc. NLRB General Counsel Richard Griffin advocates that an entity is considered a joint employer if it has the potential to control terms and conditions or employment or such entity is essential to meaningful collective bargaining.

C. This concept could apply to businesses that use subcontractors or temp agencies, car dealerships, etc.

D. On April 28, 2015, the NLRB General Counsel issued a memorandum that concluded a franchisee, franchisor, and development agent were not joint employers under the NLRA. In this case there was no direct or indirect control over the terms and conditions of employment of the franchisee employees since the franchisor and development agent were merely involved with protection and maintenance of brand quality.

INCENTIVE COMPENSATION ARRANGEMENTS TO ATTRACT, MOTIVATE AND RETAIN KEY EMPLOYEES

I. PERFORMANCE-BASED COMPENSATION.

A. Commissions. Commissions are a form of compensation paid to an employee that is equal to a percentage of the sales price of the goods or services that the employee sells to customers.

1. For example, a stock broker may receive a commission equal to a percentage of each security the broker sells to customers.

2. Commissions may be the sole form of compensation paid to an employee. Alternatively, commissions may supplement a base salary and/or other compensation paid to an employee.

3. Commissions are taxed as ordinary compensation income to the employee and subject to withholding and FICA taxes.

4. The employer receives a compensation deduction equal to the commissions paid to the employee.

B. Production Pay. Production pay is a form of compensation based on the production of the employee.

1. For example, a dentist may be paid a certain sum for each exam he performs on a patient.

2. The employee is paid a certain amount of compensation for each task completed by the employee.

3. Production pay is taxed as ordinary compensation income to the employee and subject to withholding and FICA taxes.

4. The employer receives a compensation deduction equal to the amount of production pay received by the employee.

C. Merit Pay. Merit pay is a form of compensation paid to an employee based on the performance or achievement of the employee during a specified period of time.

1. Merit pay may be discretionary or based on performance metrics.

2. Merit pay is taxed as ordinary compensation income to the employee and subject to withholding and FICA taxes.

3. The employer receives a compensation deduction equal to the amount of merit pay received by the employee.

II. EQUITY-BASED COMPENSATION.

A. Corporations:

1. Stock. Stock of a corporation may be issued to an employee as additional compensation either at a discount or for no consideration.

a) The fair market value ("FMV") of the stock, less any amount paid for the stock, is taxed as ordinary compensation income to the employee. The employer corporation receives a compensation deduction equal to the amount taxed as compensation income to the employee.

b) Any appreciation in the stock after the date of grant is taxed as capital gain to the employee when he sells the stock. The employer corporation does not receive a deduction for any amount taxed as capital gain to the employee.

2. Stock Options. A stock option is a contractual right that gives the employee the right to purchase, for an indefinite or specified period of time, up to a certain number of shares of stock of the employer corporation for a specified exercise price. An employer corporation may grant incentive stock options or nonqualified stock options to an employee.

a) Incentive Stock Options ("ISOs"). ISOs are stock options that enjoy special tax treatment under the federal income tax laws.

(1) The employee receives actual shares of stock upon exercise of the ISOs.

(2) The employee does not recognize income at the time he exercises the option. Rather, the employee

recognizes income when he sells the underlying stock.

(3) The income on the employee's sale of the stock is taxed as capital gain if the employee held the stock for at least 2 years from the date the ISOs were granted and at least 1 year from the date the ISOs were exercised. The employer corporation does not receive a deduction for the ISOs granted to the employee or for the issuance of the underlying stock to the employee pursuant to the exercise of the ISOs.

(4) The employee is not subject to FICA taxes with respect to the capital gain on the sale of the underlying stock.

(5) The following requirements must be satisfied for stock options granted by an employer corporation to be considered ISOs:

(a) The options must be granted to employees. Non-employee directors and contractors are ineligible.

(b) The plan pursuant to which the options are granted must be approved by the shareholders of the corporation within 12 months before or after the plan is adopted.

(c) The options must be granted within 10 years of the earlier of the adoption of the plan or the approval of the plan by the shareholders.

(d) The options must be exercisable within 10 years of the date of grant.

(e) The exercise price must equal or exceed the FMV of the underlying stock on the date of grant. If the employee already owns more than 10% of the outstanding stock (measured by voting power), the exercise price must be at least 110% of the FMV of the underlying stock on the date of grant and the options must be exercisable within a 5-year period beginning on the date of grant.

(6) For shares with respect to which ISOs become exercisable for the first time in any year, the special

tax treatment described above is unavailable to the extent the FMV of the shares exceeds $100,000.

b) <u>Nonqualified Stock Options ("NSOs")</u>. A nonqualified stock option is a stock option other than an ISO.

(1) The employee receives actual shares of stock upon exercise of the NSOs.

(2) NSOs can have a vesting period during which the employee must remain employed by the employer corporation before the employee is eligible to exercise the NSOs. All or a specified portion of the NSOs may vest on a date certain or upon the occurrence of one or more specified events. Alternatively, the NSOs may vest ratably over a specified period of time.

(3) The exercise price for a NSO is generally set at the FMV of the stock on the date of grant.

(4) The grant of a NSO is nontaxable to the employee.

(5) The employee realizes ordinary compensation income on the date he exercises the NSOs in an amount equal to the FMV of the stock less the exercise price (plus the amount, if any, paid for the NSOs by the employee). The employer corporation receives a deduction equal to the amount taxed to the employee as compensation income.

(6) Any appreciation in the stock after the date of grant is taxed as capital gain on the date the stock is sold by the employee. The employer corporation receives no deduction for any amount taxed as capital gain to the employee.

(7) A NSO may allow for a cashless exercise where the employee exercises the NSO without using cash to pay the exercise price. The holder effectively surrenders a number of shares of the underlying stock equal in value to the exercise price.

(8) The NSOs may terminate on the earlier of (1) some period of time after the date of grant (e.g., 10 years), or (2) within a certain period of time (e.g., 60 days) following termination of employment.

(9) Until the NSOs are exercised by the employee, he merely holds a contractual right to purchase the stock and has no rights of a shareholder to vote on corporate matters, receive dividends, or receive information regarding the corporation.

3. Restricted Stock. Restricted stock is stock that is granted to an employee subject to various restrictions such as vesting and forfeiture.

a) The employee generally forfeits the stock if he fails to satisfy certain vesting requirements relating to his service with the employer corporation or upon other events such as the employee's termination for cause. There are also limitations on the sale or other transfer of the stock to third parties.

b) The stock certificates are held in escrow until the shares vest.

c) The employee is considered a shareholder from and after the date of vesting with all the rights of a shareholder.

d) Restricted stock requires no outlay of cash by the employee to become a shareholder.

e) An employer corporation's grant of restricted stock generally is not considered deferred compensation subject to the rules of Section 409A of the Internal Revenue Code (the "Code").

f) The employee generally realizes ordinary compensation income equal to the FMV of the stock on the date the shares become "substantially vested" (i.e., the stock is either transferable or is no longer subject to a substantial risk of forfeiture). Alternatively, the employee can make a so-called "Section 83(b) election" to have the FMV of the stock on the date of grant (less any amount paid) included in taxable income on the date of grant. If the employee makes a Section 83(b) election, any appreciation in the value of the stock after the date of grant is taxed as capital gain.

g) The employer corporation receives a compensation deduction at the time the employee recognizes compensation income. The deduction is equal to the amount of compensation income to the employee. The employer corporation does not receive a deduction for any amount taxed as capital gain to the employee.

4. <u>Phantom Stock</u>. Phantom stock is a promise from the employer corporation to make a cash payment to the employee based on the FMV of the corporation's stock.

   a) Phantom stock is merely a contractual right to receive a cash payment from the employer corporation measured by the FMV of the corporation's stock.

   b) Phantom stock is settled in cash. The employee does not receive any actual stock in the employer corporation. The employee has no voting or other rights associated with being a shareholder.

   c) The employee generally is taxed only as and when he receives payments with respect to the phantom stock. The entire amount received by the employee is taxed as ordinary compensation income. The corporation receives a compensation deduction equal to the amount recognized by the employee as compensation income.

   d) No portion of the payments with respect to the phantom stock is taxed as capital gain to the employee.

   e) The timing of payments with respect to phantom stock is subject to the rules of Code Section 409A.

5. <u>Stock Appreciation Rights ("SARs")</u>. An SAR is a promise from the employer corporation to make a payment of cash to the employee, upon the occurrence of one or more specified events, equal to the appreciation in the FMV of the corporation's stock in excess of a specified exercise price.

   a) An SAR is the equivalent of a stock option that is settled in cash upon exercise.

   b) The exercise price is typically equal to the FMV of the stock on the date of grant.

   c) The employee is generally taxed only as and when he receives payments with respect to the SAR. The entire amount received by the employee is taxed as ordinary compensation income. The corporation receives a compensation deduction equal to the amount recognized by the employee as compensation income.

d) No portion of the payments with respect to an SAR is taxed as capital gain to the employee.

e) The timing of payments with respect to SARs is subject to the rules of Code Section 409A.

6. Restricted Stock Units ("RSUs"). An RSU is a promise by the employer corporation to issue stock to the employee on the date of vesting of the RSU.

a) Unlike restricted stock, there is no transfer of shares to the employee until the RSUs vest.

b) RSUs eliminate the administrative burden of the employer corporation having to hold actual shares of stock in escrow.

c) No Section 83(b) election is available with respect to RSUs.

d) A grantee of RSUs is not entitled to vote as a shareholder or receive dividends.

e) The employee recognizes ordinary compensation income equal to the FMV of the stock. Any appreciation in the stock after the exercise of the RSUs is taxed as capital gain to the employee. The employer corporation receives a deduction equal to the amount of compensation income recognized by the employee.

f) The timing of payments with respect to RSUs may be subject to the rules of Code Section 409A.

B. Partnerships/LLCs:

1. Profits Interests. A profits interest is an equity interest in a partnership/LLC that gives an employee a share of the future profits and equity appreciation in the company.

a) A profits interest does not give the employee a share of the existing value of the partnership/LLC.

b) The receipt of a profits interest in a partnership/LLC is nontaxable to the employee unless: (i) the profits interest relates to a substantially certain and predictable stream of income from partnership/LLC assets (such as income from a high-quality debt security or a high-quality net lease); (ii) the employee disposes of the interest within two years of receipt; or (iii) the profits interest is a limited interest in a "publicly traded partnership."

c) A partnership/LLC does not receive a deduction with respect to the grant of a profits interest to an employee.

d) The employee becomes a "partner" for federal income tax purposes. The employee's share of partnership/LLC income is reported on a Schedule K-1 issued to the employee.

e) The employee no longer receives a Form W-2 with respect to his salary. Rather, the employee's salary is reported as a "guaranteed payment" on the Schedule K-1.

2. Capital Interests. A capital interest is an equity interest in a partnership/LLC that gives the employee, in addition to a share of future profits and equity appreciation in the company, a share of the existing value of the company.

   a) An employee recognizes ordinary compensation income on the receipt of a capital interest equal to the FMV of the interest.

   b) The partnership/LLC receives a deduction equal to the amount taxed as ordinary compensation income to the employee.

3. Equity Options. An equity option is an option that gives the employee the right to purchase, for an indefinite or specified period of time, a certain number of units in the company at a specified exercise price.

   a) The grant or vesting of an equity option is nontaxable to the employee.

   b) The employee recognizes ordinary compensation income on the exercise of the equity option (if the equity interest received is substantially vested) equal to the amount by which the value of the underlying equity interest exceeds the exercise price.

   c) The partnership/LLC receives a deduction in an amount equal to the compensation income recognized by the employee.

   d) Upon exercise of the equity option, the employee becomes an equity owner with a capital account equal to the FMV of the underlying equity interest taken into account in determining the employee's compensation income.

e) The employee is allocated a distributive share of the partnership/LLC's income and begins to receive Schedules K-1 from the company.

4. Restricted Equity Interests.

a) Profits Interests. An employee who is granted a restricted (unvested) profits interest is treated as receiving the interest (and, thus, treated as a "partner") on the date of grant.

(1) The following requirements must be satisfied:

(a) Both the partnership/LLC and the employee treat the employee as a "partner" in the partnership/LLC from the date the interest is granted;

(b) The employee takes into account the distributive share of partnership/LLC income, gain, loss, deduction, and credit with respect to the interest in determining his tax liability for the entire period during which the employee holds the interest;

(c) Neither the partnership/LLC nor the other partners/members take a compensation deduction in connection with the grant of the interest; and

(d) The other requirements applicable to an unrestricted profits interest discussed above are satisfied.

(2) The employee is not required to make a Section 83(b) election for a restricted (unvested) profits interest (although the employee might consider making a protective Section 83(b) election in case the interest is sold within two years).

b) Capital Interests. A capital interest in a partnership/LLC is restricted (unvested) if the interest is nontransferable or subject to a substantial risk of forfeiture.

(1) A capital interest is subject to a substantial risk of forfeiture if the employee's right to full enjoyment of the interest is conditioned upon the future performance of substantial services by the employee.

(2) An employee receiving a restricted capital interest generally is not taxed on the grant of the interest until the restriction lapses.

(3) An employee receiving a capital interest may accelerate the date upon which the interest is taxed by making a Section 83(b) election no later than 30 days after the grant of the interest. The Section 83(b) election allows the recipient to treat the grant of the interest as an immediate taxable event notwithstanding the fact that the interest has not yet vested.

