TERMINATION OF EMPLOYMENT:
RESPECTING EMPLOYEES AND PROTECTING EMPLOYERS

By: Kaitlin A. Brown

I. WHEN AND HOW TO END THE EMPLOYMENT RELATIONSHIP

A. EVALUATE THE FACTUAL CIRCUMSTANCES LEADING UP TO AND SURROUNDING TERMINATION.

1. Has employee submitted any complaint about employment, or otherwise participated in an employment-related investigation, such that termination could be considered retaliation for such protected activity?

a. If so, then is there a non-retaliatory, legitimate business purpose for termination? To the extent possible, this legitimate business purpose should be documented. Consider explaining to the employee the legitimate business reason(s), to avoid any misconception of retaliatory reason.

b. Confirm that any termination would not be in retaliation for making such complaint, or otherwise based on the individual's membership in a protected classification under federal, state, or local laws.

2. Even if employee has not specifically articulated a complaint, but especially if employee has submitted complaint, consider whether there is potential liability for a claim under various employment laws, based on factual context.

a. Discrimination/harassment/retaliation (Title VII, Age Discrimination in Employment Act, Americans with Disabilities Act, Equal Pay Act)

b. Improper payment of wages (Fair Labor Standards Act)

c. Request for or provision of protected leave (Family Medical

Leave Act, Americans with Disabilities Act)

d. Restriction on protected concerted activity (National Labor Relations Act)

e. Failure to offer or provide benefits (Affordable Care Act)

f. Safety issues in the workplace (Occupational Safety and Health Act, Workers' Disability Compensation Act of Michigan)

g. Respective state law employment statutes

3. If termination is based on performance:

a. Evaluate whether employee clearly understood expectations of the job, whether opportunities were given to improve performance, and whether such critiques were properly documented. Consider whether employees performing similarly are being treated the same.

b. Consider the manager's role in supporting the employee, having regular conversations about performance inadequacies, and expectations for moving forward. If the problem has been consistent or ongoing for an extended period, document a non-discriminatory and legitimate business reason why the adverse action is occurring now (e.g., job performance, lack of qualification, poor attendance, consistent or egregious disciplinary action, objective measurements of production).

c. Consider whether the employee requested additional resources to perform the job and whether such resources were timely provided, to enhance performance.

d. Evaluate whether the employee had explained personal circumstances impeding their ability to perform, and whether those personal circumstances would lead to a legal claim or are expected to no longer affect the employee in the near future.

e. Review the personnel file to determine whether the employee

has a history of failing to meet performance expectations, especially if transferred between multiple managers. Consider whether the personnel file supports the proposed reason for termination.

4. If termination based on reduction in force:

    a. Consider whether costs may be cut in other areas of the business, such as marketing, overhead, sponsorships, etc.

    b. Consider whether the termination will be temporary or permanent, such that other measures such as hiring freezes or temporary layoffs may be adequate alternatives.

5. Consider staffing needs during transition and whether the company requires the employee's continued services

    a. Review the ongoing projects being handled by employee and who would be available and qualified to assume those responsibilities following separation.

    b. Evaluate whether replacement will be necessary to handle employee's responsibilities, or whether responsibilities will be absorbed by other employees.

        i. If hiring a replacement employee, and employer has concerns about a potential age discrimination claim, ideally the replacement should be under the age of forty.

    c. Consider effect on production and employee morale.

B. CONSIDER OFFERING SEVERANCE IN EXCHANGE FOR RELEASE OF CLAIMS

1. If, when evaluating the factual circumstances leading up to termination, you determine there is some risk for legal exposure, consider whether a severance package in exchange for a release is appropriate.

2. If the company decides to offer severance in exchange for a release,

prepare an agreement. Details about what to consider including in the release are covered in section III.

3. Prepare a cover letter summarizing the terms of the severance and release agreement.

   a. Identify the date on which employment will end.

   b. Summarize the monetary compensation, health insurance benefits, and non-monetary offers in the agreement;

   c. Provide the name and address of the individual to whom agreement must be sent;

   d. Identify the date on which the agreement must be signed and returned to the company;

   e. Identify whether there is a waiver form or revocation period applicable;

   f. Identify any ongoing obligations that apply, regardless of whether employee accepts offer;

   g. List any property that should be returned (and date by which employee should return it), regardless of whether employee accepts offer;

   h. Insert date by which Company would like confirmation that all Company confidential information has been permanently deleted from employee's electronic or other storage devices; and

   i. Insert final paycheck details, along with COBRA details, if applicable.

C. PREPARE FOR CONVERSATION AT TIME OF TERMINATION

1. Overall pointers:

   a. Consider the right time, place, and people to be present.

      i. Time: Company should weigh the risk of whether the employee has access to confidential information, along

with the likelihood of whether the integrity of such information may be compromised if the employee was told of employment being terminated prior to the last day of service.

b. Place: Try to conduct the meeting at a time when and in a manner where other employees will be least adversely affected or intimidated by the process.

c. Persons present: Having at least two people present on behalf of the company will provide additional protection, especially if the conversation becomes contentious and witnesses are necessary to explain what happened. If you anticipate a contentious or violent response, consider having security or police officers present nearby.

d. Set the tone and get to the point quickly.

e. Do not make it lengthy or get into too many details.

f. You are not obligated to provide a reason for termination.

2. Introduction:

a. Explain that this was a difficult discussion, but a necessary one for us all to move forward.

b. Ask employee to please wait until finish before responding.

c. Explain that when done, employee will have an opportunity to respond and ask questions.

d. If you do provide a reason for termination, phrase it in a way that shows the decision was based on many factors that included but were not limited to the ones discussed.

e. State that employer has decided to terminate employee's employment and employer is presenting you an offer to provide a smooth transition.

3. Review some history, if applicable, and only provided that it will not become too contentious. Otherwise, simply state that the company has decided to conclude the employment relationship based on the employee being at-will; accordingly, no notice or reason must be given.

    a. Discuss history of written warnings, along with most recent one.

    b. Give brief examples of insubordination; refusing to assist when asked; rude in conversations (don't just say "bad attitude"); dishonesty.

    c. Give examples of how affecting the team; causing people to not come to you for help; bringing down the morale, discord, etc.

    d. Explain that being able to trust employees is critical and that employee has lost its trust in employee, if applicable.

    e. Explain that employer understands from multiple sources that employee is looking for alternate employment, if applicable. Explain that, regardless of whether this is true, employer has sensed that employee is no longer fully committed to the company. Provide short, concise examples.

4. Explain how company is prepared to provide employee with a smooth transition.

    a. Explain rights to continued benefits, if any, along with COBRA notices if applicable.

    b. Return company property (including laptop); may not retain any company data or information.

    c. Provide copy of release, if offered, and describe details:

        i. Payment of unused accrued PTO, if any.

        ii. Additional monetary terms.

        iii. Willingness to treat as resignation, if offered.

iv. Continuing health insurance, if offered.

v. Willingness not to contest claim for unemployment insurance benefits, if offered.

vi. Describe consideration period. If 40 or older, describe revocation period..

vii. In exchange for compensation, employee would receive a release of claims arising from employment.

viii. Describe restraints (non-disparagement, non-competition, non-solicitation), if applicable.

5. On the day that you provide the employee with the release agreement, obtain employee's signature and date acknowledging receipt of such release agreement. Maintain the original for your records.

   a. If 40 or older, explain the waiver form. This form should be signed and returned if employee decides to accept the terms of the agreement prior to the end of the consideration period.

   b. Identify person to contact (with phone number and e-mail) with any questions.

6. Conduct exit interview. Arrange for the return or collection of employee's personal belongings.

7. Questions you should be prepared to answer:

   a. How long do I have to sign this?

   b. What happens if I decide not to sign?

   c. Will employee be paid for unused accumulated sick leave/vacation?

   d. Will company provide a reference?

8. Be prepared, upon acceptance of agreement, prepare to issue payment after expiration of revocation period (if 40 or older) or after expiration of consideration period (if under 40).

D. CONSIDER WHAT ACCESS TO COMPANY EQUIPMENT AND RESOURCES MUST BE TERMINATED UPON SEPARATION

1. Deactivate any security code and/or identification card for access to company property.

2. Remove access to computer programs and phones.

3. Request login and password information for any company accounts, and change the password or terminate such accounts.

4. Promptly inform customers and clients of the new contact replacing separated employee, and explain that separated employee no longer has authority to act on behalf of the company.

II. STATUTORY OBLIGATIONS AND RISKS FOR POTENTIAL LEGAL EXPOSURE UPON TERMINATION

A. EVALUATE THE POTENTIAL DAMAGES UNDER ANY POTENTIAL LEGAL CLAIM

1. Depending upon potential legal exposure, employer may wish to pay separated employee severance to avoid the inconvenience and costs associated with litigation in exchange for a release.

B. CONSIDER STATUTORY REQUIREMENTS TO OBTAIN RELEASE OF AGE DISCRIMINATION CLAIM

1. If there are less than 20 employees at the company, consider whether the employee(s) being released are age 40 or older.

2. Employees must be given a reasonable time to consider the agreement, which varies based on the circumstances and may require flexibility in providing extensions if requested.

3. If there are 20 or more employees at the company, then the Age Discrimination in Employment Act requires employers to provide certain protections to employees who are age forty or older, in order to waive an age discrimination claim.

a. If the employee being separated is over age 40, determine

whether the employee has 21 or 45 days to consider the agreement based on the following:

i. Is the company terminating more than one employee over age 40 at same or similar time (reduction in force), not for performance reasons?

(a) If yes, then modify any reference to the timing in which the release must be signed and returned, so that the separated employee has 45 days to review and consider the agreement. Also provide the disclosures/adverse impact study attached as an exhibit. This adverse impact study must identify: the unit considered as part of the separation (do not rely on a protected classification, but rather focus on departments, job titles, location, etc.); each employee in the unit (by position title, not name); the age of each employee in the unit; and whether the employee was offered severance.

(b) If no, then modify any reference to the timing in which the release must be signed and returned, so that the separated employee has 21 days to review and consider the agreement. No adverse impact study is necessary.

b. If the employee being separated is under age 40, provide the employee with a specific number of days or a specific deadline to review and consider the agreement. Employees under age 40 must be given a reasonable time to consider the agreement, which varies based on the circumstances and may require flexibility in providing extensions if requested.

c. Include a revocation period of at least 7 days after employee accepts agreement, for employee to change employee's mind

and revoke such acceptance.

C. CONSIDER STATUTORY REQUIREMENTS IF COMPANY IS CLOSING A PLANT OR INSTITUTING A MASS LAYOFF (AND HAS AT LEAST 100 EMPLOYEES)?

1. Covered employers

a. Employers are required to comply with the Worker Adjustment Retraining Notification Act ("WARN") if they have at least 100 employees (excluding those who worked less than 6 months in prior 12 months and those working less than 20 hours per week), unless a federal, state, or local government entity providing public services.

2. When notice is required

a. Upon employment loss resulting in one of the scenarios described below. "Employment loss" means, with certain exceptions, an employment "termination, other than discharge for cause, voluntary departure, or retirement; a layoff exceeding 6 months; or a reduction in an employee's hours of work of more than 50% in each month of any 6-month period."

i. Plant closing: Shutdown will result in employment loss of 50 or more employees (as defined above) during any 30-day period.

ii. Mass layoff: Layoff resulting in loss at employment site of 500 or more employees (as defined above) over any 30-day period.

iii. Loss of 2 or more groups of workers: Layoff of employees that meets one of the two above thresholds over a 90-day period (but not 30-day period) for two or more groups of workers, unless losses are the result of separate and distinct actions and causes.

b. Sale of business: Sale that results in a covered plant closing or

mass layoff (described above).

c. Notice is not required if:

i. Resulting from closing of a temporary facility or completion of particular project or undertaking (i.e. "workers were hired with the understanding that their employment was limited to the duration of the facility, project, or undertaking").

ii. Employees are on strike or are part of bargaining unit involved in negotiations leading to a lockout, if the strike or lockout otherwise triggers a covered plant closing or mass layoff. Non-striking employees separated on account of otherwise covered event, however, are entitled to notice.

iii. Permanently replacing an economic striker (employee who strikes in order to obtain some economic concession from employer, such as higher wages, shorter hours, or improved working conditions).

3. How notice is required

a. 60 days in advance of covered closing or layoff, except when one of the following conditions apply, in which case as much notice as practicable is required (with explanation of reason for abrogated notice period):

i. Faltering Company: when employer has sought new capital or business, where notice would ruin such opportunity (only applies to plant closings).

ii. Unforeseeable circumstances: when circumstances were not reasonably foreseeable within the time period for required notice (applies to plant closings and mass layoffs).

iii. Natural disaster: when a direct result of a natural disaster (applies to plant closings and mass layoffs).

b. In writing, with any reasonable method of delivery to ensure timely receipt, specifically conditioned upon a definite occurrence or nonoccurrence of an event that will result in a covered closing or layoff. See 20 CFR 639.7 for specific details about notice requirements, which include the following to affected employees and their representative(s) (note: separate criteria are required for non-represented employees):

i. Name and address of employment site where closing or layoff will occur;

ii. Name and telephone number of company official to contact for further information;

iii. Statement as to whether the planned action is expected to be permanent or temporary, including a statement that the entire plant will be closed (if applicable);

iv. The expected date of the first separation and anticipated schedule for subsequent separations;

v. Job titles of positions to be affected and names of workers currently holding affected jobs.

c. Provide notice to affected workers (both exempt and non-exempt employees who are not business partners, regardless of the length of service and/or the schedule of service, and both represented and unrepresented) reasonably expected to experience employment loss, their representatives (union), State dislocated worker unit, and appropriate unit of local government.

d. In a sale of business, the seller must provide notice for any covered plant closing or mass layoff up to and including the date

of the sale. The buyer is responsible for providing notice of any covered plant closing or mass layoff after the date of sale.

e. Additional notices are required when the dates for the covered closing or layoff is extended beyond the date or 14-day period articulated in original notice.

4. Penalties

a. If employer fails to comply with notice requirements, may be liable for the following damages:

i. To each affected and aggrieved employee: back wages for the period of the violation, up to 60 days, with certain potential credits applied toward such penalties.

ii. To unit of local government: civil penalty up to $500 for each day of the violation, unless the employer pays the back wages owed to each aggrieved employee within 3 weeks after the closing or layoff.

5. If covered by WARN and closing a plant or instituting a mass layoff, be sure to include a release of claims under the Worker's Adjustment and Retraining Notification Act as amended.

III. HOW SEVERANCE PACKAGES PROTECT EMPLOYERS AND EASE THE TRANSITION FOR EMPLOYEES

A. IS THE EMPLOYEE ENTITLED TO ANY COMPENSATION, BONUS OR BENEFITS PURSUANT TO A CONTRACT OR POLICY?

1. Review relevant contracts to determine whether employee is entitled to any severance pay or other benefits upon separation and resignation.

2. Review employee handbook to determine whether employee is entitled to unused accrued paid time off upon termination or resignation.

3. In terms of wages, be sure to pay non-exempt employees for all hours

worked. Exempt employees must be paid for the proportionate number of hours or days worked, in relation to their weekly salary.

4. Be clear as to which benefits have vested (e.g., in terms of 401(k), profit sharing, or pensions).

B. WHAT IS THE COMPANY OFFERING AS ADDITIONAL CONSIDERATION (THAT EMPLOYEE DOES NOT OTHERWISE HAVE A RIGHT TO RECEIVE)? FOR EXAMPLE:

1. If offering monetary payment, will it be paid as lump sum or pay continuance?

2. Will the employee receive a pro-rata portion of any discretionary bonus?

    a. If so, how much will the company pay the employee?

3. Does the employee have any benefits through the company?

    a. If so, will the company offer to continue health insurance benefits through COBRA? If so, for how many months? Will such payments be made directly by the company or as reimbursements to employee?

4. Does the employee have any remaining unused accrued PTO, vacation, or sick time?

    a. If so, what is the company's policy regarding payment upon termination/resignation?

    b. Is there a negative balance? Did the company obtain employee's prior authorization to deduct such negative balance from final paycheck? Is the company is willing to forego recoupment of payments?

5. Has the employee engaged in any misconduct that prompted the termination?

    a. If so, will the company offer not to challenge the employee's

application for unemployment compensation?

b. If not, then does the company want to allocate the additional compensation to a certain number of weeks to avoid paying unemployment insurance benefits in those weeks (see paragraph 4(a))?

6. Will company be offering outplacement services to assist employee with finding a new job?

7. Will company be offering a neutral letter of reference?

8. Is the employee being considered as having been terminated, resigned, or separated?

a. Providing employees with the option of having resigned as opposed to having been terminated is a benefit employers may offer at no cost, which may significantly ease the transition of employee to next job.

9. Will the employee be receiving any type of deferred compensation?

a. If so, address 409A implications to expressly state that employee shall be responsible for income tax obligations arising from all payments issued to employee by company.

C. RELEASE OF EMPLOYER

1. Release should be effective through the date that the agreement is signed.

2. Consider including an agreement not to sue company for any claim that has been released.

3. Are there any specific individuals who should be specifically included in release?

a. If so, insert their names into the release.

4. Are there any pending charges or cases that must be dismissed with prejudice as a result of the Release Agreement being signed?

a. If so, be sure to specifically identify the charge or case that must be dismissed with prejudice upon signing the release, and the timeline for doing so.

5. Include carveout permitting employee to file charge with, or otherwise participate in investigation conducted by, EEOC or respective government agency.

a. Include waiver of monetary damages resulting from any such charge filed.

6. Include extensive list of employment laws under which claims are being released.

a. Is company a federal contractor?

i. If so, then make sure that the release includes a release of claims under the following statutes: Executive Order 11246, Executive Order 11141, Vietnam Era Veterans Readjustment Assistance Act of 1974, the Federal Railroad Safety Act, Vocational Rehabilitation Act of 1973.

b. Is the employee working out of state? Or is the company incorporated out of state?

i. If so, modify release to include out of state laws under which a claim may be asserted.

D. DID THE EMPLOYEE SIGN A CONFIDENTIALITY AGREEMENT?

1. If so, make sure that any obligation to maintain confidentiality in the release comports with the previously signed agreement, or at the very least does not abrogate the prior restraint to make it less protective. Consider whether the original confidentiality agreement appropriately covers all proprietary and confidential information of the company, and if not expand the restriction. Also consider adding language required by Defend Trade Secrets Act to preserve the option for increased damages, in the event that employee misappropriates trade secrets of

the company.

2. Consider whether employee had any access to confidential information of customers that could result in liability to the company if disclosed. If so, then create specific provisions in the release that require the employee to maintain confidentiality of such confidential and proprietary information of customers.

E. DOES COMPANY PREFER TO MAKE AGREEMENT CONFIDENTIAL?

1. If employee has articulated a claim of sexual harassment, then certain tax benefits will be lost if the agreement is required to be confidential.

F. CONFIRM WHETHER THE EMPLOYEE HAD ANY COMPANY PROPERTY.

1. If so, then insert a provision of the release that requires the employee to return to the company all company property, confidential information, and data, regardless of the format, that is in the possession or control of employee.

G. DID THE EMPLOYEE ENTER INTO A NON-COMPETITION AGREEMENT?

1. If so, consider whether the prior restraint is sufficient to protect the company's business interests. If not, modify the non-competition restraint to reflect the terms of the agreement and/or reasonable and appropriate preferred terms for time, geography, business purpose for restraint.

2. If not, consider whether there is a business interest that must be protected, given departure of employee from the company. Insert a non-competition restraint to reflect the reasonable and appropriate preferred time, geography, business purposes for restraint.

H. DID THE EMPLOYEE ENTER INTO A NON-SOLICITATION AGREEMENT

1. If so, consider whether the prior restraint is sufficient to protect the company from the employee soliciting its employees, customers, and clients. Insert a non-solicitation restraint to reflect the terms of the original agreement and/or reasonable and appropriate preferred time

and contacts whom employee should refrain from contracting to transact business or terminate association with company.