(4) If the employee makes a Section 83(b) election, the employee recognizes, as ordinary compensation income, an amount equal to the FMV of the capital interest (less the amount, if any, that the employee pays for the interest). Any subsequent appreciation in the capital interest is generally taxed at capital gains rates upon the disposition of the interest.

(5) If the employee does not make a Section 83(b) election, he does not recognize income until the capital interest vests and, at such time, the employee recognizes ordinary compensation income to the extent of the then FMV of the portion of the capital interest that has vested (less the amount, if any, that the recipient paid for the interest).

5. Phantom Equity. A partnership/LLC can grant an employee a phantom equity unit that represents a contractual right to receive a cash payment equal to the FMV of a unit of partnership/LLC equity interest upon the occurrence of one or more specific events.

a) The employee’s status as an employee does not change for tax purposes. The employee continues to be issued a Form W-2 for wages, bonuses, and other compensation and benefits.

b) The employee is generally taxed only as and when he receives payments with respect to the phantom equity. The entire amount received by the employee is taxed as ordinary compensation income. No portion of the amount received by the employee is taxed as capital gain. The partnership/LLC receives a compensation deduction at the time the employee recognizes compensation income.

c) The timing of payments with respect to phantom equity is subject to the rules of Code Section 409A.

6. Equity Appreciation Rights. An equity appreciation right is a contractual right to receive, upon the occurrence of one or more specified events, a cash payment from the partnership/LLC equal to the appreciation in the value of the underlying equity in the company.

a) The employee is generally taxed only as and when he receives payments with respect to the equity appreciation rights. The entire amount received by the employee is taxed as ordinary compensation income.

b) The corporation receives a compensation deduction at the time the employee recognizes compensation income. No portion of the payments with respect to the equity appreciation right is taxed as capital gain to the employee.

c) The timing of payments with respect to equity appreciation rights is subject to the rules of Code Section 409A.

III. DEFERRED COMPENSATION.

A. Elective Deferral Arrangements. An elective deferral arrangement allows the employee to defer all or a portion of his compensation to a future date.

1. The amounts deferred by the employee may be limited to the employee's base salary or include incentive compensation.

2. The deferred amounts are credited by the employer to an account for the employee. The deferred amounts are subject to the claims of the employer's creditors.

3. Any earnings on the deferred amounts accumulate on a tax-deferred basis.

4. The employee generally is permitted to elect the time at which the deferred amounts are distributed subject to the limitations of Code Section 409A.

B. <u>Excess Benefit Plans</u>. An excess benefit plan is a plan maintained by the employer for the sole purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits on qualified benefit plans.

1. An excess benefit plan may be a separate part of a qualified plan that provides other benefits.

2. The plan may be funded or unfunded by the employer.

3. An excess benefit plan does not have to be limited to highly compensated employees.

* * *

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OUT OF THE FRYING PAN, INTO THE FIRE;
LET THE LITIGATION COMMENCE

By: Richard M. Mitchell, Esq., CPCU

A. Concluding the investigation and the determination to sue

1. Mission of the EEOC

   The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

   a. EEOC formed in 1965.

   b. Agency responsible for enforcing key federal statutes

2. Two options at the conclusion of the investigation:

   a. Decision by EEOC not to pursue litigation. This does not mean no liability and there may still be a private cause of action.

      (i) Agency issues a right to sue letter, allowing claimant to bring action, but EEOC is not involved.

      (ii) Individual has 90 days to bring action in federal court.

      (iii) Even if no action is commenced, individual may still bring action in State Court at a later time. Action, however, will involve only state statutes, not federal law

   b. Agency determines there is "reasonable cause" to believe a violation of federal law has occurred and brings an action.

3. Some numbers. These do not include litigation brought by private claimants:

   From 1997 to 2007, the EEOC filed an average of 395 suits per year.

   From 2008 to 2011, the EEOC filed an average of 303 suits per year.

From 2012 to 2014, the EEOC filed an average of 157 suits per year.

From 1997 to 2007, EEOC suits resulted in an average of $90 million in total monetary benefits per year.

From 2008 to 2011, EEOC suits resulted in an average of $90 million in total monetary benefits per year.

From 2012 to 2014, EEOC suits resulted in an average of $35 million in total monetary benefits per year.

Accordingly:

From 1997 to 2007, the average EEOC suit yielded $227k.

From 2008 to 2011, the average EEOC suit yielded $298k.

From 2012 to 2014, the average EEOC suit yielded $224k.

4. Even if the EEOC does not bring an action, it may still have legal merit. You may still end up in costly, time consuming litigation with a private claimant.

5. What are factors in determining whether to bring suit

   a. Severity of circumstances

   b. Systematic discrimination

   c. Impact on other matters and governmental interests

B. The laws involved:

1. Americans with Disabilities Act, precludes discrimination:

[A]gainst a qualified individual with a disability *because of the disability* of such individual in regard to job application procedures…

42 U.S.C 12112(b).

2. Title VII – Civil Rights Act of 1964

   a. Discrimination based on:

      - Race
      - Gender
      - Religion

- National origin

- Retaliation

3. Age Discrimination in Employment Act; protects employees over age 40

4. Pregnancy Discrimination Act

5. Equal Pay Act of 1963

6. Genetic Information Non-Discrimination Act of 2008

C. How Does the Litigation Work

1. Defenses:

   a. Employment action undertaken for legitimate business reasons. This burden is on the employer. *McDonald Douglas Corp v Green*, 411 U.S. 792 (1973)

   b. Burden then "shifts" back to claimant to show that the proffered reason is merely a pretext to a discriminatory act.

2. Preserving all documents and electronic data; This should be done as soon party becomes aware of potential litigation, even if no formal claim has yet been filed.

   a. Spoliation – Serious problem that arises when one party destroys documents or data that would otherwise be admissible.

   b. Rebuttable presumption arises that the evidence would have been damaging to the destroying party.

3. Remember, EEOC has already talked to your key witnesses during the investigation stage and may have talked to witnesses you did not even know about. Even if EEOC decides not to bring an action, a private litigant may have access to information gathered during investigation that can be used against the company in discovery.

4. Key depositions

   a. Preparation is critical

   b. Witnesses, especially managers, must realize they are on the record, not out with their friends

5. Effect on the Company and time taken away from normal business operations.

D. Resolving the Litigation

1. Trial – Very public and expensive with no guarantee of the result. Requires a careful, realistic evaluation of the strengths and weaknesses of defenses.

2. Settlement – causes of action

   a. Private cause of action often involves settlement agreement with a confidentiality clause.

   b. If action is brought by EEOC, no confidentiality

3. Consent decree with government

   a. May be able to reduce publicly disclosing amount paid, but likely not

   b. Remedial measures, such as ongoing training, policy revision, changes to HR department, continuing reporting obligations for a period of years.

   c. Punitive/exemplary damages

THE REVOLVING DOOR OF EMPLOYEE LEAVE:
THE INTERPLAY AMONG EMPLOYMENT LAWS AND EMPLOYEE LEAVE

By: Michelle C. Harrell, Esq.

I. TYPES OF EMPLOYEE LEAVES OF ABSENCE

A. Disability, injury or illness (not caused on the job)

B. Disability, injury or illness (on the job)

C. Family circumstances

II. THE EMPLOYMENT RELATED STATUTES AND LEAVES OF ABSENCE

A. ADA – Americans With Disabilities Act, 42 USC §12101, *et seq*.

1. Persons and Entities Covered: An "Employee" who is an individual employed by an "Employer," which is defined as a "Person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person . . ." 42 USC §12111(5)(A).

2. Exclusions: Does not include the U.S. Government, or a corporation wholly owned by the U.S. Government; or "bona fide private membership club" that is exempt from taxation under IRC §501(c)(3) (other than a labor organization). 42 USC §12111(5)(B)(i).

3. General Rule of ADA: No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 USC §12112(a). Employers subject to the ADA must offer to make "reasonable accommodations" of an employee's qualified "disability" as long as it will not cause the employer an "undue hardship."

4. No Express Unpaid Leave Required for an Employee's Medical Reasons But. . . . may have the same effect due to its prohibition against discriminating against a qualified employee relating to discharge, compensation and other terms, conditions and privileges of employment. The EEOC's Technical Assistance Manual and interpretative guidance suggest that "reasonable accommodations"

could include permitting the use of accrued paid leave, providing additional unpaid leave necessary for treatment, and modified work schedules. Also, the ADA defines "reasonable accommodation" to include "part time or modified work schedules." *See*, Section 12111(9).

5. No Unpaid Leave Requirement for "Family" Reasons: ADA does not require an employer to provide "reasonable accommodations" such as unpaid leave to an otherwise qualified employee without a disability simply because that person has a relationship with someone with a disability. The ADA is employee-focused, not family focused.

B. FMLA – Family Medical Leave Act, 29 USC §2601, et seq.

1. Persons and Entities Covered: Employers subject to FMLA are those engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, any person who acts directly or indirectly on behalf of such employer, any successor in interest of such an employer and any "public agency" as defined in the Fair Labor Standards Act. To be an "eligible employee" for FMLA, the employee must have been employed by the employer for at least 12 months and worked for at least 1,250 hours of service for that employer during the previous 12-month period.

2. Exclusions: An "eligible employee" does not include an employee who works at a work site at which the employer employs less than 50 employees, and the total number of the employer's employees within 75 miles of that work site is less than 50.

3. General Rule of FMLA: An eligible employee upon reasonable notice and a properly supported request is entitled to up to 12 workweeks of leave during any 12-month period, and the continuation of the employee's group health plan coverage during the leave period (provided that the employee timely returns to work upon the expiration of leave). The employee can elect to, and the employer can require that the employee, substitute any accrued paid vacation time, personal time or family leave for all or part of the 12-week unpaid leave. When the leave ends, the employee is entitled to be restored to the same position or an equivalent position.

4. FMLA provides for leave under the following circumstances:

a) Because of the birth of employee's son/daughter and in order to care for such son/daughter;

b) Because of the placement of a son or daughter with the employee for adoption or foster care;

c) In order to care for the spouse, or a son, daughter or parent, of the employee, if such spouse, son, daughter or parent has a "serious health condition"; or

d) Because of a "serious health condition" that makes the employee unable to perform the functions of the position of such employee.

5. A "serious health condition" is defined in the FMLA as "an illness, injury, impairment, or physical or mental condition that involves – (a) inpatient care in a hospital, hospice or residential medical care facility; or (b) continuing treatment by a health care provider."

6. A "serious health condition" based upon (b) [continuing treatment by a health care provider] includes:

a) a period of incapacity (inability to work, attend school, or perform regular daily activities because of an illness, injury, impairment or condition) of more than 3 consecutive calendar days and subsequent treatment or period of incapacity that involves either (a) treatment two or more times by a health care provider, nurse or physician assistant or a health care provider (ie, physical therapist) under orders or referral from a health care provider; or (b) treatment by a health care provider on at least one occasion which results in a regiment of continuing treatment.

b) any period of incapacity due to pregnancy or for prenatal care.

c) any period of incapacity or treatment for a "chronic serious health condition."

d) Any period of incapacity which is permanent or long term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of a health care provider (ie, stroke, terminal stage of a disease, Alzheimer's, ALS).

e) Any period of absence to receive multiple treatments, such as for cancer, severe arthritis, kidney disease.

C. Persons With Disabilities Civil Rights Act (PDCRA/MHCRA), MCL 37.1101, *et seq*.

1. Persons and Entities Covered: An employer that has "1 or more employees or a person who as a contractor or subcontractor is furnishing material or performing work for the State or a governmental entity or agency of the State and includes an agent of such person." MCLA 37.1201(b). A covered person is an individual with a handicap (a "handicapper").

2. General Rule of PDCRA: An employer cannot discriminate against an employee with a disability. A "disability" is a determinable physical or mental characteristic of an individual which substantially limits 1 or more of the major life activities of that individual and is *unrelated* to the individual's ability to perform the duties of a particular job or position and/or is unrelated to the individual's qualifications for employment or promotion. The term "unrelated to the individual's ability" to perform the job" means with or without accommodation.

3. Unpaid Leave: There is no express mention of unpaid leave being required under PDCRA. However, just like the ADA, the allowance of the use of accrued paid leave time, sick time, personal time or providing additional unpaid leave for necessary treatment may be considered to be an appropriate reasonable accommodation.

D. Workers Disability Compensation Act (WDCA), MCL 418,101, et seq.

1. Persons and Entities Covered: All employees, all public employers, all private employers with more than 3 regular employees, and private employers with less than 3 employees if 1 or more of them have been employed for 35 hours or more for 13 weeks during the preceding 52 week period. Agricultural employers are subject to specific threshold requirements.

2. General Relief: Provides wage replacement and related benefits for loss due to an employee's work-related personal injury or death. The WDCA does not provide for any required leave of absence.

E. Interaction of ADA, PDCRA, WDCA AND FMLA a/k/a the Revolving Door.

1. These laws provide that each law will <u>not</u> invalidate the others, or limit any rights, remedies and procedures of any federal or state law that provides an employee with greater or equal protection than as provided under the ADA, PDCRA, WCDA or FMLA. The net result is that if there is a more protective, generous law, it will control.

2. ADA: "Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals that are afforded by this Act." 42 USC §12201(b).

3. FMLA: "Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or disability." 29 USC §2651.

4. PDCRA/MHCRA: provides that employers shall not take certain actions except as allowed by federal law. MCLA 37.1202. WDCA is silent.

5. The Department of Labor's FMLA regulations provide that "if FMLA entitles an employee to leave, an employer may <u>*not*</u>, in lieu of FMLA entitlement, <u>*require*</u> an employee to take a job with reasonable accommodation." 29 CFR 825.702(d)(1). However, the ADA may require that the employer <u>*offer*</u> the employee the opportunity to take such a position.

6. The ADA, PDCRA, WDCA and the FMLA can be operative at the same time and should be considered by employers when making determinations relating to an employee who is a "qualified individual with a disability" (ADA) and/or an employee who is entitled to leave due to a "serious health condition." For example, an employer may have an employee who attends work with reasonable accommodations to the duties of her position under the ADA or PDCRA. Then, while being provided with those accommodations, the employee could suffer from a period of incapacity due to her physical condition for purposes of FMLA, and be entitled to 12 weeks of unpaid FMLA leave. The FMLA leave can be taken "intermittently" in blocks of days or sometimes hours, or on a "reduced leave schedule. FMLA, §2612(b)(1). Also, an employee could be injured on the job and receive WDCA wage replacement and other benefits. However, if the employee recovers (ie, loses

three toes but heals) and wants to return to work but has difficulties in performing the essential functions of the job, the employee may seek reasonable accommodations under the ADA. In other words, just because an employee receives WDCA benefits, and may be on FMLA leave to recover, the inquiry does not end. Instead, it can be a revolving door. Each matter is very fact specific.

(NOT SO) LIMITED LIABILITY: WHEN CORPORATE OFFICERS BECOME PERSONALLY LIABLE

This outline addresses many of the most common situations where individual liability can arise in the employment context for individual decision makers, directors, and officers of a corporation. It concludes with some best practices to be followed to minimize risk exposure for the individuals involved.

Perhaps the most common circumstance where individual liability can arise is sexual harassment, especially in the context of a supervisor-subordinate relationship. Given the serious nature of sexual harassment, any such circumstances must be handled appropriately.

I. SEXUAL HARASSMENT

A. Definition of sexual harassment: Sexual harassment is defined by Michigan statute and federal regulations as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when any of the following is true:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment;

2. An individual’s submission to or rejection of such conduct is used as the basis for employment decisions affecting him or her; or

3. Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.
See MCL 37.2103.

B. In both state and federal context, this applies to both traditional male-female, female-male, and same sex harassment. *Robinson v Ford Motor Co*, 277 Mich App 146 (2007); *Oncale v Sundowner Offshore Services*, 523 US 75 (1998).

C. Two theories of harassment: **Quid Pro Quo** Sexual Harassment and **Hostile Work Environment**. State law recognizes a distinction between quid pro quo and hostile work environment sexual harassment.

1. The Michigan Supreme Court has held that sexual harassment that falls into one of the first two categories (“submission to such conduct…” and “an individual’s submission”) above is known as

quid pro quo harassment, while the third category ("such conduct has…") refers to hostile work environment sexual harassment. *Chambers v Trettco, Inc,* 463 Mich 297, 310 (2000).

It is worth noting that this distinction, while still present in federal caselaw, is increasingly ignored.

D. QUID PRO QUO HARASSMENT

1. Quid Pro Quo Harassment is defined as: Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by and individual is used as the basis for employment decisions affecting such individual (such as not being hired, being fired, denying a raise, or losing a promotion). The largest number of these cases involve sexual harassment, typically by a supervisor toward a subordinate.

a) Elements of the offense:

(1) The employee was subjected to **unwelcome** sexual conduct or communications (including advances, requests for sexual favors, or other verbal or physical conduct) of a sexual nature;

i. Unwelcome: Can it be unwelcome if the complainant consents?

ii. The U.S. Supreme Court says harassment can be unwelcome even if the complainant consents. In *Meritor Sav Bank v Vinson*, a bank employee alleged that she had a relationship with her supervisor because she thought she'd lose her job if she did not comply. The Court commented that the employee's consent to a sexual relationship with her supervisor did not mean that the relationship was welcome. "The correct inquiry is whether [the employee] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in the sexual intercourse was voluntary." But the Court also said that the teller's sexually provocative speech or dress "may be relevant" in determining whether she regarded advances as unwelcome. 477 US 557 (1986)

iii. State law takes a different position. As a general matter, conduct and communications arising out of a consensual relationship (up to and including sexual activity) have been held as not sufficient to constitute "unwelcome" conduct or communication for purposes of proving a quid pro quo or hostile work environment claim. *See, e.g. Haseley v Kelley Svcs, Inc*, 2003 WL 22204743 at *4 (Mich App).

b) The harassment was based upon the employee's sex; and

c) As a result of the employee's reaction to the harassment, some aspect of the employee's employment was affected (compensation, benefits, status, conditions, privileges).

2. Employer's duty upon learning of harassment:

a) If it comes to an employer's attention that one of his supervisory employees is sexually harassing another employee, the employer is required to take immediate appropriate corrective action.

b) Employer's liability for quid pro quo harassment: Strict liability (federal), preponderance of the evidence (state). *Quinn v Pipe & Piling Supplies (USA) Ltd*, 2010 WL 4226734 at *2 (WD Mich); *Chambers v Trettco, Inc, supra*.

c) An employer can be held automatically liable for quid pro quo sexual harassment under both federal and Michigan law. *See Henson v City of Dundee*, 682 F2d 897 (11th Cir 1982) (holding employer strictly liable for actions of its supervisors amounting to sexual discrimination or harassment resulting in tangible job detriment to subordinate employee); *Champion v Nationwide Sec, Inc, 450 Mich* 702, (1996) (overruled on other grounds) (Civil Rights Act imposes strict liability on employers for quid pro quo sexual harassment committed by supervisory personnel); *See also Hamed v Wayne County,* 284 Mich App 681, 688-693 (overruled on other grounds) (holding same).

d) Under federal law, the employer can oftentimes be held vicariously liable for hostile work environment sexual harassment. *See Faragher v City of Boca Raton*, 524 US 775 (1998); *Meritor Sav Bank, supra* (employers are not automatically liable for sexual harassment by their superiors, but absence of notice to an employer does not necessarily insulate that employer from liability).

e) Under State law, the employer can be vicariously liable for quid pro quo harassment when the employer's employee uses supervisory authority to perpetrate harassment.

(1) Defeating strict liability

a) As the US Supreme Court has explained, an employer can only defeat liability (in the quid pro quo federal context) by raising a specific defense outlined in the case of *Burlington Indus Inc v Ellerth*, 524 US 742, 761 (1998):

When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence…The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm...."

E. Hostile Work Environment Harassment

1. Hostile work environment harassment occurs when an employee is repeatedly subjected to unwelcome sexual conduct (comments, actions) to the point that the harassment unreasonably interferes with the employee's work performance or creates an intimidating, hostile or offensive working environment.

2. <u>Elements of the offense</u>. Under Michigan law, to state a prima facie case of hostile work environment sexual harassment, a plaintiff must establish all of these five elements:

a) the employee belonged to a protected group;

b) the employee was subjected to communication or conduct on the basis of sex;

c) the employee was subjected to **unwelcome** sexual conduct or communication;

d) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and

e) respondeat superior.

Radtke v Everett, 442 Mich 368, 382-83 (1993) (internal footnote omitted) (emphasis added).

3. <u>Employer's duty upon learning of harassment</u>. If it comes to an employer's attention that one of his supervisory employees is sexually harassing another employee, the employer is required to take immediate, appropriate action:

   a) Employer's liability for HWE harassment:

   b) Federal: "presumption of liability" but not strict liability. *Quinn v Pipe & Piling Supplies (USA) Ltd*, supra.

   c) State: Liability only if did not take prompt action to remedy the situation upon learning about the harassment.

4. Defeating Liability

   a) Federal: Under federal law an employer may show that they have "exercised reasonable care to avoid harassment and to eliminate it when it might occur." *Faragher*, *supra* at 805.

   b) State: "an employer may avoid liability [in a hostile work environment case] 'if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment.'" *Chambers v Trettco, Inc*, *supra* at 312.

F. Suggesting How to Prevent Sexual Harassment

1. Let employees know that sexual harassment of any form is not acceptable and will not be tolerated.

2. Create a written sexual harassment policy which includes a clear explanation of how employees can report sexual harassment and the consequences for employees engaging in harassment.

3. Be receptive to all complaints and observations. Don't merely dismiss an employee's concerns as over-sensitivity!

4. When and if you are notified of any potential harassment, immediately investigate the allegations fully, document the investigation and take appropriate corrective actions if necessary.

5. Once an investigation has begun, maintain confidentiality at all times.

6. Establish a complaint procedure that enables an employee to present a complaint to one of several designated employees, including individuals other than direct supervisors.

7. Make sure supervisors are trained to recognize harassment and intervene when appropriate. Supervisors should also know that they risk further discipline and potential legal liability for engaging in harassing behavior or failing to take appropriate action to stop it.

8. Communicate the results of the investigation and the decision to both the alleged victim and the alleged harasser.

9. Follow up with complainant to confirm that the problem has not recurred, if applicable.

10. Maintain thorough and up to date personnel records. This is the best safeguard against contrived allegations of discrimination and harassment.

G. Note: Managers are personally liable for their harassment of subordinates.

1. ELCRA defines discrimination based on sex to include sexual harassment. MCL 37.2103.

2. ELCRA defines "employer" as "a person who has 1 or more employees and includes an agent of that person." MCL 37.2201(a). Similar to definition of "employer" in Title VII, but our courts (unlike federal courts) do not read "agent" as a subset of "employer" but as a separate, liable entity.

3. *Elezovic v Ford Motor Company*, 472 Mich 408 (2005). This case overruled existing precedent that followed the federal model and applied a strict construction of the statutory definition of "employer." Court found that the supervisor could be personally liable under the ELCRA definition of "employer" because as a supervisor he was an "agent" of the employer at the time he engaged in harassment,

thereby exposing the corporate employer to liability. Supervisor can be personally liable, even if employer is not. Harasser does not need to be "functioning as an agent" when he commits the harassment for liability to attach.

4. Notably, liability does not apply to "co-workers" or peers.

Another inherently tricky circumstance is dealing with Family Medical Leave Act related issues. In Michigan, thus far the Courts have held that individuals cannot be held liable, but this could change in the future.

II. <u>THE FAMILY MEDICAL LEAVE ACT (FMLA)</u>

A. There is a split among Courts which have addressed individual liability under the FMLA. Some Courts have held that individuals in positions of authority can be held liable in their individual capacities for FMLA violations.

B. The courts have compared the FMLA to the Fair Labor Standards Act (discussed in more detail below), which imposes individual liability where a person has some control over the corporate purse strings. In the FMLA context, the analysis is whether the individual has the control over whether the employee may take leave.

C. The FMLA creates rights of action for employees against "any employer" who violates the statute. The definition of "employer" under the FMLA includes "any person who acts, directly or indirectly, in the interest of any employer to any of the employees of such employer." 29 CFR 825.104.

D. There is a split among the federal circuit courts that have ruled on this issue. The Third, Fifth, and Eighth Circuits have all found that there can be individual liability for FMLA violations. The Sixth Circuit (which includes Michigan) and Eleventh Circuit, however, both maintain that there is no individual liability under the FMLA.

E. Takeaway: Individuals are safe for now in Michigan, but that could change at any time, especially if the U.S. Supreme Court weighs in.

Individual liability can also attach in the context of alleged violations of the Americans with Disabilities Act and/or its Michigan counterpart. This relates to, for example, failure to provide reasonable accommodation to a disabled employee. If a court were to find the right degree of control existed, liability is a real possibility.

III. AMERICANS WITH DISABILITIES ACT / MICHIGAN PERSONS WITH DISABILITIES CIVIL RIGHTS ACT

A. ADA

1. The ADA does not provide for supervisor liability, only employer liability. *E.g., Mason v Stallings*, 82 F3d 1007 (11th Cir 1996); *EEOC v AIC Sec Investigations*, 55 F3d 1276 (7th Cir 1995); *Montez v Romer*, 32 F Supp 2d 1235 (D Colo 1999); *Meara v Bennett*, 27 F Supp 2d 288 (D Mass 1998). This does not end the inquiry, however.

2. At least one case has held that an officer's involvement in the corporation may trigger ADA liability. See *Clackamas Gastroenterology Assocs, PC v Wells*, 538 US 440 (2003). In *Clackamas* the Supreme Court resolved a conflict in the circuits with respect to whether the shareholders and directors of a corporation are considered "employees" for purposes of satisfying the ADA's 15-or-more-employees applicability requirement. The Supreme Court rejected the approach of several lower courts and, as with other statutes, looked to the individual shareholder/director's control (master-servant relationship). The Supreme Court held that the "common law element of control" should be the "principal guidepost" in determining whether the shareholder or director acts independently and participates in managing the organization and whether the individual is subject to the organization's control. The Supreme Court adopted six factors from the EEOC Compliance manual to be applied by lower courts:

[1] Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;

[2] Whether and, if so, to what extent the organization supervises the individual's work;

[3] Whether the individual reports to someone higher in the organization;

[4] Whether and, if so, to what extent the individual is able to influence the organization;

[5] Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and

[6] Whether the individual shares in the profits, losses, and liabilities of the organization.