2. If not, consider whether there is a business interest that must be protected, such that employee should be restrained from soliciting company employees, customers, and clients. Insert a non-solicitation paragraph to reflect the reasonable and appropriate preferred time and contacts from whom employee should refrain from contacting to transact business or terminate association with company.

I. DID THE EMPLOYEE ENTER INTO A NON-DISPARAGEMENT AGREEMENT OR OTHERWISE WISH TO EXPAND/ADD SUCH RESTRAINT?

1. If so, consider whether the prior restraint is sufficient to protect the company from disparaging comments. Make sure any non-disparagement restraint in the release reflects the terms of the prior agreement and/or expand the restraint to enhance protections.

2. If not, consider inserting a non-disparagement restraint that prohibits the employee from defaming the company.

J. INCLUDE EXPRESS TERMS ABOUT RAMIFICATIONS UPON BREACH OF AGREEMENT.

1. To deter employees from breaching the agreement, consider myriad options for recovering damages or expediting recovery upon breach. For example, employers may consider including:

a. A "clawback" provision, stating that upon breach by employee, employer shall no longer be liable for any outstanding payments and employee is required to pay back any amounts previously paid under the agreement. This is one of the harsher options, which may result in pushback from employees and/or their counsel.

b. Liquidated damages clause, providing that upon breach (e.g., of confidentiality agreement or non-disparagement), employee

agrees to pay a sum certain.

2. Ex parte relief or injunction, providing employer with the option to seek an order from a judge, on an expedited basis, to demand that employee cease and desist from any further action in violation of the agreement.

3. Other remedies, in equity or at law.

K. INCLUDE CLAUSE STATING THAT, BY ENTERING INTO THE AGREEMENT, EMPLOYER IS NOT ADMITTING TO ANY LIABILITY, WHICH IS EXPERSSLY DENIED. RATHER, SETTLEMENT WAS INTENDED TO AVOID ADDITIONAL COSTS THAT MAY OTHERWISE BE ASSOCIATED WITH LITIGATION.

L. DID EMPLOYEE SIGN ANY OTHER AGREEMENTS WITH THE COMPANY THAT INCLUDE TERMS THAT SURVIVE TERMINATION (E.G., ANY CONTRACT WITH OBLIGATION TO MAINTAIN CONFIDENTIALITY, NON-COMPETITION, NON-SOLICITATION, ETC.)?

1. If so, insert the date and full title of the agreements into the paragraph designating the entire agreement, to the extent that the surviving terms are intended to be incorporated into the agreement.

M. INCLUDE PARAGRAPH WHEREBY EMPLOYEE ACKNOWLEDGES SIGNING THE AGREEMENT KNOWINGLY AND VOLUNTARILY WITHOUT DURESS, HAS HAD AN OPPORTUNITY TO HAVE AN ATTORNEY REVIEW THE AGREEMENT, AND THAT EMPLOYEE UNDERSTADNS THE TERMS CONTAINED IN THE AGREEMENT.

MANAGING UNEMPLOYMENT LIABILITY AND RESPONDING TO CLAIMS FOR BENEFITS

I. DISPUTING AN UNEMPLOYMENT CLAIM

A. Key Statutory Language:

1. Section 421.29 - An individual is disqualified from receiving benefits if he or she: (a) Left work voluntarily without good cause attributable to the employer or employing unit. (b) Was suspended or discharged for misconduct connected with the individual's work or for intoxication while at work. (c) Failed without good cause to apply diligently for available suitable work after receiving notice from the unemployment agency of the availability of that work or failed to apply for work with employers that could reasonably be expected to have suitable work available. (d) Failed without good cause while unemployed to report to the individual's former employer or employing unit within a reasonable time after that employer or employing unit provided notice of the availability of an interview concerning available suitable work with the former employer or employing unit. (e) Failed without good cause to accept suitable work offered to the individual or to return to the individual's customary self-employment, if any, when directed by the employment office or the unemployment agency.

B. Timeline for Unemployment Benefit Requests:

1. Employee files for benefits - Shortly after separation.

2. UIA mails a Request for Information to the employer – Shortly after separation.

3. Employer has 10 or 30 days to respond to the Request for Information.

4. In a short period of time (usually about a week), the UIA will issue a second Request for Information or a Determination stating the worker

is entitled to benefits or is disqualified for benefits.

5. The party that does not agree with the Determination can protest and request a Redetermination. The protest must be ***received*** by the UIA within 30 days of the mail date of the Determination.

6. Soon after, the Redetermination will be issued.

7. The party that does not agree with the Redetermination can protest and request a hearing before an administrative law judge ("ALJ") by submitting a request within 30 days of the mail date of the Redetermination.

8. A hearing will be scheduled by the Office of Administrative Hearings. Usually, notice will be given only a week or two in advance of the hearing.

9. All evidence that will be submitted at the hearing must be received by the ALJ and the other parties before the hearing.

10. At the hearing, the ALJ will take testimony and receive evidence from both the claimant and the employer.

11. Soon afterwards, the ALJ will issue a written decision which summarizes the ALJ's factual conclusion and legal rationale for the decision.

12. The ALJ's decision is appealable to the Michigan Compensation Appellate Commission.

C. New claims for unemployment benefits:

1. When a worker files a new claim for benefits, the UIA must decide two things:

   a. Did the worker earn enough in wages in his or her recent work history to be entitled to unemployment benefits, and

   b. What is the reason the worker is no longer working, and whether the worker is eligible and qualified to draw

unemployment benefits. Once the worker files a claim with the UIA, we call the worker the unemployed worker or sometimes the "claimant" for unemployment benefits.

2. The unemployed worker and employer are both interested parties in the claim. As such, both are equally entitled to see the file of the claim, and to formally protest or appeal any adverse determination made by the UIA concerning the claim. The employer's response to the monetary determination must be received by the UIA within 10 calendar days after the mail date shown on the form. If the UIA needs more information from the employer regarding a claimant's separation from employment, computer-generated Form UIA 1713, "Request for Information Relative to Possible Ineligibility or Disqualification" is sent to the employer. If the employer provides information they feel should disqualify the unemployed worker or should result in no benefits being charged to the employer, the UIA may ask for further information from the unemployed worker and the employer.

3. If the UIA does not receive a response from the employer, then the UIA will set up the claim on the basis of wages previously reported or as provided by the unemployed worker. The UIA will also charge the employer for benefits paid to the unemployed worker. Once the UIA has paid benefits based on the information the employer provided or the unemployed worker reported, the law says we cannot credit the employer’s account for any overpayments for weeks of benefits paid before we received the employer’s information, if the information we used proves inaccurate.

4. The entire benefit payment for each of the first two weeks of the claim will be charged to the claimant’s most recent employer at the time the claim was filed if that employer is liable for paying unemployment taxes in Michigan. That employer, known as the last employer, may or may not also be a base period employer. However, if the unemployed worker did not earn, with the separating employer, an amount equal to

at least $2,072, then the separating employer's account will not be charged the entire first two weeks of benefit payments. Instead, each week of benefits, beginning with the first week, will be charged, proportionally, to all base period employers.

D. Standards for Opposing Claims for Unemployment:

1. Voluntary Leaving.

a. The worker will be disqualified from receiving unemployment benefits if he or she quits a job without good cause attributable to the employer, unless the worker later requalifies for benefits. A complete explanation of requalification is found elsewhere in this booklet, under the heading, "Requalifying for Benefits, After Disqualification." Good cause attributable to the employer includes reasons that would cause a reasonable person to leave his or her job, but does not include personal reasons such as babysitting problems. Good cause attributable to the employer could include such things as safety hazards on the job or job discrimination the employer allows to continue.

b. Before a worker quits a job, he or she must bring to the employer's attention the situation the worker feels needs correction, and the employer must be given adequate time to correct the problem. In most cases, an employee who quits a job without giving such an opportunity to the employer to correct the problem will be considered to have quit without good cause attributable to the employer. However, if a worker quits a job after accepting permanent, full-time work with a new employer, and the worker actually goes to work for the new employer, then the worker will not be disqualified for leaving the former employer to accept the new work.

c. All of the wages earned with the former employer will transfer to the new employer and can be used to pay benefits charged to

the new employer. Also, if a worker accepts a recall to a former employer or a union hiring hall referral, the worker will not be disqualified and the unemployment liability will transfer to the recalling employer or the employer assigned by the hiring hall.

d. A worker who negligently loses a requirement for the job, such as a driver license, will be disqualified for voluntarily leaving the job. The first thing that must be proved in a case involving voluntary leaving is that the unemployed worker left the job and was not fired. The employer must prove that. Then, the requirement to prove the case shifts to the unemployed worker. To avoid disqualification, the unemployed worker must show either that he/she left the job involuntarily, or that he/she left with good cause (that is, with good reason) attributable to the employer. A good personal reason for leaving a job will not prevent a disqualification. The claimant's good cause for leaving the job must, in some way, be attributable to the employer. To show that he/she left "involuntarily," the worker must provide medical documentation of a condition preventing him/her from continuing in that job, and must have unsuccessfully sought alternative employment from the employer and a leave of absence.

e. Cases where a worker will likely be disqualified. If, at the time of hire, a worker was informed how to contact the employer in the event of an absence, and the worker is absent for three days or more without contacting the employer, the worker will be considered to have voluntarily left the work without good cause attributable to the employer. If, at the time of hire, a worker was informed that holding a certain license, for example, was a requirement for obtaining the job and remaining employed in the job, and then as a result of his or her negligence the worker loses the requirement and therefore the

job, the worker will be considered to have voluntarily left work without good cause attributable to the employer.