3. *See also De Jesus v LTT Card Serv*, 474 F3d 16, 21–24 (1st Cir 2007) (applying *Clackamas* approach to close corporation); *Fichman v Media Ctr*, 512 F3d 1157 (9th Cir 2008) (holding that directors of a nonprofit corporation were not employees based on the *Clackamas* factors)

B. MPDCRA

1. Under MPDCRA, owners of a business or members of management arguably are "persons" within the meaning of the Act, which is defined to include both an individual and an agent of the company. This includes supervisors. MCL 37.1103(h).

2. Although authority for imposing individual liability under the Michigan Act is somewhat questionable, a plaintiff may choose to sue under that statute rather than the ADA in those cases where judgment against an individual officer or agent is possible (i.e., the individual was particularly involved or committed the violation), where there is no otherwise colorable basis for supervisory liability under the ADA.

Another common source of claims is those brought under various state and federal Wage and Hour laws.

IV. <u>WAGE AND HOUR</u>

A. Fair Labor Standards Act – FLSA

1. FLSA has been held to impose personal liability on corporate agents for unpaid wages. This is the case in Michigan federal courts. See, e.g., *Dole v Elliott Travel & Tours*, *Inc*, 942 F2d 962, 966 (CA 6 1991).

2. Federal law, through the FLSA, requires "employers" (broadly defined in the statute) to pay federally regulated minimum wages and overtime compensation (*not* contractual wages). If the employer does not meet these obligations when due, the employees may recover (1) their wages or unpaid overtime compensation, and (2) an equal additional amount as liquidated damages unless the employer can show that the failure to pay was in good faith and it reasonably believed it was not violating the law. *See* 29 U.S.C. § 216(b).

3. Definition of employer: "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).

4. Scope: FLSA coverage is limited to federal minimum wage and overtime violations. The FLSA does not cover claims for immediate payment of contractual wages, accrued vacation pay and other accrued benefits to which employees may be entitled under state law.

B. WARN ACT

1. The WARN Act requires employers to give employees at least 60 days' notice of a plant closing or "mass layoff."

2. The WARN Act defines an "employer" to be "any business enterprise" employing 100 or more full time workers. 29 U.S.C. § 2101.

3. Federal courts have not read this language to extend liability for WARN Act violation to directors and officers, except when the plaintiffs could pierce the corporate veil, relying on alter ago theories of liability. *See International Union Auto, Aerospace & Agric Implenent Workers v Aguirre*, 410 F3d 297, 302–03 (6th Cir.2005).

C. Michigan Wage and Fringe Benefits Act

1. Michigan imposes iindividual liability for violations of state law wage and hour statutes. MCL 408.471(d) defines "employer" as "an individual, sole proprietorship, partnership, association, or corporation, public or private; this state or an agency of this state; a city, county, village, township, school district, or intermediate school district; an institution of higher education; or an individual acting directly or indirectly in the interest of an employer who employs 1 or more individuals."

2. Courts have the authority to impose individual liability if the circumstances warrant. See *In the Matter of 8 Complainants v. Bobbie Johnson, Richard Ries, and Cherokee Express, Inc., Jointly and Severally* (Applying FLSA analysis to determine if president of defunct corporation was individually liable for unpaid wages and fringe benefits, and determining that under the circumstances president was not liable).

3. Other states' laws vary, so if your business takes you to other jurisdictions be sure to check local law. Certain states, such as Illinois, New York, and Washington, have held that managers, directors and officers can be personally liable under those states' wage and hour statutes. New York even imposes criminal penalties on individuals when wages are not paid in violation of the statute.

Michigan has one of the strictest statutory schemes in the country pertaining to individual liability for unpaid taxes (of any kind) if a business fails to remit. The IRS has similar powers for federal taxes, although they are more limited.

V. <u>TAXES</u>

A. Michigan/State

1. The Michigan Department of Treasury has the authority to individually assess officers, members, managers, and/or partners for the liabilities of a corporation, limited liability company, limited liability partnership, limited partnership or a partnership under Michigan law for unpaid taxes. MCL 205.27a(5) states

> "If a corporation, limited liability company, limited liability partnership, partnership or a limited partnership liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers, members, managers, or partners who the department determines, based on either an audit or an investigation, have control or supervision of, or responsibility for, making the returns or payments is personally liable for the failure."

2. Following an entity's nonpayment of state taxes, Treasury begins the investigative process, culminating in the issuance of a "Letter of Inquiry" being sent to all individuals identified as being potentially liable for the corporate debt during the period in question. Note that at the time the Letter of Inquiry is issued, it is the understanding of the Department that the recipient may be liable for the billing/assessment, but no adjudication of such has been made at that time.

3. The recipient then has thirty days from the date on the Letter of Inquiry to submit documentation that proves he/she was not involved with the corporation, an officer of the corporation, or responsible for paying taxes/filing Michigan tax returns during the

relevant time period. We advise seeking assistance of counsel for responding to any Inquiry letter.

4. If no documents are sent in, or Treasury is not satisfied that they exculpate the recipient of the Letter, a bill will be sent for taxes due to the recipient. The bill notifies the person that the Department intends to hold them personally liable for the corporate taxes in question. The recipient may dispute the request within 60 days on the date on the bill for taxes due.

5. If the Department doesn't receive any payment, installment agreements, or an approved notice of appeal, the State of Michigan will send the file to collections, which can adversely affect the individual's creditworthiness and ability to borrow funds. Other possible consequences include garnishments of wages/accounts receivable, the placement liens on real or personal property, and active interception of state money being sent to the person (i.e., tax refunds).

6. Michigan has one of the toughest sets of individual liability standards in the country. Recent efforts to revise this law have not been successful in Lansing. Governor Snyder vetoed the last attempt to relax this liability in early 2014.

B. Federal Liability: The IRS has a similar process at the federal level for unpaid taxes.

1. Under Internal Revenue Code Section 7202, anyone required to collect, account for, and pay over to the IRS any tax is guilty of a felony, punishable upon conviction by fine of up to $10,000, or imprisonment of up to five years, or both, for each offense.

2. The IRS will also assess the company's taxes due personally against the company's "responsible persons" which includes those individuals who controlled the company's available funds and used them to pay debts other than taxes, such as ordinary course of business.

3. "Trust fund recovery penalty" – this is the penalty levied by the IRS following a nonpayment of federal taxes. This is what is assessed against the responsible individuals.

a) INCLUDES: Federal income tax and Social Security tax withheld by the company from employees' wages but not paid to the Internal Revenue Service.

b) DOES NOT INCLUDE: Employer matching Social Security tax, as well as penalties and interest accrued on the unpaid tax.

4. Statute of Limitations: 10 years to collect.

5. Mechanism: The IRS will place a tax lien all property owned by the responsible person at the time the trust fund recovery penalty is assessed, or acquired by the responsible person during the ensuing ten years. The IRS records notice of the Federal tax lien in the register of deeds' office of the county of the responsible person's residence.

6. Consequences: The tax lien may interfere with selling or mortgaging real property interests, can adversely affect creditworthiness, and will appear in employment background checks.

7. Not Dischargeable: A trust fund recovery penalty is not dischargeable in bankruptcy.

In line with the serious nature of occupational safety issues, individual liability can attach to various violations of occupational safety laws.

VI. WORKPLACE SAFETY: Occupational Safety and Health Act and Michigan Occupational Safety and Health Act

A. OSHA

1. General Duty: Under the Occupational Safety and Health Act (OSHA), employers must provide a workplace free from "recognized" hazards. A violation of this duty can lead to criminal sanctions in addition to civil penalties. An employer can also be exposed to liability under occupational safety and health regulations promulgated by the Secretary of the Department of Labor. Officers can be found personally liable.

2. OSHA provides for criminal sanctions when (1) the employer's willful violation of a standard, rule, order, or regulation has caused the death of an employee, (2) when the employer falsely represents its compliance with OSHA, or (3) when a person gives advance notice of an OSHA inspection.

3. OSHA imposes liability on an "employer" for violations. An "employer" is defined as "a person engaged in a business affecting commerce who has employees . . ." A "person" is defined as "one

or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons."" 29 USC 652. This means that an individual can be liable as an "employer" for OSHA violations.

4. The OSHA Review Commission has thus far not recognized a corporate officer as an employer (unless, of course, the officer is the one committing the violations); however, at least one federal district court has concluded that the question of whether a corporate officer who was otherwise uninvolved in the violation in question was an "employer" under OSHA was for the fact finder to decide.

5. In *US v Cusack*, 806 F Supp 47 (DNJ 1992), the federal district court in New Jersey found that "an officer's or director's role in a corporate entity (particularly a small one) may be so pervasive and total that the officer or director is in fact the corporation and is therefore an employer" under OSHA. The court acknowledged that if the individual's role was not substantial enough to raise him to the level of an employer, he could not be charged as a principal or an aider and abettor.

6. **Sixth Circuit Danger Zone**: In *Danis-Shook Joint Venture XXV v Sec'y of Labor*, 319 F3d 805 (6th Cir 2003), the Sixth Circuit held that an employer "knew" about a worksite safety violation because its worksite supervisor, who drowned during work at a wastewater treatment plant, was aware of his own safety violation. 319 F3d at 812. The court reasoned that "[b]ecause [he] was a foreman and knew of his own failure to wear personal protective equipment, this failure may be imputed to [his employer]." The Sixth Circuit is an outlier as most circuits do NOT impose a supervisor's knowledge of an OSHA violation to the employer.

B. MIOSHA

1. Like OSHA, MIOSHA defines "employer" as "an individual or organization, including the state or a political subdivision, which employs 1 or more persons." MCL 408.1005(2).

2. Supervisory violations of MIOSHA impugn the corporation, which may include directors and/or officers. *See People v Lanzo Const Co*, 272 Mich App 470 (2006).

One of the most commonly overlooked (and easily avoided) sources of individual liability for a corporate director of officer relates to management of retirement plans. Fortunately, the bulk of liability issues can be handled easily with correct planning and foresight.

VII. EMPLOYEE RETIREMENT INCOME SECURITY ACT/ERISA

A. Employers are not required to set up employee benefit plans; however, if they do, certain fiduciary obligations arise and can attach to individual directors and officers, even if the corporation ultimately dissolves, closes down, or goes bankrupt.

B. The Corporate form does not insulate corporate directors or officers from liability for actions taken as an ERISA fiduciary. Directors & Officers are ERISA fiduciaries "to the extent" they exercise:

1. Discretionary control or authority over plan management;

2. Discretionary authority or responsibility over plan administration;

3. Any authority or control over management or disposition of plan assets.

4. Authority to select and retain plan fiduciaries.

See ERISA § 3(21)(A), 29 U.S.C. 1002(21)(A); 29 C.F.R. 2509.75-8.

C. Specific Fiduciary Duties:

1. Duty of loyalty, ERISA § 404(a)(1)(A), 29 USC 1104(a)(1)(A).

2. "Prudent person" obligation. ERISA § 404(a)(1)(B), 29 USC § 1104(a)(1)(B).

3. Exclusive purpose obligation. *Kuper v Iovenko*, 66 F 3d 1447 (6th Cir 1995). This means that fiduciary may act to provide benefits to plan beneficiaries only.

D. ERISA obligations are not dischargeable in corporate bankruptcy.

E. Personal liability. The Department of Labor may pursue an ERISA plan fiduciary personally under §409 which provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary …

F. Consequences. Even if the corporation closes or has no more assets, the Department of Labor can place liens on a fiduciary's personal property, garnish future income or offsets of a fiduciary's 401K account long after the company shut its doors.

G. No indemnification. Even if a plan sponsor has adopted indemnification provisions in the plan's documents, such provisions are likely unenforceable. ERISA § 410(a) provides that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy."

H. Possible methods of reducing risk for ERISA liability specifically:

1. Obtain Fiduciary Liability Insurance or other appropriate coverage. Most D+O policies exclude ERISA claims.

2. Remove directors and officers from investment or plan administration entirely, including day to day management or placement on committees.

3. Delegate fiduciary duties in corporate documents to one specific non-director (and purchase insurance for that person).

The corporate form serves as a shield, but not always. If a corporation commits certain tortious conduct, the consequences of those actions can flow through to individual decision makers, directors, and officers.

VIII. TORTS

A. A corporate officer is generally not liable for the corporation's torts simply by virtue of the office. Rather, liability only attaches to those corporate acts in which the officer personally or actively participates.

1. Personally Committed. In *Warren Tool Co v Stephenson* (a case involving a suit against the former president and general manager of a corporation alleging that they inappropriately diverted corporate funds), the Michigan Court of Appeals stated that "[i]t is a familiar principle that the agents and officers of a corporation are liable for torts which they personally commit, even though in doing so they act for the corporation, and even though the corporation is also liable for the tort. *Warren Tool Co v Stephenson*, 11 Mich App. 274, 300 (1968).

2. <u>Corporate Veil need not be pierced if personal participation</u>. It is important to note that in order to find officers of a corporation personally liable the Plaintiff need not invoke the doctrine of corporate veil piercing. In *Attorney General v Ankersen*, the Michigan Court of Appeals specifically stated that "[w]e note that this is not a question of piercing the corporate veil. It is beyond question that a corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation. *Attorney General v Ankersen*, 148 Mich App. 524, 557 (1986). The court, therefore, found that the defendant was personally liable as owner and operator of a corporation guilty of promulgating a nuisance and of violating the fire code.