Cases where a worker will likely not be disqualified. In some cases, a worker's medical condition prevents him or her from continuing to work and the worker must "involuntarily" leave employment and will not be disqualified for quitting. But before quitting, the worker must first have (1) obtained a statement from a medical professional showing that continuing in the current job would be harmful to the worker's physical or mental health; (2) unsuccessfully requested alternative work from the employer within the worker's capabilities, and (3) unsuccessfully requested a leave of absence until the worker is again able to do the job.

f. Unemployment compensation cases say that before quitting, the worker must first tell the employer about the problem and must give the employer a chance to correct it. If the problem continues, and the worker quits the job, he or she would not be disqualified from receiving unemployment benefits [assuming the Unemployment Insurance Agency (UIA) agreed that the employer's conduct provided the worker with an acceptable reason for leaving]. The worker must show that he or she left the job for a reason that would cause a reasonable person, under similar conditions, to leave the job. However, the worker must still be able to work at a job he or she is qualified to do, by past experience or training, to be eligible for benefits.

g. Example: If a worker quits a job because his or her spouse was transferred, the worker had a good personal reason to quit the job, but since there is no fault by the employer, the worker would be disqualified from receiving unemployment benefits. However, if the worker's spouse was a full-time member of the United States armed forces and the leaving is due to the military

duty reassignment to a different geographic location, the leaving will not be disqualifying, the employer's account will not be charged for those benefits.

2. Misconduct.

   a. The Michigan Supreme Court has defined misconduct in an unemployment compensation case in its decision in the case of *Carter v Employment Security Agency*, 364 Mich 538, 541 (1961): "[Misconduct in an unemployment compensation case is] ... conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the [unemployment compensation] statute."

   b. Misconduct for which a worker will be disqualified must therefore show an intentional disregard by the worker of the employer's interests, or must show gross negligence (that is, a high degree of carelessness) by the worker. For example, acts of misconduct could include unexcused absence or tardiness, insubordination to a supervisor, competing against an employer, and other such actions contrary to the interests of the employer. If a worker is discharged for either a single act of misconduct, or the last in a series of acts of misconduct connected with the

work, the worker will be disqualified from receiving unemployment benefits. In the case of a discharge for a series of incidents, the final incident must show some degree of wrongdoing. In most cases, a worker must have been warned of the fact that his or her actions were unacceptable, before the worker can be disqualified.

c. In some cases of gross misconduct, however, prior warnings are not necessary. For example, a worker who is discharged for a serious incident of insubordination, such as arguing with the employer in front of customers, will probably be disqualified from receiving unemployment benefits. Even a single incident of something that is harmful to the employer is enough to show a substantial and intentional disregard of the interests of the employer. In the case of absence or tardiness, each incident, taken separately, might not be serious enough to disqualify a worker from receiving unemployment benefits. However, if the employer counsels the worker and explains that the pattern of absence or tardiness, or both, is becoming a serious problem, and the worker continues the pattern and is discharged, the worker could be disqualified for misconduct. The fact that the employer gave the worker a warning and the worker continued to be absent or tardy shows that the worker knowingly violated the interests of the employer. The worker will also be disqualified if he or she is discharged for intoxication at work.

d. A worker who was informed at the time of hire how to contact the employer for an absence, and then is a 3-day no-call/ no-show, will be disqualified for a discharge for misconduct.

e. Even if the employer fires a worker for misconduct, the employer also has to show that the act of misconduct happened in connection with the work in order for the worker to be disqualified from receiving unemployment benefits. For

example, if a worker is fired because he had a fist fight with a co-worker after working hours, and off of the company property, and the fight was not related to the work, then the worker would not be disqualified. The reason is that the firing was not for an incident that occurred in connection with the work, even though it involved a co-worker. If a worker is fired because he or she is unable to do the job (for example, the worker can't learn the job, or can't meet production standards) then the worker will not be disqualified from receiving unemployment benefits even though the employer may have been perfectly justified in firing the worker. Whether the discharge is for misconduct connected with the work or for intoxication at work, the worker will not receive unemployment benefits, unless the worker later requalifies.

f. It is important for the employer to explain to the UIA what incident or series of incidents led to the claimant's discharge and why the employer should not be charged for benefits. If warnings were given to the unemployed worker, you should tell the UIA the dates the warnings were given, and who gave the warnings to the unemployed worker. If they were written warnings, copies should be sent to the UIA. Also, the dates of the absences or tardinesses, or other incidents that led to the discharge, should be provided to the UIA. Copies of any warnings should also be taken to the Administrative Law Judge Hearing by a witness who can testify about them. The courts have said that the burden of proof (that is, the responsibility to justify disqualification) is on the employer, when the employer discharges the employee.

g. What court cases have said: Unemployment compensation cases say that to be misconduct, the actions by the worker must be harmful to the interests of the employer, and must be done

intentionally or in disregard of the employer's interests. Actions that are grossly negligent will also be considered misconduct. A single incident of misconduct or of gross negligence may be enough to disqualify a worker from unemployment benefits. A worker who commits many infractions may be disqualified, even if none of the infractions, alone, would be misconduct resulting in disqualification. However, the final incident in a series, for which the worker is fired, must itself show an intentional disregard of the employer's interests. However, if the actions by the worker show merely the worker's inability to do the job correctly, or show an isolated case of bad judgment or negligence, then the worker will not be disqualified from receiving unemployment benefits. (This does not necessarily mean the employer did not have a good reason for firing the worker.) Acts committed by the worker that have no connection with the work will not result in disqualification if the employer fires the worker for them.

h. Example: If a worker is consistently absent or tardy from work, without a justifiable excuse, the worker could be disqualified from receiving benefits. If a worker is discharged based on an arrest occurring on the worker's own time and not connected with the job, then the worker would not be disqualified.

E. Burdens of Proof

1. In a voluntary leaving case, the burden is on the unemployed worker to prove: (1) That the leaving was voluntary but with good cause attributable to the employer, or (2) That the leaving was involuntary (for example, due to personal health reasons). To show that a leaving was with good cause attributable to the employer, the unemployed worker must prove that some condition existed that would have made continued employment unacceptable to a reasonable person. This condition must have been brought to the employer's attention and the

employer failed to correct it. Unsafe working conditions, failure to pay wages when due, or failure to provide promised benefits or promotions (things over which the employer has control but fails to correct) are examples of situations that could amount to good cause attributable to the employer for the worker to voluntarily leave a job.

2. In a misconduct case, the burden is always on the employer to prove: (1) That the unemployed worker engaged in misconduct, and (2) That the misconduct occurred in connection with the work. In unemployment compensation cases, the Michigan Supreme Court has defined "misconduct" as a willful or wanton disregard of the employer's interest, or negligence of such seriousness as to imply disregard of the employer's interest. However, the mere inability to do the job, or a good faith error in judgment, is not considered misconduct. In some cases, the employer may have a perfectly good and valid reason to discharge an employee, but that reason still might not amount to misconduct for purposes of the unemployment compensation law.

F. What Happens If I'm Late? What the law says: This issue is covered by Sections 32a, 33, and 34 of the Michigan Employment Security Act, Unemployment Insurance Agency (UIA) Administrative Rule 270, and the Michigan Compensation Appellate Commission's Administrative Rule 109. When the UIA issues a "determination," either the unemployed worker or the employer (whichever party disagrees with the determination) may "protest" the determination and request a redetermination. Also, when the UIA issues a "redetermination," either party may "appeal" the redetermination to a hearing before an Administrative Law Judge. To be received "timely" (on time) the signed or verified protest or appeal must be received by the UIA not later than the end of the 30th day after the date of mailing of the determination or redetermination. In counting the 30 days, every day of the week is counted beginning with the day after the determination or redetermination is mailed. Even weekend days and holidays are counted. But if the 30th day is a Saturday, Sunday, legal holiday, or UIA non-work day,

then the protest or appeal period ends at the end of the next day that is not a Saturday, Sunday, legal holiday, or UIA nonwork day.

G. Late Protest of a Determination. If an unemployed worker or employer is late in filing the protest, the UIA must first determine whether there was "good cause" for filing late. Good cause can include inability to file due to illness, or having new information that was not available when the determination or redetermination was issued. If the UIA finds there was good cause for late filing, the UIA will issue a redetermination. If the UIA finds there was not good cause, the UIA will issue a "Denial." The Denial can be appealed directly to an Administrative Law Judge. Late Appeal of a Redetermination. If an unemployed worker or employer is late in filing an appeal to an Administrative Law Judge, the case cannot be considered by the Administrative Law Judge. The Administrative Law Judge lacks legal authority to hold a hearing when an appeal is filed late. The unemployed worker or employer may wish to withdraw (cancel) the appeal and request the UIA to reconsider the matter. The UIA must then find out whether there was "good cause" for the late filing of the appeal. If the UIA finds there was good cause for the late filing, the Agency will issue a redetermination. The redetermination can then be appealed (on time!) to the Administrative Law Judge. If the UIA finds there was not good cause, the office will issue a "denial." The denial can be appealed (on time!) directly to an Administrative Law Judge.

II. MANAGING EMPLOYEE DEPARTURES AND UNEMPLOYMENT RISKS

A. Unemployment as a Negotiation Tool. Unemployment benefits can be used to help secure an employee's execution of a Release Agreement which can protect your business. Unemployment benefits total approximately $7,000 for the worker and result in no out-of-pocket cost to the employer. Thus, agreeing not to contest unemployment benefits can provide an incentive for the employee to sign a Release Agreement at little immediate out-of-pocket cost to the employer.

B. Mitigation of Unemployment Liability. Employees are required to offset unemployment payments by income received in weeks they are eligible for benefits. As a result, by spreading out settlement payments to an employee, an employer can mitigate the benefit amount they are entitled to receive. Therefore, when possible, structure Release Agreement payments as a continuation of wages or salary over a period of time to realize some cost savings in the form of a lower unemployment rate in subsequent years.

C. Preparing for Voluntary Quit. When an employee quits, is absent for several days, or otherwise quits a job, send confirmation in writing. Numerous unemployment cases have been saved because an employer sent a confirming letter the day after separation explaining the circumstances of the quit and requesting the employee contact Human Resources if their understanding of the facts are different.

D. Preparing for Misconduct Cases. When an employee engages in misconduct, you will be asked to produce information related to the misconduct, the employee's prior knowledge of the policy, and if the misconduct is not severe, you may be asked to produce evidence of prior discipline for the same form of misconduct.

III. BUSINESS TRANSACTIONS AND UNEMPLOYMENT TAXES

A. Successorship Transactions.

1. Successorship. Employer includes the definition of "(a) Any individual, legal entity, or employing unit that acquires the organization, trade, or business, or 75% or more of the assets of another organization, trade, or business, which at the time of the acquisition was an employer subject to this act. (b) Any individual, legal entity, or employing unit that becomes a transferee of business assets by any means otherwise than in the ordinary course of trade from an employer, if there is substantially common ownership, management, or control of the transferor and transferee at the time of transfer."

2. Section 22b of the Michigan Employment Security Act prohibits a

person from: transferring the person's trade or business or a portion of the trade or business to another employer for the sole or primary purpose of reducing the contribution rate or reimbursement payments in lieu of contributions, or acquiring a trade or business or a part of a trade or business for the sole or primary purpose of obtaining a lower contribution rate than would otherwise apply under the act. The law also requires the transfer and consolidation of the unemployment history and the unemployment tax rate of a trade or business to prevent or remedy transfers of trade or business that violate the new provisions of the law described above. The law also imposes civil and criminal penalties on both an employer who engages in SUTA Dumping, and on a business advisor who counsels an employer to engage in the practice.

B. Consolidation of Employment. Situations where it might make sense to consolidate employment businesses with many small centers of operation (franchises or property management) or ease and cost of benefit plan administration.

C. Forming a New Entity. Registration for Michigan Business Taxes (Form 518). Form 518 requires disclosure of a significant amount of information, including an identification of your type of business, the types of employees you will be employing, and a questionnaire related to successorship. Forming a new business and improperly completing the Form 518 and attached successorship questionnaires can result in unintentionally successor liability and scrutiny. Carefully consider each question and consider the instructions.

D. Discontinuing an Entity. Form 1772. Form 1772 requires disclosure of entity and owner information of the entity that is being discontinued. The discontinuance should be filed when the entity will no longer have any employees, whether the entity itself is being discontinued, or the employees are being transferred to a new entity. Properly filing Form 1772 will result in termination of the employer account and transfer of any reserve balance.

E. The Use of PEOs. Businesses that take advantage of PEOs are monitored by the UIA to prevent avoidance of unemployment taxes. PEOs are also subject to specific regulation by the UIA. When a business first enters into an Agreement with a PEO, it will transfer its unemployment history and account to the PEO, and a separate account will be maintained by the PEO and charged back to the business.

F. Procedure on the Sale of a Business.

1. Not less than **two** calendar days before a sale, the selling entity must provide the purchasing entity a completed copy of the Business Transferor's Notice to Transferee of Unemployment Tax Liability and Rate – Form 1027.

2. The form requires disclosure of employees as of the date the form is signed, unemployment taxes, disclosures related to quarterly unemployment tax reports, and identification of the unemployment tax rate for the prior five years (if the business has been operating that long).

3. Penalty for failure to complete the Form 1027 is a **misdemeanor**.

MANAGING LEAVE ISSUES WHILE NAVIGATING THE OVERLAP BETWEEN FMLA, ADA, GINA, WORKERS COMPENSATION AND LEAVE POLICIES

I. OVERLAPPING LAWS

A. Federal, State, and Local laws may all apply to leave issues.

B. Many times multiple contractual rights or policies provide greater rights than laws.

C. Best Practices require employers to analyze all "rights" and take action based on the option that favors the employee the most.

D. Case law needs to be reviewed to evaluate when an employee may be terminated for excessive leave.

II. FAMILY AND MEDICAL LEAVE ACT ("FMLA")

A. The Family and Medical Leave Act requires covered employers to provide eligible employees with unpaid, job-protected leave for certain periods of time, for specific family and medical reasons. The Company may adjust its FMLA policy to comply with applicable state law, in the event it provides a more generous or additional benefit.

1. Eligible Employee

To be eligible for FMLA leave, you must have been employed by a Company for at least 12 months, have worked at least 1,250 hours during the 12-month period preceding the start of the leave, and work at a location where the Company employs 50 or more employees within 75 miles.

2. 12-Week FMLA Leave

Eligible employees are entitled to use up to 12 workweeks of unpaid leave during any rolling 12-month period for one or more of the

following reasons:

a. The birth of a child and in order to care for such child (within 12 months after the birth of the child);

b. The placement of a child with you for adoption or foster care, and to care for a newly placed child (within 12 months of the placement of the child);

c. To care for your spouse, domestic partner, child, or parent with a serious health condition;

d. You have a serious health condition that makes you unable to perform your job duties; or

e. A qualifying exigency related to your spouse, son, daughter, or parent being on active duty (or having been notified of an impending call or order to active duty) in the Armed Forces, National Guard or Reserves in support of a contingency operation.

B. Under the "rolling" 12-month period, each time an employee takes FMLA leave, the remaining leave entitlement would be the balance of the 12 weeks which has not been used during the 12-months immediately preceding the date on which FMLA leave is anticipated to be used. For purposes of a leave based on a qualifying exigency, the leave is available during a single 12-month rolling period, starting on the first date of leave.

C. If your spouse also works for a Company and you both become eligible for a 12-week leave under paragraphs a or b above, or for the care of a sick parent under paragraph c above, the two of you together will be limited to a combined total of 12 workweeks of leave in any rolling 12-month period.

D. Eligible employees may take all 12 weeks of his/her FMLA leave entitlement as qualifying exigency leave or the employee may take a combination of 12 weeks of leave for both qualifying exigency leave and leave for a serious health condition.

E. When taking a leave based on a qualifying exigency, you will be required to provide a copy of the covered military member's active duty orders or other documentation issued by the military that indicates that the military member is on active duty or call to active duty status in support of a contingency operation and the dates of the covered military member's active duty service.

F. With respect to 12-week FMLA Leave, the following definitions apply:

1. Serious Health Condition: means an illness, injury, impairment or physical or mental condition that involves one of the following:

a. Hospital Care: Inpatient care in a hospital, hospice or residential medical care facility, including any period of incapacity relating to the same condition.

b. Absence Plus Treatment: A period of incapacity of more than three full consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition), that also involves either: (1) treatment two or more times (within that same period of incapacity and provided the first visit takes place within seven days of the first day of incapacity) by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services under orders of, or on referral by, a health care provider; or (2) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider (first visit to health care provider must take place within seven days of the first day of incapacity).

c. Pregnancy: Any period of incapacity due to pregnancy, or for prenatal care.

d. Chronic Conditions Requiring Treatment: A chronic condition which: requires at least two periodic visits for treatment per

year by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider; which condition continues over an extended period of time; and may cause episodic rather than a continuing period of incapacity.

e. Permanent/Long-Term Conditions Requiring Supervision: A period of incapacity which is permanent or long-term due to a condition for which treatment may be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider.

f. Multiple Treatments (non-chronic conditions): Any period of incapacity to receive multiple treatment (including any period of recovery) by a health care provider or by a provider of healthcare services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three full consecutive calendar days in the absence of medical intervention or treatment.

2. Qualifying Exigency: includes the following broad categories: (a) short notice deployment; (b) military events and related activities; (c) childcare and school activities; (d) financial and legal arrangements; (e) counseling; (f) rest and recuperation; (g) post deployment activities, including reintegration activities, for a period of 90 days following the termination of active duty status; and (h) additional categories that are agreed to by the employer and employee within this phrase.

3. Contingency Operation: means short-notice deployment issues, military events, childcare/school activities, financial/legal arrangements, counseling, rest/recuperation, post-deployment activities and other activities arising out of active duty (provided that

the employer and the employee agree upon timing and duration of leave).

4. Covered Military Member: means your spouse, son, daughter or parent who is on active duty or called to active duty status. Son or daughter, for purposes of a covered military member, is defined as your biological, adopted, foster, stepchild, legal ward, or child for whom you stood in loco parentis, who is 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. Note that this definition is different from other sections of this FMLA policy.

5. Parent: means a biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to you when you were a son or daughter, but does not include parents-in-law.

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

H. Pretext Versus Honest Belief Rule.

1. *Fatemi v White.* Expanding examples of reasons to terminate after the fact is not "pretext."

2. *Curly v City of North Las Vegas.* Tolerating misconduct for years does not show pretext when employer ultimately decides to terminate.

3. *Burton v Freescale Semiconductor, Inc.* A sudden and unprecedented campaign to document a specific employee's deficiencies in effort to justify a decision that has already been made could raise an inference of pretext.

4. *Yazdin v Conmet Endoscopic Technologies, Inc.* The honest belief rule is inapplicable when the employer fails to make a reasonable informed and considered decision.

5. *Sklyarsky v Means-Knaus US Partners.* The employee's opinion about his work performance is irrelevant. Employer won on summary judgment when the decision maker honestly believed the plaintiff was performing poorly.

6. *Marshall v The Rawlings Company LLC.* The court reconciled the honest belief rule with the cat's paw theory, holding that the "honest or sincerity" of a decision-maker's belief is irrelevant if that belief is based on the influence of a biased lower-level supervisor.

7. *Brown v Excelda Manufacturing Company, Inc.* Written warnings are not adverse action. The court granted summary judgment for the employer, holding that the plaintiff failed to produce evidence that the supervisor intended to have the plaintiff fired.

8. *Severson v Heartland Woodcraft, Inc.* The court held that, "If as the EEOC argues, employees are entitled to extended time off as a reasonable accommodation, the ADA is transformed into a medical leave statute – in effect, an open-ended extension of the FMLA. That's an untenable interpretation of the term 'reasonable accommodation'."

I. 26-Week Military Caregiver Leave

An eligible employee is entitled to use up to 26 workweeks of unpaid leave during any single 12-month period to care for a covered spouse, son, daughter, parent, or next-of-kin service member who is injured or recovering from an injury suffered while on active military duty making the service member unable to perform the duties of the office, grade, rank, or rating, or when receiving medical treatment, recuperation, or therapy, even if the service member is on the temporary disability retired list. Same goes here.