B. Specific Torts (Common)

1. <u>Torts to Land</u>. In *Allen v Morris Bldg Co*, the Michigan Supreme Court found that a corporation's president and majority stockholder had supervised operations which resulted in the flooding of neighboring land. As a result, the court ruled that the individual had "participated in the tort" and was liable along with the corporation itself. 360 Mich 214, 218 (1960).

2. <u>Negligence</u>. The Court of Appeals concluded in *Baranowski v Strating* that [w]hether defendant … was acting on his own behalf or as an officer or agent of the corporation, he is personally liable for torts in which he actively participated, … including negligence. *Baranowski v Strating*, 72 Mich App 548, 560 (1976). *Baranowski* involved assigning liability to owners/officers of a corporation for their negligence in not conducting soil boring tests prior to constructing a house.

3. <u>Conversion</u>. This doctrine of personal liability for corporate officers also applies to situations where a corporate officer participates in conversion, even when the conversion was for the benefit of the corporation and not that of the individual officer. *See, e.g. Warren Tool Co. v Stephenson*, 11 Mich App 274, 300-301 (1968), *Bush v Hayes*, 286 Mich. 546, 549-550 (1938), *Trail Clinic, PC v Bloch*, 114 Mich App 700, 709 (1982), and *Citizens Ins. Co. of America v Delcamp Truck Center, Inc.,* 178 Mich App 570, 576 (1989).

In light of the foregoing areas of liability, below are some best practice pointers which, if utilized correctly, can help minimize or eliminate entirely many of the areas of risk described in this outline.

XI. BEST PRACTICES FOR AVOIDING LIABILITY

A. Information and Documentation. Ensure that directors, officers, and individual decision makers have full information regarding subordinates' activities and possible exposure points for liability. This will give everyone sufficient warning to retain counsel to navigate through difficult decisions as may be necessary, which ultimately can lead to better decision-making, lessen the likelihood of costly mistakes, and minimize the individual's exposure to litigation.

B. Know the law. Ignorance is no defense. It is your obligation to know the various areas of law applicable to your sphere of action, and you must stay up to date as the law changes.

C. Use common sense. Does something seem complicated or thorny? Consult with counsel rather than trying to navigate alone.

D. Implement effective supervisor training. Supervisors are the first line of defense against a possible claim given their regular interface with employees, so use best practices to ensure supervisors are acting appropriately towards employees and are trained to act professionally and in accordance with best management and corporate practices.

E. Be consistent and audit often. If a policy (regarding any sort of workplace issue) is in place, enforce it without exception and continually monitor to ensure it is being followed.

F. Director's and Officer's Liability Coverage. Make sure the corporation carries an appropriate kind and amount of D+O coverage. This will provide the directors and/or officers with coverage should a claim arise, regardless of whether the claim is meritorious.

G. Employment Practices Liability ("EPL") Insurance. Individual decision makers who may find themselves in the crosshairs of potential claims should ensure they are covered under the company EPL policy and, if not, at least ensure they will be indemnified by the company should an issue arise if the decision maker is sued when acting on behalf of the employer.

H. Indemnification. Ensure that, if possible, the corporate bylaws indemnify directors and officers against any and all claims or losses sustained as a result of negligence.

BUYER/SELLER BEWARE: EMPLOYMENT ISSUES IMPACTING THE SALE OF A BUSINESS

By: Ronald A. Sollish, Esq.

I. ACQUISITION ISSUES

A. Due Diligence (see attached Due Diligence Checklist)

B. Allocation of Risk within Purchase Agreement

C. Statutory or Common Law Risk and/or Successor Liability

II. INVESTIGATIONS

A. Workforce

B. Agreements

C. Plans

D. Disputes and Litigation

E. Compensation Arrangements

F. Benefits

G. Health and Welfare

H. Labor Agreements

I. Safety

J. Culture

III. BUSINESS TRANSFEROR'S NOTICE TO TRANSFEREE OF UNEMPLOYMENT TAX LIABILITY AND RATE

A. UIA Form 1207 (see attached UIA Form 1207)

B. Regardless of any agreements between the parties to the transfer, the law provides when a business is sold (or otherwise transferred), the Buyer (or other Transferee) of the business may be liable to pay the unpaid unemployment taxes and interest and may receive the unemployment tax rate, penalty, and the benefit charges of the Seller (or other Transferor)

C. The law requires the Transferor of the business, or the Transferor's real estate broker or other agent or attorney, to complete and deliver Form 1027 to the Transferee of the business at least two calendar days (not including Saturday and Sunday or legal holidays before the Transferor's acceptance of the Transferee's offer to acquire the business

D. Failure of the business Transferor or Transferor's agent to provide correct information is a misdemeanor, punishable by up to 90 days imprisonment and/or fine of up to $2,500 civil liability for consequential damages resulting from the failure to comply with the obligation

E. In general, a person or business that acquires the organization, trade, business, or 75% or more of the assets of a business will be liable for unemployment taxes, interest due the unemployment insurance agency from Seller (or other Transferor) of the business, the time of the transfer, up to the reasonable value of the business minus any secured interests in assets

F. SUTA Dumping

IV. COBRA OBLIGATIONS

A. Successor liability may exist for Buyer

B. In a stock sale where selling group ceases to provide a group health plan, the buying group health plan must provide COBRA coverage to qualified beneficiaries

C. In an asset sale where the selling group ceases to provide a group health plan. The buying group health plan has the obligation to provide COBRA coverage to qualified beneficiaries

D. Parties are permitted to allocate responsibility for COBRA pursuant to a contractual agreement

V. THE WORKER ADJUSTMENT RETRAINING NOTIFICATION ACT ("WARN"), 29 USC § 2101 ET. SEQ.

A. The Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §2101, et seq. provides that employers about to experience mass layoffs or plant closings must notify employees of the upcoming events.

B. Coverage.

Generally, WARN applies to employers who have at all their sites a total of 100 or more full-time employees or 100 or more employees including part-time employees who work at least 4,000 hours per week, exclusive of overtime.

C. When is Notice Required.

Notice is required when there is a mass layoff or plant closing. A mass layoff occurs when there is a reduction in hours that effects 500 or more full-time employees or 50 or more full-time employees if they constitute at least 33% of the active full-time employees. A reduction in hours worked means a reduction of 50% during each month of any six month period as compared to the previous six months.

D. Plant Closing.

A plant closing occurs when there is a temporary or permanent shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment and 50 or more full-time employees are laid off, terminated or experience a reduction in hours.

E. Notice.

In the event of a mass layoff or plant closing, notice must be given to the employees or their union, the state dislocated worker unit and the chief elected official of local government. Notice must be given 60 calendar days prior to the final day of work. Shorter periods of time are allowed in the event the employer is seeking capital or business which would avoid the plant closing, there is a dramatic, sudden, unforeseen circumstance forcing the plant closing or layoff, there is a natural disaster, or if a layoff extends beyond the six month period but was not originally intended to do so. The notice must contain comprehensive information regarding the site of employment, the temporary or permanent nature of the layoff, the date the layoff or plant closing is to occur, individuals affected and such other additional information as may assist in the employee following the layoff or plant closing.

F. Penalties.

Unions, governments and discharged employees are afforded the right to file lawsuits alleging damages under WARN including damages for back wages, benefits, fines and attorney fees.

G. In the sale of the business where the Purchaser elects to keep all or most of the employees, the Warn regulations indicate that an employee's termination of employment incident to an asset sale does not constitute a **LOSS OF EMPLOYMENT** for Warn purposes

VI. EMPLOYMENT SEPARATIONS-REDUCING AN EMPLOYER'S EXPOSURE TO LIABILITY

A. General Considerations.

Generally, reducing liability for terminating employees depends on an employer's appropriate adherence to good employment practices. Employers who have obtained "at-will" statements from their employees, have properly documented disciplinary and performance infractions, and have consistently applied employment practices and policies, generally have lower risks of liability arising out of employment terminations.

B. Exit Interview.

For any employment related termination, an exit interview should be conducted between the employee, the individual recommending the employee's discharge and a member of the personnel department. The basis for discharge should be reduced to writing and documented. The employee should acknowledge a receipt of the employment action leading to discharge and should be given an opportunity to respond thereto. The exist interview should be conducted in such a fashion as to afford the employee as much respect and dignity as possible. The employer should attempt to reduce the stress, and embarrassment of the termination process. All parties present at the termination exit interview on behalf of the employer should prepare written notes of the event. Attempt to obtain conciliations from the employee regarding the employee's understanding of the basis for termination.

C. Releases.

One of the best ways an employer can eliminate liability upon termination of employees is to obtain a signed release from the employee. In order to be enforceable, a release should contain the following provisions:

1. Voluntary.

   A release must be knowingly and voluntarily executed. The employee's signature cannot be obtained through duress, fraud or misinformation. The release should contain an express provision providing that the employee has signed the agreement knowingly and voluntarily.

2. Consideration.

The employee must receive some type of consideration which he or she would not have otherwise been entitled to but for the release. Such consideration can take the form of additional compensation, payment for health benefits if permitted under the health insurance plan, letters of recommendation, use of secretary or office facilities, or out placement services.

3. Time to Review.

The employee must be given ample time to deliberate and review the release. The courts have essentially recognized the embarrassing and stressful nature of the termination process and are thus more likely to enforce a release if an employee is given a reasonable period of time to review the documentation.

4. Express Release.

The nature and scope of the release must be specifically set forth in the document. The release should be generally broad based and apply to all forms of employment related claims which could be asserted by the employee.

5. Execution.

The release must be signed by all of the parties to the document.

6. Additional Provisions for Inclusion in a Release.

a. Reaffirmation of "at-will" relationship.

The release should reaffirm that the employee was retained on an "at-will" basis.

b. Attorney Review.

The release should provide a certification that the employee has seen or has been afforded the opportunity to review the release with an attorney. An employer's best defense to rescission of a release arises in situations where the employee has been represented by counsel.

c. Confidentiality.

The release should contain language whereby the employee agrees not to disclose the terms or existence of the release.

d. Conduct.

The release should contain language whereby the employee agrees not to act in any way which could cause embarrassment, damage or injury to the reputation of the employer.

e. Return of Property.

The release should contain language providing that any property which is in the possession of the employee which is owned by the employer shall be returned.

f. Default Provisions.

The release should contain provisions dealing with breach or default by the employee of the terms and provisions of the release. Additionally, the document may contain alternative dispute resolution mechanisms.

g. Waiver of Right to Tender Back.

Various common law cases exist whereby an employee can tender back the consideration received in support of the release and thereafter, proceed against the employer. The release should contain a provision which provides for a waiver of the right to tender back consideration.

h. Waiver of Right of Reinstatement.

The employee should waive the right to be reinstated and/or to re-apply for a position with the employer.

7. Releases Applying to Older Workers.

Workers who are 40 years of age or older may be covered by the Older Workers Benefit Protection Act. The Older Workers Benefit Protection Act requirements apply to all releases and waivers of any claim under the Age Discrimination in Employment Act. In order for a release to be valid under the Age Discrimination in Employment Act, the release must contain the following specifications:

a. The release must be written, understandable and must refer to claims under the Age Discrimination in Employment Act.

b. The employee cannot waive rights that arise after the date of the release.

c. The employee must receive some consideration which they would not otherwise be entitled to but for the release.

d. The employee must be advised of the right to consult with an attorney before execution of the release.

e. An employee must be given at least 21 days to consider the agreement and 7 days in which to revoke the agreement after signing it.

f. If the waiver is offered as part of an incentive program which is offered to a group of employees, the employees must be given 45 days to consider the agreement.

VII. DISCRIMINATION ISSUES

A. Age

B. Disability

C. Workers' Compensation

D. Other protected classes

VIII. RETIREMENT PLAN TERMINATION

A. A successor liability

B. Withdraw liability, alter ego

C. Adoption of plan

IX. COLLECTIVE BARGAINING AGREEMENTS

A. Duty to bargain

B. Contract terms

C. NLRB claims

HUMAN RESOURCES

1. General:

Documents Required:

1.1. Current active employee census (hard copy) and digital file (preferable), including:

1.1.1. Employee ID and other unique identifier (optional)

1.1.2. Social Security Number

1.1.3. Name

1.1.4. Gender

1.1.5. EEO Classification

1.1.6. Job Grade

1.1.7. Salary Range

1.1.8. Job Title

1.1.9. FLSA Code

1.1.10. Other Status (FT, PT) Temporary, etc.)

1.1.11. Hire Date

1.1.12. Benefits Date (if applicable)

1.1.13 Rehire Date (if applicable)

1.1.14. Birth Date

1.1.15. Salary (annual) for 2012, 2013 & YTD 2014

1.1.16. Salary (hourly, biweekly, monthly, if applicable) for 2012, 2013 & YTD 2014

1.1.17. Bonus & Commission for 2012, 2013 & YTD 2014

1.1.18. Weekly hours worked basis (40, 37.5, etc., if applicable) for 2012, 2013 & YTD 2014

1.1.19. Annual Over time Income for 2012, 2013 & YTD 2014

1.1.20. Shift differential

1.1.21. Other compensation (commissions, etc.)

1.1.22. Department Name

1.1.23. Listing of Fringe Benefits which the employee currently has (i.e., Medical, Dental, 401 (k), Life Insurance etc.)

1.1.24. Detail Organization Chart

1.2. List of plan participants (if available, employees not participating) by classification, i.e., salaried, hourly, union, commissioned sales people. Include date of birth, date of hire, salary, bonus, current year-to-date and prior year's W-2 earnings, position/grade level and marital status.