1. For purposes of the 26-week Military Caregiver Leave, the "single" 12-month period begins as of the date the leave commences and ends

12-months after that date. Any unused amounts are forfeited. In addition, if you and your spouse both become eligible for a leave under the Military Caregiver provision or under a combination of Military Caregiver provision and a 12-week leave, the two of you together will be limited to a combined total of 26 workweeks of leave in any rolling 12-month period.

2. Military Caregiver Leave may be permitted more than once if necessary to care for a different covered service member (or the same service member with multiple injuries or illnesses) up to a combined total of 26-workweeks in a rolling 12-month period. Nothing in this paragraph shall be construed to limit the availability of leave during any other 12-month period and this 26-week period of Military Caregiver Leave is in addition to other types of approved FMLA leave. However, your total available leave time in any rolling 12-month period may not exceed a combined total of 26 workweeks, including FMLA time off taken for any other reason.

3. With respect to Military Caregiver FMLA Leave, the following definitions apply:

    a. Covered Service Member: means a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy from an injury or illness occurring in the line of active duty and/or during active duty, who is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.

    b. Outpatient Status: means the status of a member of the Armed Forces assigned to a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

c. Next of Kin: means the nearest blood relative of that individual (regardless of age). You are required to provide confirmation of the relationship upon request. The Service Member may designate the blood relative who is considered his/her next of kin; otherwise, the following order generally will apply: blood relatives granted custody by law, brother/sister, grandparents, aunts/uncles, and then first cousins.

d. Serious Injury or Illness: means an injury or illness incurred by the Service Member in the line of duty on active duty in the Armed Forces that may render the Service Member medically unfit to perform the duties of the Member's office, grade, rank or rating.

4. Notification and Reporting Requirements

a. All requests for leaves of absence should be submitted at least 30 days in advance of the start of the leave, except when the leave is due to an emergency or is otherwise not foreseeable. If the leave is not foreseeable, employees should provide notice as soon as practicable, which generally means either the same day or the next business day that you learn of the need for leave, in the absence of any unusual circumstances. If there are any delays in employees notifying Companies of their need for leave (e.g., more than five days from the first day of their leave), employees time away may not be protected and their leave may be denied.

b. In processing employees' request for leave, Companies should determine if the leave qualifies for FMLA protection. In all cases in which employees are seeking leave under this policy, they should also provide their employer notice consistent with the Company's established call-in procedures, so long as no unusual circumstances prevent them from doing so. Failure to cooperate or otherwise provide compliant notice may result in loss or delay

of FMLA protections.

c. If employees are seeking leave due to an FMLA-qualifying reason for which a Company has previously granted them FMLA-protected leave, employees should specifically reference the qualifying reason or need for FMLA leave at the time of their request to be away from work. It is not sufficient to simply "call in sick" without providing additional information which would reasonably cause a Company to believe their absence/time away from work may qualify as an FMLA qualifying event.

d. A company should inform employees requesting leave whether they are eligible under FMLA. If they are not eligible, the company should provide a reason for the ineligibility. If they are eligible, the notice will specify any additional information required as well as the employees' rights and responsibilities.

e. The requested additional information and/or certification supporting the need for leave, such as the applicable health care provider's medical certification of a serious health condition affecting the employee or an immediate family member, must be provided within 15 days from the request, or within a reasonable time thereafter upon request for an extension. You are required to timely submit this information on the forms provided to you; failure to provide necessary certifications or supportive documentation requested may result in loss or delay of FMLA protections.

f. If a company finds reason to doubt the validity of the certification, it may require, at its own expense, a second medical opinion from a health care provider designated or approved by the company, but not regularly employed by the Company. Should the second opinion differ from the original certification provided by the employee, a company may, at its own expense, require that the employee obtain a third opinion.

The opinion of the third health care provider, designated or approved by both the company and the employee, is final and binding. A company may also require recertification of the continued need for leave every 30 days while the employee is on leave.

g. During the leave, employees may be required to report periodically on their status and their intention to return to work. Any extension of time for their leave of absence must be requested in writing prior to their scheduled date of return to work, together with written documentation to support the extension.

5. Intermittent Leave. An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt a Company's operations. If leave is requested on an intermittent basis, however, a Company may require employees to transfer temporarily to an alternative position which better accommodates recurring periods of absence or to a part-time schedule, provided that the position offers equivalent pay and benefits. Employees must make an effort to schedule a leave so as not to unduly disrupt business operations.

6. Light Duty Work Assignments. Voluntarily performing in a light duty capacity while on FMLA leave does not count against an employee's 12-week FMLA allotment. In effect, your right to restoration is held in abeyance during the period of time that you are performing in a light duty capacity.

7. Concurrent Use of Unused Accrued Vacation and Coordination of Benefits. Employees may be required to substitute any unused accrued vacation for unpaid leave under this policy, and any such vacation must be taken concurrently with an employee's FMLA Leave.

For example, all time missed from work that qualifies for FMLA Leave and workers' compensation may be counted toward an employee's FMLA Leave.

During FMLA leave, a Company should maintain the employee's health coverage under any group health plan maintained by the Company on the same terms as if the employee had continued to work. Once an employee's accrued vacation is exhausted, a company may require all employees pay the amount normally deducted from the employee's wages to continue health insurance premiums. Companies reserve the right to terminate health insurance if the employee is more than 30 days' late in paying the amount normally deducted from the employee's wages.

8. Return to Work. Employees' failure to either return to work on the scheduled date of return or to apply in writing for an extension prior to that date may be considered a resignation of employment effective as of the last date of the approved leave. An employee on FMLA leave who provides notice of their intent not to return to work upon expiration of a leave may lose their entitlement to FMLA leave and related benefits.

   a. If an employee does not return to work at the expiration of the family and medical leave, a company may require the repayment of health insurance premiums paid on the employee's behalf during the leave period. Reimbursement will not be required if the employee does not return from leave because of the continuance, recurrence or onset of a serious health condition that prevents the employee from performing his or her job or because of further circumstances that are beyond the employee's control.

   b. If employees return from their leave on or before being absent for the full period to which they are entitled, they may be restored to the same or to an equivalent position to the one

they held when the leave started. Employees have no greater right to reinstatement or to other benefits and conditions of employment than if they had been continuously employed during the FMLA leave period. In determining whether a position is "equivalent" Companies should looks at whether the position had substantially similar terms and conditions of employment and whether the position entails similar duties, skills, efforts, responsibilities, authority, privileges and status.

c. If the leave was due to an employee's own serious health condition, employees are required to submit a fitness for duty certification from your health care provider, in accordance with our normal policies and practices applicable to other leaves of absence, certifying that they are able to resume work and perform the essential functions of the job, either with or without a reasonable accommodation. A list of the essential job functions should be made available to the employee for compliance with this requirement.

d. If a reasonable job safety concern exists, employees also may be required to provide a fitness-for-duty certification up to once every 30 days before returning from an intermittent or reduced schedule FMLA leave related to an employee's own serious health condition. Generally, a returning employee will be permitted to return to work within two business days of the Company's receipt of a valid fitness-for-duty release.

9. Key Employees. Certain highly compensated key employees may be denied reinstatement when necessary to prevent "substantial and grievous economic injury" to a Company's operations. A "key" employee is a salaried employee who is among the highest paid 10% of employees at that location, or any location within a 75 mile radius. Employees should be notified of their status as a key employee, when applicable, after they request a FMLA Leave.

10. Prohibition Against Retaliation. If employees feel they have been the victim of any retaliation for exercising rights under this policy, they are encouraged to contact the proper authority so that the matter can be promptly investigated and remedied as appropriate.

III. AMERICANS WITH DISABILITIES ACT (ADA)

A. The law applies to employers with 15 or more employees. However, the Michigan Persons with Disabilities Civil Rights Act applies to all Michigan employers.

B. A "disability" is a physical or mental impairment that substantially limits one or more major life activities. This includes employees who have a record of an impairment, even if they do not currently have a disability. It also includes individuals who do not have a disability but are regarded as having a disability.

C. Employees must be able to perform essential job functions with or without reasonable accommodation. *EEOC v Ford,* Essential functions generally are those that are determined in the employer's judgment or a written [job] description.

D. Questions for the Jury (unless arbitration provision in employment agreement):

1. *EEOC v. Kroger.* The jury gets to decide whether an employee that has a serious back injury is capable of performing essential lifting functions.

2. *Keith v. County of Oakland.* The jury gets to decide if a deaf lifeguard is unable to do marginal or essential job functions.

3. *Gleed v. AT&T Mobility Services.* Employee that was not allowed to sit at work to accommodate a disability was a question for the jury since a pregnant woman was allowed a chair.

4. *Acker v General Motors, LLC.* FMLA requests alone don't trigger ADA. A request for an ADA accommodation would be to assert that he was

able to perform the essential functions of his job with a reasonable accommodation.

5. *EEOC v.* Dolgencorp, LLC. Don't steal and sue. If the jury believed that the termination decision was made based on the employer's honest belief that the employee violated the anti-grazing policy, the disability would not have been the "but for" cause of the termination.

6. *Blatt v Cabela's Retail, Inc.* The plaintiff's gender dysphoria (a/k/a Gender Identity Disorder) was a disability because, as her doctor attested, it substantially limited her major life activities, including interacting with others, reproducing, and social and occupational functioning. It did not merely affect how she identified herself sexually.

7. *Kubik v Central Michigan University Board of Trustees.* If decision was made before Pregnancy = No Claim & 5 Month Gap. The court ruled that in the context of pregnancy-discrimination claims, a plaintiff has the burden to show that "(1) she was pregnant, (2) she was qualified for her job, (3) she was subjected to an adverse employment decision, and (4) there is a nexus between her pregnancy and the adverse employment decision."

E. Safety defense.

1. *Michael v. City of Troy.* An employer's determination that an employee cannot safely perform his job function is objectively reasonable when the employee relies on a medical opinion that is objectively reasonable.

2. *Henschel v. Clare County Road Commission.* An excavator who lost a leg in a motorcycle accident can't safely operate the excavator.