1.3. Copies of compliance documents for Immigration Control Act.

1.4. All claims, actions and proceedings (other than benefit claims in the normal course) pending or threatened in connection with any employee benefit plan or employment-related matter, including, without limitation, all wrongful discharge claims and proceedings, and claims for unemployment claims, litigation's, and other proceedings under OSHA, ADEA, Title VII, and all other equal opportunity laws, including those of any state or municipality, and all deficiency and other reports, notices of violation and governmental findings regarding same.

1.5. List all plant closings and mass layoffs covered by ARN since its inception and all governmental, regarding same.

1.6. List and description of recent employee termination programs, reductions in force, early retirement windows, etc. and impact on each location in Group.

1.7. Department Code (division, cost center, etc.)

1.8. Latest annual report, proxy statement and Form 10K (if applicable)

1.9. Organizational Charts

1.10. Employee benefits budget for current year by plan.

1.11. Board of Directors meeting minutes for past two years. Specifically, when votes were taken changing Employee Benefits and/or Human Resource policies and procedures.

1.12. Headcount Report by Business unit (or division, group, etc., whichever is applicable).

1.13. Description of Loans or other similar arrangements to directors, officers and employees.

Questions:

1.14. Are there any outstanding HR regulatory issues with such agencies as the IRS, DOL, SEC, etc.?

1.15. Are there any issues with compliance associated with operational or internal administration or audit findings requiring follow-up or resolution?

1.16. Is there a written severance plan policy?

1.17 Are there any state laws or requirements regarding plant closings or corporate mergers regarding severance? ("Tin" parachutes) extended health coverage with employer paying full cost, etc.).

1.18. Who sets the policies in each of the following areas, and who is accountable for and coordinates each area?

1.18.1. Recruiting/Selection

1.18.2. Employee Relations

1.18.3. Compensation

1.18.4. Benefits

1.18.5. Training/Development

1.18.6. Labor Relations

1.18.7. FEG

1.18.8. Safety

1.19. Do you have a formal policy in each of the above areas?

1.20. Is it a published policy?

1.21. Has it been communicated to all employees?

1.22. If so, how has it been communicated to all employees?

1.23. How often are the policies reviewed, and by whom?

2. Recruiting and Selection:

Documents Required:

2.1. Sample offer letter.

2.2. Sample employment application.

2.3. Sample employment contract.

2.4. Diagram of the hiring/decision-making process.

Questions:

2.5. Describe any oral or informal promises or commitments regarding any terms of employment

2.6. Do you have a staffing plan?

2.7. Do you have a staffing budget?

2.8. Does authorization for filing a position require that a position description be submitted if none exists?

2.9. What is the practice in determining what sources of candidates are to be selected?

2.10. What sources do you use?

2.11. Is an attempt made to fill position vacancies from within the organization?

2.12. Is job posting used to advise employees of available positions?

2.13. Are employees advised of the requirements for available positions?

2.14. Are selection devices, such as tests, used?

2.15. If so, which ones are used, and who administers them?

2.16. When would positions not be filled from within the organization?

2.17. In recruitment advertising, are fill job particulars given, such as experience desired, educational requirements, location, travel required, etc.? (If advertising is used, attach copies of various ads).

2.18. How many candidates are considered desirable in filling a typical job vacancy?

2.19. Are employees from within the organization who apply for open positions considered before an attempt is made to obtain candidates from outside the organization?

2.20. Who screens all candidates?

2.21. Have these devices been professionally validated?

2.22. Have managers who must interview job candidates been trained in interviewing techniques?

2.23. Have the interviewers been trained in the legal requirements of selection interviewing?

2.24. Are all candidates informed regarding the organization's decision?

2.25. Who makes the final selection decision?

2.26. Is the selection interview considered a two-way flow of information in that information about the company and the job is communicated to the candidate?

2.27. Is the applicant's prospective supervisor involved in the hiring process?

2.28. Is descriptive literature about the company available, and is it given to the candidates?

2.29. Does your company provide a personnel orientation and induction process for new employees?

2.30. Do you have a college relations or recruiting program? if so, who coordinates it?

2.31. Are individuals recruited from colleges treated differently from other candidates?

2.32. Is there a reference-checking procedure outline?

2.33. Do you obtain applicants' authorization before checking references?

2.34. Are copies of references kept for seven years?

2.35. Has the organization implemented the requirements of the Immigration Reform and Control Act of 1986?

2.36. Has the organization projected its future needs in the area of recruitment and selection?

2.37. Is there a relocation policy? Are there any current liabilities?

2.38. What is the cost per hire per category of employee (Administrative, Secretarial, Accounting etc.)?

2.39. How many hires in each category did you have for the past year?

2.40. How many terminations, indicate voluntary and involuntary, in each category in the past year?

2.41. Is it company policy to rehire retirees? Is so, are they rehired as independent contractors or employees? Do they continue to receive their pension and retiree benefits?

2.42. What is your total employment? And what was it for each of the past five years?

2.43. Is turnover up or down, overall, and by category?

2.44. What are your hiring plans for the next 12 months, total, and by category?

2.45. Using a scale of 1 to 10, how do you think most employees rated the quality of the recruitment and selection function?

2.46. Using the same scale, how would you rate the function?

3. Employee Relations:

Documents Required:

3.1. Written policies and procedures including employee handbook, supervisor's handbook and other official policy and procedures handbooks. Leave of absence (including sick pay and salary continuation), vacation policies and termination procedures should be included.

3.2. List of employees currently on a Leave of Absence.

3.3. State Laws and/or regulations covering severance (plant closings), mandated benefits, unemployment and any other Human Resource issue.

3.4. Employment agreements/contracts with rehired employees (specifically, terminated employees and retirees).

3.5. Separation of Employment Agreements if applicable.

3.6. Severance plan document, policy and description.

3.7. Copies of contracts with outside vendors providing EAP or Wellness services.

3.8. Service award program description

3.9. Copies of all Employee Confidentiality and Invention Agreements.

Questions:

3.10. Is there any HR litigation pending?

3.11. Are there any cases recently settled past 2 years?

3.12. Are there any Federal or State consent decrees?

3.13. Are banking services provided to employees? If so, what types?

3.14. Are there any special discounts for employees such as subsidized cafeteria, commuting subsidies, fitness club discounts, etc.?

3.15. Is an outside firm used to manage unemployment claims?

3.16. Is there a Wellness Program?

3.17. Do you offer any non-traditional benefits that we should be aware of, such as financial planning, elder care, or legal services?

3.18. Is the company in compliance with the Americans with Disabilities Act (ADA)?

3.19. Are employees given information on whom to consult about Employee Relations situations?

3.20. Is there an individual available with whom employees can discuss personal matters?

3.21. Does someone conduct exit interviews?

3.22. Are attitude surveys conducted?

3.23. To whom are attitude survey results communicated?

3.24. Does the organization communicate its reactions to the results of the survey?

3.25. Are the results compared with those of prior surveys?

3.26. Is there an open door policy in place that allows employees to discuss their problems. If so, describe; if not, discuss alternatives.

3.27. Is this policy documented and published to all employees?

3.28. How often has this policy been utilized in the past 12 months?

3.29. Does management meet routinely with the employees to inform them of business conditions and have an open dialogue about issues of mutual concern?

3.30. Are managers routinely meeting with their subordinates at staff meetings?

3.31. Are your supervisors given information about the company's plans and progress before this information hits the "grapevine"?

3.32. Is the absenteeism tracked, and if so, what is the rate presently and compared to past experience?

3.33. Does the organization sponsor social activities for its employees?

3.34. If so, what kind of activities are sponsored, and what is the level of participation?

3.35. Is there a service award (recognition) program?

3.36. Does the organization sponsor a child care center?

3.37. If so, how is it managed and what charge is made to the employee?

3.38. How many employees participate in the child care center?

3.39. Are there non-traditional work schedules such as flex-time, 4/40, etc.?

3.40. Is there an employee suggestion program? If so, how is it communicated?

3.41. Is the program successful in improving productivity?

3.42. Is there a policy and procedure which details the process for employee termination, including severance pay entitlement?

3.43. Does the organization sponsor an employee assistance program - AP?

3.44. Is the program available for employees only, or for employees and dependents?

3.45. Is the program a broadbrush program in that it allows for counseling on all issues, or only for substance abuse (drugs & alcohol)?

3.46. Have there been any union drives within the last five years?

3.47. If so, what unions were involved, and what were the results of any elections?

3.48. Has the organization projected its future needs in the area of employee relations?

3.49. Do you have a Human Resource or Personnel department or individual?

3.50. If so, what role do they play in formulating your employee relations plans, strategy and programs?

3.51. Using a scale of 1 to 1 0, how do you think the employees would rate the employee relations activity?

3.52. How would you rate the employee relations activity?

4. Executive Compensation:

Documents Required:

4.1. Plan documents

4.2. Communication Materials

4.3. Covered Employees

4.4. Estimates of Assets and Liabilities

4.5. Funding arrangements (Rabbi Trusts, Life insurance, general assets)

4.6. Individual signed agreements (if applicable) or generic agreement

4.7. Possible plans are:

4.7.1. Excess Pension and 40l(k)

4.7.2. SERP

4.7.3. Deferred Compensation

4.7.4. Stock Option Plans (including ISO, RSO, NQSO, SAR)

4.7.5. Employment Contracts

4.7.6. COLI

4.7.7. Split Dollar

4.7.8. Executive Severance Plan

4.8. Supplementary benefits payable to retirees and former employees.

4.9. All plans that exist for Board of Directors (Deferred Compensation, Health/Welfare and other special arrangements).

4.10. Special arrangements including automobiles, auto allowances and/or parking arrangements, club memberships, tax preparation or other perquisites.

4.11. Listing of employees eligible for executive plans.

5. General Compensation:

Documents Required.

5.1. Job evaluation program.

5.2. All salary structures or ranges for all employment categories (officer, exempt, non-exempt)

5.3. Key benchmark job descriptions.

5.4. Survey analysis of competitive market position.

5.5. General bonus/incentive plans for non-executive employees.

5.6. All stock option agreements and plans, stock appreciation rights and other stock-based compensation arrangements, contracts or plans involving employees or consultants of or with respect to the Group. (Please include a list of individuals holding unexercised stock options and other rights, the number of unexercised options and rights, the option prices, and when such options and rights are exercisable.)

5.7. All restricted stock arrangements including a list of individuals holding restricted stock grants, the number of shares and when restrictions lapse.

5.8. All vacation, leave, holiday, sick day, payroll practices and other fringe benefits including employee assistance programs, relocation policies, (domestic and international), tuition reimbursement programs, and housing allowances. Include funding source and future cost obligations to be assumed by successor company.

5.9. All "Golden Parachute," "Silver Parachute" and "Tin Parachute" arrangements involving the employees or consultants of the Group, including all arrangements conditioning or accelerating payment or vesting of benefits on a "change-in-control" or change in ownership of any entity involved in the Group or any position thereof.

5.10. All employment contracts and consultants' agreements, confidentiality and non-competition agreements, applications for employment, and hire letters with respect to employees, directors and consultants of the Group.

Questions:

5.11. Average merit increase, and average promotional and adjustment increases for past three (3) years.

5.12 Functions currently provided by employees who will not be transferred to buyer as part of Group.

5.13. Is there a pay program in effect and currently being administered?

5.14. What are your employee definitions (FT, PT, Temporary, Peak, etc.)?

5.15. What is the work week (40 hours)? When does it start/end?

5.16. How is overtime calculated? Shift differentials?

5.17. Is there a stock purchase plan independent of any qualified or non-qualified stock ownership or option plan?

5.18. Is a booklet summarizing the compensation program distributed to all new employees?

5.19. Is there a formal job evaluation program?

5.20. Who evaluates positions for compensation purposes?

5.21. Is the company in compliance with the Fair Labor Standards Act (Wage and Hour Law)?

5.22. Are salary and wage rates for positions communicated to the individuals filling these positions?

5.23 Are salary and wage rates for positions within a department communicated to all its members?

5.24. Is there a formal plan for salary and wage increases?

5.25. Who approves a salary or wage increase?

5.26. Are there regular dates for salary and wage reviews?

5.27. What is the longest time anyone may go without a salary or wage review?

5.28. Do you have performance evaluations, other than for salary or wage reviews? If so, attach a copy of your performance evaluation form.

5.29. Have supervisors and/or managers been trained in how to do reviews?

5.30. Are inflationary trends considered in reviews and/or rates?

5.31. Is longevity a key factor in determining increases?

5.32. Are managers provided with annual guidelines for salary/wage reviews?

5.33 Do you know of any wage or salary inequities in your present wage and salary program?

5.34 Does the organization conduct annual compensation surveys of similar organizations, organizations in the same geographic area, and/or competitive organizations?

5.35. Are the results of such surveys communicated to employees?

5.36. How often are the surveys conducted?

5.37. Is it the organization's policy to pay competitive salaries and wages?

5.38. Are the evaluations of specific positions periodically reviewed? if so, how often?

5.39. Does the organization have bonus/incentive plans? If so, briefly describe who is eligible, and the payoff.

5.40. Are they published and communicated to those eligible?

5.41. Are they based on individual performance?

5.42. Are they based on the organization's performance?

5.43. Are they considered to be part of the total compensation program?

5.44. Are there equity programs, such as stock options?

5.45. If so, what kinds of plans exist, and how successfully have they met the design objectives?

5.46. What concerns do you have about your compensation program?

5.47. Using a scale of 1 to 10, how do you think employees rate the compensation activity?

5.48 How would you rate the activity?

6. <u>Benefits:</u>

Documents Required:

6.1. Pension Plan

6.1.1. Plan Document and subsequent amendments.

6.1.2. SPD and other employee communications materials.

6.1.3. Favorable determination letter and, if there have been any amendments since the determination letter was issued, a legal opinion regarding subsequent amendments.

6.1.4. Latest Form 5500 filing, including auditor's report and PBGC filing.

6.1.5. Any comments/opinions regarding compliance with the Tax Reform Act and subsequent regulations.

6.1.6. Pension Committee Meeting Minutes for past two years.

6.1.7. Results of nondiscrimination testing, if applicable.

6.1.8. Most recent Actuarial Valuation Report and SFAS 132 figures.

6.1.9. Projection or budgeted figures for current and previous year's Contributions and Expense.

6.1.10. Latest statement of assets. Also details of any annuity holdings, if applicable. if assets include GIS's, provide a copy of the contract.

6.1.11. Current retiree and terminated vested data including sex, date of birth, benefit amount and form of benefit.

6.1.12. Trustee report detailing investments.

6.1.13. Name and address of actuary, accountant, Trustee, fund manager.

6.2. 401(k)Plan:

6.2.1. Plan Document and any subsequent amendments.

6.2.2. SPD and any other employee communications material.

6.2.3. Favorable determination letter and, if there have been any amendments since the determination letter was issued, a legal opinion regarding subsequent amendments.

6.2.4. Form 5500 filing including auditor's report.

6.2.5. 401(k) Committee meeting minutes for past two years could be the same committee which is responsible for Pension Plan.

6.2.6. Results of ADP/ACP nondiscrimination testing for prior year and projections for current year.

6.2.7. Latest statement of assets.

6.2.8. If assets include GIC's, provide a copy of the contracts.

6.2.9. Name and address of recordkeeper, accountant, trustee, fund manager.

6.2.10. Number of participants and company cost.

6.2.11 Trustee report detailing investments.

6.2.12 All trust instruments, annuity contracts, guaranteed investment contracts ("GIOCs") or other funding vehicles for such plans.

6.2.13 Any investment management agreements relating to investments of all or a portion of such plans' assets.

6.2.14 All fiduciary liability insurance policies and fidelity bonds for such plans.

6.2.15 The most recent actuarial valuation reports for all defined benefit plans of the Group.

6.3. Health/Welfare Plans

6.3.1. Plan documents for all benefit plans including medical, life (all types), STD, LTD, dental, retiree medical, Section 125, and reimbursement accounts.

6.3.2. SPD's and other employee communication materials

6.3.3. Employer and employee contribution schedules for all plans including COBRA.

6.3.4. Copies of all contracts with insurance companies, HMO's or TPA's including stop loss arrangements and ASO agreements.

6.3.5. Form 5500 filings for the last 3 years.

6.3.6. FAS 106 figures for retiree benefits.

6.3.7. Statement of financial experience for indemnity plans.

6.3.8. Is there a VEBA? if so, provide

6.3.8.1. Copy of Plan Documents

6.3.8.2. Plan Coverage

6.3.8.3. Reserve Accounts

6.3.8.4. Name of Trustee

6.3.8.5. Trust Document

6.3.8.6. Audited financials

6.4. Are any plans self-assured? If so, provide details of Incurred But Not Reported (IBNR) reserves.

6.5. Copy of Workers' Compensation policy/contract.

6.6. Copies of reports, claims, injury statistics for past three (3) years, and funding arrangements for workers' compensation. Copies of legal counsel's opinion letters on pending workers' compensation cases.

6.7. Copies of the current state disability (non-occupational) reports for plans insured in a state insurance fund.

6.8. Any existing estimate of the actuarial present value of the liability for post-retirement health, dental and life insurance benefits for current retirees as well as the estimated liability for future retirees, including ABO, PBO and actuarial assumptions.

6.9. Copy of general notification to employees required under COBRA (Code S4980B) and form letters distributed upon employment commencement and upon the occurrence of a qualifying event for all Group health plans.

6.10. Copy of HIPPA Certificate of Coverage (ERISA S701).

6.11. All claims experience reports and related data (claims reserves, etc.) for the last 24 months for all health and life insurance benefit plans with respect to the Group, broken down between retirees and active employees.

6.12. Any other available information similar to that requested above which would facilitate an analysis of the medical or life insurance benefits claims experience regarding the Group.

6.13. Enrollment statistics for all plans broken out by level of coverage (i.e. single, two-party, family).

Questions:

6.14. How are the Health and Welfare Plans administered? Staff? Systems?

6.15. Are the plans self or fully insured?

6.16. Are there Reimbursement Accounts? if so, how are forfeitures handled?

6.17. Do you have a tuition reimbursement program? if so, are there any employees currently drawing benefits? What is the dollar value of this commitment?

6.18. How is the Pension Plan administered? Staff? Systems? Who is the Plan Trustee? Plan Administrator? Actuary? Investment Advisor? Counsel?

6.19. Who is on the Pension Committee?

6.20. Has the Plan been amended to comply with the Tax Reform Act and subsequent regulations?

6.21. Are there any prior plan issues that affect the administration of the current plan?

6.22. Have the employees received information on whom to consult about benefit questions they may have?

6.23. Are benefits periodically reviewed? if so, by whom? And how often?

6.24. Are competitive organizations or organizations in the same geographic area regularly surveyed to determine the competitiveness of benefits?

6.25. How often and how is the survey made?

6.26. Is an individual accountable for continually reviewing legislation effective benefits and benefits trends?

6.27 Have studies been conducted to determine what type of benefits the employees want?

6.28. Has consideration been given to the possibility of cafeteria type benefits?

6.29. Are different benefit plans available for different levels within the organization?

6.30. Is one individual accountable for insuring all benefits meet local, state and federal benefits legislation such as ERISA and the Tax Reform Act of 1986? Who?

6.31. Has a discrimination test been performed? When?

6.32. Are the costs to the organization of benefits for individual employees communicated to employees?

6.33. How often is this information communicated and how is it accomplished?

6.34. What has been the trend for rising medical costs and have cost containment features been implemented to control the cost of medical coverage?

6.35. Do employees share the cost of the benefit programs, and if so, how much does the organization pay relative to the employee? (13e specific for each program.)

6.36 For what primary purpose does the organization provide benefits (philosophy)?

6.37. Does the organization comply with the requirements set forth in COBRA?

6.38. Who administers the COBRA Compliance, and have there been any complaints filed as a result of the administration?

6.39. What is the current COBRA enrollment?

6.40. Have 5500's been filed in a timely manner?

6.41. Has the organization projected its future needs in the benefits area?

6.42. How far into the future has it made this projection?

6.43. What benefits do you provide List each program and attach a copy of the Summary Plan Description.

6.44. How is the 401(k) Plan administered? Staff? Systems? Who is the Plan's Trustee? Plan Administrator? Recordkeeper? Investment Advisor? Counsel?

6.45. Is there a Company Match? If so, what is the vesting schedule?

6.46. How are forfeitures handled?

6.47. If you have a 401(k), have you performed a deferral test? IF so, who performed it? When?

6.48. Using a 1 to 10 scale, how would you think the employees rate the benefits program?

6.49. How would you rate the program?

6.50. Is there a Sick leave policy? A short-term disability or salary continuation program? How do they interact?

7. <u>HRIS/Payroll:</u>

Questions:

7.1. How are employees paid? In-house, or through a vendor?

7.2. What type of HRIS is used? How does it interface with Payroll?

7.3. Is direct deposit provided?

7.4. Does the Payroll system or HR'S support the benefits program?

7.5. How is the HR'S supported (outside vendor contracts or in-house)?

7.6. What software is used? Are there PC or LAN applications?

8. <u>Training and Development:</u>

Questions:

8.1. Who initiates requests for the type of training provided? (Name, Title)

8.2. Who determines the types of training techniques utilized? (Name, Title)

8.3. Do all training and development programs have clearly established objectives?

8.4. Are training needs regularly reviewed with management?

8.5. Who identifies the individual training needs of employees? (Name, Title)

8.6. How are individual training needs identified?

8.7. Are subscriptions to professional journals encouraged?

8.8. Are memberships in professional organizations encouraged?

8.9. Are internal or external seminars used in training?

8.10. Is there any audio-visual equipment available to be used in training in-house?

8.11. Are training and development programs developed internally, externally or both?

8.12. Is the use of external training resources coordinated by an individual?

8.13. Is information regarding outside training resources obtained by an individual and distributed throughout the organization?

8.14. Has the organization made plans to meet its future training and development needs?

8.15. What are your training goals?

8.16. How do you measure the results?

8.17. What types of training do you provide (technical, professional development, etc)?

8.18. Is training tied to performance? if so, how?

8.19. Do you have a "Mentor" program?

8.20. Is a file of external training resources maintained?

8.21. Has the organization projected its future needs in the areas of training and development?

8.22 Using a scale of 1 to 10, how do you think the employees would rate the effectiveness and quality of the training and development activity?

8.23 Using the same scale, how would you rate the activity?

9. Labor Relations:

Questions:

9.1. Copy of each collective bargaining agreement, and all related side-letters and similar informal agreements involving the Group. Indicate if any agreement contains assertion clauses or stipulations of insurance carrier, plan administration, etc.

9.2. Describe multiemployer pension plans to which the Group contributes and a description of any withdrawal that has occurred or is imminent or asserted and any estimates or determinations of potential withdrawal liability or the contribution history necessary to determine such withdrawal liability.

9.3. Describe any strike, organizing campaigns at non-union locations, work stoppage, unresolved grievances, labor disputes or arbitration proceedings involving the Group during the past three (3) years.

9.4. Schedules for upcoming negotiations, negotiation minutes from last negotiations, including union and Group proposals, settlement, etc.

9.5. List of employees and pay classifications which are represented by the respective union at each location.

9.6. Does the company have continuing access to legal counsel in labor relations matters?

9.7. Who in the organization has authorization to obtain counsel? (Name, Title)

9.8. Have managers within the company been informed about what to do in the event of a union organization campaign?

9.9. Are managers regularly updated on union organization methods and on legal requirements regarding managers' actions?

9.10. How often do they receive this updating?

9.11. In the event of a union organizing campaign, is there one individual accountable for the organization's response?

9.12. Has the individual accountable for management's role in a union organizing campaign been identified prior to the start of any campaign?

9.13. Is there any individual in the organization who, on a regular basis, reviews current labor regulations, rulings and activities?

9.14. In preparation for union negotiations, are the managers and supervisors of the employees covered by the union agreement asked for their recommendations regarding changes to the existing document?

9.15. In preparation for union negotiations, are grievances and arbitration records reviewed?

9.16. Are parameters clearly established for possible settlements well in advance of negotiations?

9.17 Who is the chief spokesperson for the organization at negotiating sessions?

9.18. Is there an individual who attends some type of briefing seminar or updating conference on labor matters just prior to negotiations?

9.19. Does your organization actively consult and share information with others in the same industry or geographic area?

9.20. Is there an individual accountable in the organization for overseeing the final settlement of all grievances?

9.21. Are records of all grievances maintained and analyzed?

9.22. Are grievances investigated within 5 days of receipt?

9.23. Is it management's policy to settle grievances at the lowest possible level in the grievance procedure?

9.24. Are grievances reviewed by legal counsel at any point in the grievance procedure prior to arbitration?

9.25. Who represents management at arbitration hearings? (Name, Title)

9.26. Briefly describe arbitration procedures. Who is involved from the company in each step?

9.27. Has the organization projected its future needs in the area of Labor Relations?

9.28. On a scale of 1 to 10, how do you think most employees would rate the quality of Labor Relations activity?

9.29. How would you rate its quality?

9.30. Attach a copy of the union contract.

10. Equal Employment Opportunity:

Questions:

10.1. Copy of current Affirmative Action Plan and most recent EEO-1 report.

10.2. Are all legally required bulletin board notices posted at all locations?

10.3. Are all bulletin boards periodically reviewed to ensure that all the required notifications are displayed?

10.4. Who has the responsibility to review the bulletin boards? (Name, Title)

10.5. Does the organization view EEO as a government requirement, a social responsibility or both?

10.6. Is one individual accountable for coordinating EEO activities?

10.7. Has the identity of that individual been communicated throughout the organization?

10.8. Are state and federal reports on EEO prepared and filed whenever requested or required? EE01, etc.

10.9. Who is the person responsible for ensuring those reports are filed? (Name, Title)

10.10. Have all selection devices been reviewed to ensure they meet the requirements of job analysis, job relatedness and validity as required by EEO legislation?

10.11. Has the employment application form been reviewed to ensure it meets all EEO requirements?

10.12. Is all newspaper advertising reviewed to ensure it meets EEO requirements?

10.13. Have all employment agencies and search firms been notified of the organization's EEO policy?

10.14. Are all promotion and selection decisions reviewed to ensure they meet EEO requirements?

10.15. Are employment statistics obtained and reviewed to ensure that promotions, demotions, and selections are made without discrimination due to race, sex, religion or country of national origin?

10.16. Are all those who may conduct employment related interviews aware of the restrictions placed by EEO legislation on what may be asked in such interviews?