F. Reasonable accommodations.

1. Employers do not have to agree to employee's specific request and are free to offer other reasonable accommodations.

2. The ADA requires employers to re-assign to a vacant position if available. Michigan law does not have this requirement. Plaintiff attorneys should only bring claims in federal court.

G. Associational Discrimination.

1. Expense (cost of insuring).

2. Disability by association (fear employee may contract the disability or fear employee is genetically predisposed to develop a disability).

3. Distraction (an employee has been somewhat inattentive at work because of the disability of the associated person).

4. Employees Not Covered by the Family and Medical Leave Act. The Americans With Disabilities Act ("ADA"), ensures equal opportunity in employment for qualified persons with disabilities. Any employee who becomes disabled and is unable to work, with or without a reasonable accommodation, may be granted a leave of absence as a reasonable accommodation in accordance with the Disability Accommodations policy.

IV. GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)

A. GINA is a federal law that protects people from genetic discrimination in health insurance and employment. Genetic discrimination is the misuse of genetic information.

B. What is genetic information?

1. Genetic information includes any health conditions and risk for developing certain health conditions.

2. Who doesn't apply to GINA?

a. Employers with fewer than 15 employees are not included in GINA.

b. GINA's employment protections do not apply to US Military and Federal Employees.

V. WORKERS' COMPENSATION

A. Workers' compensation is a form of insurance providing wage replacement and medical benefits to employees injured in the course of employment in exchange for mandatory relinquishment of the employee's right to sue his or her employer for negligence.

B. In Michigan, workers' compensation is governed by the Michigan Workers' Disability Compensation Act. The Worker's Disability Compensation Act (WDCA), MCL 418.101 et seq., requires that employers provide compensation to employees for injuries suffered in the course of an employee's employment, regardless of who is at fault. MCL 418.301(1); Pro-Staffers, Inc v Premier Manufacturing Support Services, Inc, 252 Mich App 318, 323; 651 NW2d 811 (2002). In return for this almost automatic liability, employees are limited in the amount of compensation they may collect, and, except in limited circumstances, may not bring a tort action against their employer. MCL 418.131; Pro-Staffers, Inc, supra at 323.

C. The WDCA prevents retaliation against workers who file claims for worker's compensation benefits. MCL 418.301(14); Chiles v Machine Shop, Inc, 238 Mich App 462, 469; 606 NW2d 398 (1999). To establish retaliation, a plaintiff must show that: "(1) he asserted his right for worker's compensation, (2) defendant laid off or failed to recall plaintiff, (3) defendant's stated reason for its actions was a pretext, and (4) defendant's true reasons for its actions were in retaliation for plaintiff's having filed a worker's compensation claim." Id. at 470. The plaintiff bears the burden of showing that a causal connection existed between the filing of a worker's compensation claim and the adverse employment action. Id.

D. However, under the WDCA, Employers are not required to keep jobs open and can terminate employment at will. This is common if your work restrictions prevent return to work for an extended period of time. However, even if the state WDCA law does not provide for job restoration, if the employer is subject to the ADA, they may be required to grant leave as an accommodation.

VI. LEAVE POLICIES

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

1. Conditional certification of a class action was granted when employees argued that employer's timekeeping system left employees with no method for tracking meal breaks, that supervisors required them to work through breaks with little recourse, and that the employer prioritized patient-care responsibilities over the ability of its workers to take meal breaks.

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

VII. DEFENDING UIA & DISCRIMINATION CLAIMS

A. Identify policy violations

B. Identify non-discriminatory reasons for separation

C. Write correspondence confirming facts

D. Give employees an opportunity to respond

SURVIVING AN I-9 INSPECTION CONDUCTED BY U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT ("ICE")

By: John A. MacKenzie, Esq.

I. INTRODUCTION AND INSPECTION TRENDS

A. Immigration and Nationality Act

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

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

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

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

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

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

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

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

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

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

B. Traditional targeted industries

1. Traditionally, ICE targeted industries known to employ immigrant workers, including the following:

a. Construction

b. Hospitality

c. Food preparation

d. Health care

e. Retail

C. Modern trend

1. ICE inspections are expected to increase 400% from 2017.

2. ICE inspections will no longer target certain industries or small companies; rather inspections will be conducted large and small scale among any industry.

D. The big raid

1. January 10, 2018, ICE served notices of inspection on 98 7 Eleven convenience stores in 17 states, including Michigan.

2. It is the largest operation against an employer so far under the Trump administration.

3. 21 arrests were made.

4. Criminal and civil penalties against 7 Eleven are pending.

5. The head of ICE's homeland security investigations ("HSI"), Derek Benner's, statements regarding the 7 Eleven raid:

a. "This is what we're gearing up for this year and what you're going to see more and more of is these large-scale compliance inspections, just for starters. From there, we will look at whether these cases warrant an administrative posture or criminal investigation."

b. "It's not going to be limited to large companies or any particular industry, big medium and small," he said. "It's going to be inclusive of everything that we see out there."

6. Statements from Thomas Homan, director of ICE:

a. Today's actions send a strong message to U.S. businesses that hire and employ an illegal work force. ICE will enforce the law, and if you are found to be breaking the law, you will be held accountable." - Thomas D. Homan, the acting director of Immigration and Customs Enforcement.

b. Homan stated he will "significantly" increase work site raids because immigrants will be more hesitant to illegally enter the U.S. if there are no jobs for them. He ordered ICE agents to ramp up their work site investigations by "four to five times."

c. Homan stated "agents will not target one side of the employment equation, as past administrations did."

d. On January 15, 2018, Homan stated that ICE inspections will "increase 400%."

E. Asplundh Tree Experts Co. inspection

1. Asplundh is a tree trimming and brush clearing company headquartered in Willow Grove, Pa. The company hired and rehired employees across the United States by accepting identification documents it knew to be fraudulent.

2. A six-year HSI audit and investigation revealed that the company decentralized its hiring so upper level management could remain

willfully blind while supervisors and general foremen (lower level management) hired ineligible workers, including unauthorized aliens, in the field. Hiring was by word of mouth referrals rather than through any systematic application process, which allowed Supervisors and General Foremen to hire a work force that was readily available and at their disposal.

3. This model perpetuated fraudulent hiring practices that, in turn, maximized productivity and profit. With a motivated work force, including unauthorized aliens willing to be relocated and respond to weather related events around the nation, Asplundh had crews which were easily mobilized that enabled them to dominate the market.

4. The company agreed to a record breaking settlement for civil fines in the amount of $95 million.

II. THE INSPECTION PROCESS

A. Notice of Inspection ("NOI")

1. The administrative inspection process is initiated by the service of a Notice of Inspection ('NOI") upon an employer compelling the production of Forms I-9.

2. Employers are provided with at least three business days to produce the Forms I-9.

3. ICE will request the employer provide supporting documentation, which usually includes a copy of the payroll, list of current employees, Articles of Incorporation, and business licenses.

B. Violations

1. Procedural / Technical (terms are used interchangeably)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Substantive violations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Types of notice you may receive after inspection

1. Notice of Inspection Results – also known as a "compliance letter," used to notify a business that they were found to be in compliance.

2. Notice of Suspect Documents – advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has determined that an employee is unauthorized to work and advises the employer of the possible criminal and civil penalties for continuing to employ that individual. ICE provides the employer and employee an opportunity to present additional documentation to demonstrate work authorization if they believe the finding is in error.

3. Notice of Discrepancies – advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has been unable to determine their work eligibility. The employer should provide the employee with a copy of the notice, and give the employee an opportunity to present ICE with additional documentation to establish their employment eligibility.

4. Notice of Technical or Procedural Failures – identifies technical violations identified during the inspection and gives the employer ten business days to correct the forms. After ten business days, uncorrected technical and procedural failures will become substantive violations.

5. Warning Notice – issued in circumstances where substantive verification violations were identified, but circumstances do not warrant a monetary penalty and there is the expectation of future compliance by the employer.

6. Notice of Intent to Fine ("NIF") – may be issued for substantive, uncorrected technical, knowingly hire and continuing to employ violations.

    a. In instances where a NIF is served, charging documents will be provided specifying the violations committed by the employer. The employer has the opportunity to either negotiate a settlement with ICE or request a hearing before the Office of the Chief Administrative Hearing Officer (OCAHO) within 30 days of receipt of the NIF.

    b. If the employer takes no action after receiving a NIF, ICE will issue a Final Order. If a hearing is requested, OCAHO assigns the case to an Administrative Law Judge (ALJ), and sends all parties a copy of a Notice of Hearing and government's complaint, thus setting the adjudicative process in motion.