10.17. Has the organization projected its future needs in the area of EEO?

10.18. Has the organization compared this projection to its capacity to meet that projection?

10.19. Are you a government contractor or subcontractor?

10.20. Do you maintain an individual employment file for each employee?

10.21. Are copies of all resumes and applications from applicants kept for a minimum of three years from the date of last contact or entry?

10.22. On a scale of 1 to 10, how would the employees rate the EEO activity?

10.23. How would you rate the EBO activity?

11. <u>Safety:</u>

Questions:

11.1. Are records maintained on the number of accidents, days lost due to accidents and alleged incidents?

11.2. Does top management receive periodic reports in safety results throughout the organization?

11.3 Who is accountable for furnishing those reports?

11.4. How frequently are those reports generated?

11.5. Are Worker's Compensation reports filed promptly?

11.6. What is the Worker's Compensation cost trend for the last 3 years?

11.7. Do bulletin boards contain all of the required safety notifications?

11.8 Are bulletin boards continually reviewed to ensure that proper safety notification is posted?

11.9. How often are the bulletin boards reviewed, and who is accountable for this activity?

11.10. Are safety and housekeeping inspections conducted on a regular basis?

11.11. By whom?

11.12. Who received reports on these inspections?

11.13. Is safety and housekeeping training provided for all supervisors and managers?

11.14. Has first aid training been provided for all supervisors and managers?

11.15. Is someone with first aid qualifications always available during all hours of normal operation?

11.16. Has provision been made for professional medical attention during operating hours?

11.17. Is someone aware of these arrangements present and available during all normal hours?

11.18. Has provision been made for transportation of an injured worker to a designated medical facility?

11.19. Are all newly rebuilt facilities, newly installed equipment and revised equipment reviewed for safety before being put to use?

11.20. Does the individual position accountable for safety have the authority to stop a clearly dangerous operation?

11.21. Has the noise level in all locations been tested to ensure that it meets government and other appropriate safety standards?

11.22. Has the environment, including light, air cleanliness, etc. been checked to ensure that it meets government and other health requirements?

11.23. Are industry safety and health standards utilized?

11.24. Are personal safety devices made available to employees for free or at a discount?

11.25. Is an individual accountable for continually reviewing the latest legislation and trends in safety and health?

11.26. Has the organization implemented the Right to Know Law?

11.27. Do you use or store any chemicals on hazardous substances in your business?

11.28. Are material safety data sheets (MSDS) maintained for each and every hazardous chemical in the workplace?

11.29. Have you file copies of MSDS sheets with the appropriate local, state and federal agencies?

11.30. Has the required training program been implemented that instructs each employee on how to detect the presence of a hazardous chemical, provides knowledge of any physical and health hazards presented by chemicals in the employee work area and instructs on what the employer's hazard communication standard requires?

11.31. Have there been any OSHA audits within the last 3 years?

11.32. If so, why and what were the results?

11.33. Do you believe you now or will in the future come under the provisions of SARA from the standpoint of utilizing or storing hazardous chemicals or substances?

11.34. On a scale of 1 to 10, how would the employees rate safety activity?

11.35. How would you rate safety activity?

12. Documentation and Security:

Questions:

12.1. Is access to information about employees controlled?

12.2. Are all people who request information about employees required to show proper justification and identification?

12.3. Is one individual accountable for ensuring that all documentation meets all legal requirements?

12.4. Are there backup records for all employee information?

12.5. Has documentation been reviewed to ensure that it does not invade Right-to-Privacy legislation?

12.6. Are all files and storage cabinets clearly identified and controlled?

12.7. Is all outdated wage and salary information destroyed in a controlled way?

12.8. Are security systems regularly reviewed?

12.9. How often are they reviewed, and who is the person accountable to ensure they are reviewed?

12.10. Are personnel records maintained for 7 years for the date of last entry or termination of employment, whichever ends later?

12.11. Copies of all Confidentiality, Non-Competition, Invention or other similar Agreements.

13. Culture:

Questions:

13.1. Is there a stated organization culture that the organization strives to promulgate?

13.2. What is the stated culture?

13.3. What does the Organization do specifically to reinforce the continuity of its culture?

13.4. If the culture is unstated, what appears to be the culture of the organization?

13.5. How would key managers describe the culture?

13 6. Do objective criteria, such as turnover statistics, absenteeism rates, attitude surveys, profitability, etc. seem to reflect a culture such as that stated or perceived by management?

13.7. If not, what are the inconsistencies?

13.8. Does the culture that exists seem to be productive or counterproductive to the business?

13.9. Does the company have or publish a mission statement? (If so, please attach a copy.)

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STATE OF MICHIGAN
LICENSING AND REGULATORY AFFAIRS
UNEMPLOYMENT INSURANCE AGENCY
3024 W. Grand Blvd., Suite 11-500 • Detroit, Michigan 48202
www.michigan.gov/uia

Authorized by MCL 421.1, et seq.
Completion of this form is mandatory.
See statement of penalties below.

BUSINESS TRANSFEROR'S NOTICE TO TRANSFEREE OF UNEMPLOYMENT TAX LIABILITY AND RATE

REGARDLESS OF ANY AGREEMENT BETWEEN THE PARTIES TO THE TRANSFER, THE LAW PROVIDES THAT WHEN A BUSINESS IS SOLD (OR OTHERWISE TRANSFERRED), THE BUYER (OR OTHER TRANSFEREE) OF THE BUSINESS MAY BE LIABLE TO PAY THE UNPAID UNEMPLOYMENT TAXES AND INTEREST, AND MAY RECEIVE THE UNEMPLOYMENT TAX RATE, PENALTY, AND THE BENEFIT CHARGES OF THE SELLER (OR OTHER TRANSFEROR).*

THE LAW REQUIRES THE TRANSFEROR OF A BUSINESS, OR THE TRANSFEROR'S REAL ESTATE BROKER OR OTHER AGENT OR ATTORNEY, TO COMPLETE AND DELIVER THIS FORM TO THE TRANSFEREE OF THE BUSINESS. Section 15(g) of the Michigan Employment Security Act [MCL 421.15 (g); MSA 17.515(g)] requires the seller (or other transferor) of a business to complete this form and give an accurately and fully completed copy of this form to the buyer (or other transferee) of the business at least two calendar days (not including Saturday, Sunday, or legal holiday) before the transferor's acceptance of the transferee's offer to acquire the business. This obligation extends to the transferor's real estate broker, other agent, or attorney.

THE INFORMATION SUBMITTED MUST BE CURRENT INFORMATION. The information on this form must be current as of the date it is signed. However, this form may be given to a prospective transferee within 90 days of the date it was signed; the form must be delivered to the prospective transferee not less than two calendar days before the transferor's acceptance of the offer.

STATEMENT OF PENALTIES APPLICABLE FOR NON-COMPLIANCE WITH THE LAW. Failure of the business transferor or transferor's agent to provide correct information is a misdemeanor, punishable by up to 90 days imprisonment and/or fine of up to $2,500.00. Civil liability for consecutive damages may also apply, as well as other remedies provided by law.

* In general, a person or business that acquires the organization, trade, business, or 75% or more of the assets of a business will be liable for unemployment taxes and interest due the Unemployment Insurance Agency from the seller (or other transferor) of the business at the time of the transfer, up to the reasonable value of the business minus any secured interest in assets.

1. Using a separate sheet(s) of paper or computer printout, list the names, addresses, and social security numbers of all your employees as of the date you or your agent or attorney signs this form. This will give the transferee an idea of the number of individuals for whom unemployment tax must be paid, and of the potential number of claimants for unemployment benefits.
2. Using a separate sheet(s) of paper or computer printout, list the names, addresses, and social security numbers of all your employees separated from employment for any reason in the most recent 12 months prior to the date this form is signed. This will give the transferee an idea of potential current charges to their account.
3. (a) What is the amount of unemployment taxes you have reported to the Unemployment Insurance Agency as owing, but have not yet paid to the UIA? ....

   (b) What is the interest you owe the UIA on this account? ....

4. (a) Which quarterly unemployment tax reports (give calendar quarter numbers and calendar years) are unfiled with the UIA?

   ______ ______ ______ ______ ______ ______
   ______ ______ ______ ______ ______ ______
   ______ ______ ______ ______ ______ ______

   (b) How much do you owe in unemployment taxes for these unfiled quarters? (The UIA may assess interest and penalties on this amount. Interest accrues at 1.0% per month, not to exceed 50%.)

5. In the space provided, indicate figures from 5 most recent years, ending the most recent past June 30,
* (a) the unemployment tax (contribution) payments made to the UIA in each of those years;
   (b) the unemployment benefit charges to your account in each of those years;

	12 Mo. Ending 6/30/___	12 Mo. Ending 6/30/___	12 Mo. Ending 6/30/___	12 Mo. Ending 6/30/___	12 Mo. Ending 6/30/___
a. Contributions (taxes) Paid (Includes SUTA Rate Penalty monies)					
b. Benefit Charges					
c. Taxable Wages					

* All of the information you will need to complete Part 5 is shown on your annual rate determinations (Form UIA 1771) for each of the years involved. See the next page of this form for the procedure for calculating tax rate from the information above. If you acquired the business less than five years ago, include information only for the period you have the business, and attach the copy of this form you received from the transferor when you acquired the business (if you acquired the business after April 1, 1990).

(d) the computed unemployment tax rate plus the Section 18(d) penalty, if applicalbe, for the current and each of the past four calendar years, even if you have paid the rate under protest, and/or you have appealed the rate;

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	Calendar Year 20___	Calendar Year 20___	Calendar Year 20___	Calendar Year 20___	Calendar Year 20___
d. Unemployment Tax Rates (Solvency Rate)					
Non Reporting Penalty					
TOTAL	0.00	0.00	0.00	0.00	0.00

(e) the Actual Reserve as of the most recent past June 30; ______

(f) the Required Reserve as of the most recent past June 30; ______

(g) the Total Payroll for the 12 months ending the most recent past June 30.

CERTIFICATION: I certify that the information contained on this form is accurate and complete to the best of my knowledge and belief. I understand that criminal and civil penalties may apply for failure to provide accurate information on this form.

The person signing this form below is the: ☐ Business Transferor; ☐ Transferor's Real Estate Broker; ☐ Agent of Transferor; ☐ Attorney for Transferor.

Name of Business: ______ UIA Employer Account No.: ______

Signature: ______ Date: ______ Telephone: ______

Typed or Printed Name of Signer: ______

Title of Signer: ______

NOTE TO TRANSFEREE: The information on this form may be up to 90 days old. Inquire from the Transferor as to updated information.

CERTIFICATION OF RECEIPT OF INFORMATION BY PROSPECTIVE TRANSFEREE

Name: ______ Date: ______

Signature: ______ Telephone: ______

PROCEDURE FOR CALCULATING UNEMPLOYMENT TAX RATE

A tax rate is composed of the Chargeable Benefits Component (CBC), the Account Building Component (ABC), and the Nonchargeable Benefits Component (NBC). The method of calculating a rate is shown below.

Years of Contribution Liability	Contribution Rate
1	2.7%
2	2.7%
3	1/3 CBC plus 1.8% (maximum rate 3.9%)
4	2/3 CBC plus 1.0% (maximum rate 5.2%)
5	CBC plus ABC plus NBC

Construction employers have higher minimum rates for the first four years of liability.
All rates are figured using the following calculations as provided by Section 19(a)(1) of the Act.

Chargeable Benefits Component (CBC):

The Calculation is: $\frac{\text{60 months of benefit charges}}{\text{60 months of taxable payroll}} = \text{CBC}$

The result is rounded up to the next higher 0.1%.
The maximum value is 6.3%.

Account Building Component (ABC):

The Calculation is: $\frac{\text{(Required Reserve minus Actual Reserve)} \times 0.50}{\text{12 months of total payroll}} = \text{ABC}$

The result is rounded up to the next higher 0.1%.
The maximum value for the ABC is 3.0%.

Nonchargeable Benefits Component (NBC): If there were Benefit Charges in any of the 5 years shown in Section 5(b) of this form, the NBC is 1.0%. If the CBC was equal to 0.1%, the NBC is 0.5%. If there were no Benefit Charges for those 5 years, the NBC is 0.1%. If there were no Benefit Charges for more than 5 years, the NBC may be as low as 0.06%.

Solvency Tax Rate: When the UI Trust Fund has interest-bearing advances from the federal government, a Solvency Tax becomes effective. This tax is levied against all fully experienced employers with a negative (Actual Reserve) balance. Solvency Tax monies are not credited to the employer's experience account. The Solvency Tax, if applicable, shall be computed in accordance with the provisions of Section 19a(2)(e) of the MES Act.

Total Tax Rate: The total rate is calculated by adding the three tax components (CBC + ABC + NBC) and state tax penalties.

Non Reporting Penalty: If any or all quarterly tax reports used in the computation of a tax rate are missing, an additional non-reporting penalty of 2% to 3%, per House Bill 4804 enacted 12/31/93, is added to the Total Tax Rate.

SUTA Rate Penalty: As Required by Public Act No. 18 of 2005, a SUTA Rate Penalty has been added to your computed rate because it has been determined that you knowingly violated or attempted to violate Section 22b(1) of the MES Act.

IF YOU NEED ASSISTANCE IN COMPLETING THIS FORM, YOU MAY CALL THE UIA TAX OFFICE AT (313) 456-2180.

THIS FORM MUST BE PROVIDED TO PROSPECTIVE PURCHASERS.