D. Penalties

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

    a. Size of the business

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

    c. Seriousness of violation

    d. Whether the violation involved unauthorized workers, and

    e. History of previous violations

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

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

    b. Examples of aggravating circumstances

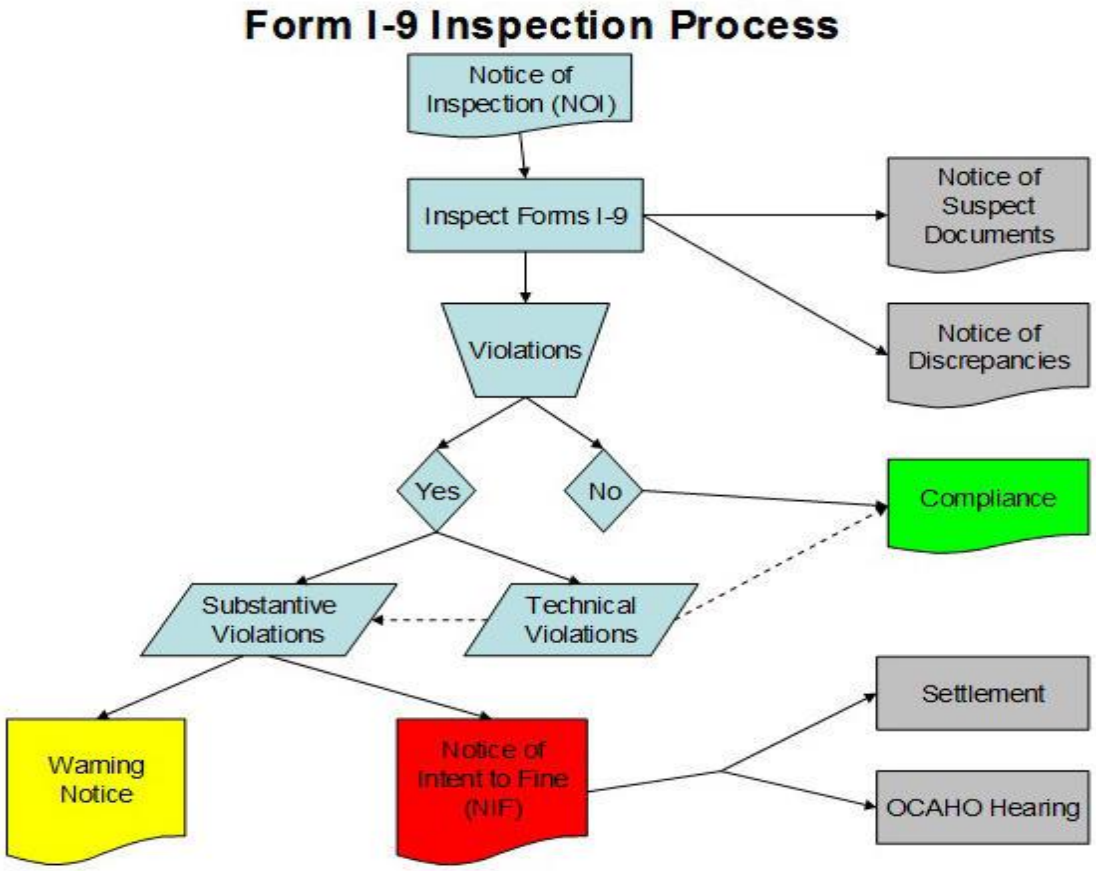
i. Large percentages of employee I-9 forms are non-complaint with 8 CFR 274A

ii. Multiple knowing violations

iii. Repeat offenses

3. Knowingly hire and continuing to employ violations – fines range from $375 to $16,000 per violation, with repeat offenders receiving penalties at the higher end.

E. Inspection process flow chart



Graphic courtesy of U.S. Immigration and Customs Enforcement www.ice.gov

III. FORM I-9 COMPLIANCE

A. Section 1 – employee

1. Every new hire must fill out Section 1.

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

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

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

5. Check correct citizenship status box:

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

6. Employee must sign and date.

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

B. Section 2 – employer

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

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

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

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

      i. Passport

      ii. Permanent resident alien card

iii. Employment authorization care

b. Common list B documents – establishes identity only.

i. Driver license

ii. State identification card

iii. Voter identification card

iv. School identification card

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

i. Social security card

ii. Birth certificate

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

C. Section 3 – Re-Verification

1. Required when an employee's work authorization expires (aliens on temporary work authorization) or for re-hires hired within three years of completion of original I-9.

2. Must be completed on or before expiration date.

3. Must use most recent Form I-9.

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

5. US citizens and Lawful Permanent Residents are exempt.

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

D. Making corrections to Form I-9

1. Only the employee can correct Section 1.

a. Reminder – if the employee no longer works for the company and cannot be located, write a memo to ICE explaining why the defect cannot be cured.

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

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

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

E. Form I-9 retention requirements

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

F. Tips for compliance

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

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

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

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

a. Employers often forget to re-verify employees. For example, if you have an employee that has been working pursuant to a temporary work authorization that is renewed yearly for the last ten years, but you only completed a Form I-9 on the initial hire

date, then you will be cited for nine violations for that employee and fined accordingly during an ICE inspection.

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

3. Organized records

a. Each employee personnel file should include the Form I-9 and copies of the identifying documents used in Section 2.

4. Yearly audits

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

IV. MITIGATING AND DEFENDING A POST-INSPECTION FINE FROM ICE

A. Retention Limitations – 8 CFR 274a2(b)(2)(i)

1. An employer must retain Form I-9s for each employee three years from the date of hire or one year post-termination, whichever is longer. Any former employee I-9s outside this scope are exempt from inspection and fines.

B. Substantial Compliance

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

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

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

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

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

c. The employee's signature in Section 1;

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

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

C. Good Faith Defense – knowing violations only

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

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

D. The Eight Amendment excessive fines clause

1. A fine that is so excessive that it outweighs the gravitational relationship to the offense it is designed to punish violates the Excessive Fines Clause of the Eight Amendment. The question is one of proportionality.

2. Argue the five factors – the size of the business of the employer being charged; the good faith of the employer; the seriousness of the

violation; whether or not the individual was an unauthorized alien; and the history of previous violations of the employer.

E. Other defenses

1. The employee must have received wages or remuneration from the employer to be subject to inspection.

2. Procedural issues

   a. Pay attention to exact wording on NOI. Employers often make the mistake of producing Form I-9s for subsidiaries or other related companies, which were not requested for inspection.

   b. Service issues.

3. Staffing companies and Professional employment organizations ("PEO").

   a. Staffing companies – as a general rule, the staffing company is responsible for Form I-9 retention and responding to NOI.

   b. PEO – as a general rule, the employer will be responsible Form I-9 retention and responding to NOI.

   c. Note that (a) and (b) are general rules; there are exceptions and it often will depend on the degree of control that the company has over the employee and contractual language with the staffing or PEO company.

F. What are we seeing?

1. A significant increase in ICE inspections since January 1, 2018

2. Large and small scale inspections – companies with 15 employees to several hundred employees

3. Fines averaging $750 to $1,300 per violation – strongest factors appear to be size of company and history of compliance

4. ICE will fine anything and everything it finds, even for I-9s produced that are outside the scope of inspection

5. ICE looks favorably upon companies that are proactive about Form I-9 compliance. It is imperative to contact counsel to assist with production of your Form I-9 records when you receive a NOI.

6. Proper responses to a notice of intent to fine often results in significant reductions in the fine

EMPLOYEE PERFORMANCE MANAGEMENT:

NAVIGATING THE EMPLOYEE DEVELOPMENT PROCESS SUCCESSFULLY

By: Michelle C. Harrell, Esq.

I. THE PERFORMANCE MANAGEMENT SYSTEM: A KEY TO INTEGRATED EMPLOYEE DEVELOPMENT AND SATISFACTION

A. Definition: Performance management is a shared understanding about how individuals contribute to an organization's goals. An effective performance management and appraisals process focuses on aligning your workforce, building competencies, improving employee performance and development, and driving better business results. Performance management is a management style that has grown increasingly popular, and surveys show that more companies are replacing annual performance reviews with comprehensive performance management systems. This approach is not a year-end check in but instead continues over all 365 days. It involves a process in which a company, organization, or institution creates a work environment that empowers employees to work to the best of their abilities. The process that an employer uses to accomplish this often varies from one business to the next. Despite these variations, the performance management process generally involves some form of goal setting, evaluation and reward. In addition, coaching is often offered throughout the process.

B. Four Stages of the Performance Management Process:

1. Planning: The planning stage of the performance management process is meant to formulate the employee's job description, set achievement goals for the employee and discuss the expected level of performance for the job. The expectations for any given employee will typically depend on the work they are doing or the department they are in. At the end of the planning stage both the employee and management must be in agreement in terms of what is expected. In

addition, the goals that are set are ones that should be achieved within the course of one year.

2. Assessment: The assessment is an annual evaluation of the employees' performance. This often takes feedback from co-workers and clients into consideration, in addition to observations by management. Assessments also include a review of the previous years' evaluation and an assessment of skills. Some employers may have an employee complete an evaluation of their own performance that is then discussed during the evaluation and compared to the official evaluation.

3. Recognition: This portion of the process is about recognizing the employee's accomplishments as well as any areas that need improvement. During this process the manager/employer and the employee should discuss ways to make improvements. Management should also be open to things that they can do differently in efforts to help the employee. In terms of accomplishments, employees may be given recognition verbally and/or in the form of bonuses or promotions.

4. Career Development: This phase of the process is to promote and encourage future improvement and development of the employee. It should meet the needs of the business or organization, enhance the strengths of the employee and work to eliminate areas of weakness. This may involve training on site as well as sending the individual to off-site training. As with other phases or stages of the process, communication between management and the employee is important.

C. GUIDING PRINCIPLES OF PERFORMANCE MANAGEMENT:

1. Goals are the foundation for performance management and must be S.M.A.R.T.:

a. S: Specific

b. M: Measurable

c. A: Attainable

d. R: Relevant

e. T: Timely

2. Setting Goals:

a. Prepare the goals together with the employee.

b. Focus upon employee performance improvement but also professional skill development related to needs of the organization and the employee's unit in the organization.

c. Include goals relating to the employee's desired advancement in the organization and overall career.

d. Be specific and include details, method of measurement and deadlines.

e. Consider the employee's workload, employee's function and fit within the overall work unit, employee strengths and interests.

f. Set short term goals for one year or less and then long term goals for up to 5 years.

g. Be realistic!

3. The 360º Survey and Feedback

a. 360° degree feedback is feedback that you collect from an individual's direct reports (if they have any), colleagues or co-

workers, customers, and anybody else that the individual would have a lot of work contact with at work.

b. Invite your employees to submit names of appropriate respondents to you, as well as select some other respondents, both inside and outside the organizational unit. This enables you to get a well-rounded perspective on the quality of an employee's work and their interpersonal effectiveness.

c. 360° feedback MUST be confidential; you are compiling summary comments and looking for trends and patterns.

d. The best use of 360° degree feedback is for development purposes, NOT for performance ratings or compensation decisions.

e. Coaching should be provided to the individual on how to interpret their feedback and how to use it for development planning.

f. Survey questions should measure specific behaviors and key competencies associated with job performance and success; they should be asked in behavioral terms and be actionable.

g. The more feedback gathered, the better the data.

h. Research shows that performance, morale, and engagement can actually decline if a 360° process is not done well or the feedback is negative and the employee gets upset so manage the process carefully.

D. The Supervisor's Role: Supervisors are responsible for:

1. Communicating the goals to employees;

2. Assessing the performance of the organizational unit in which the employee is involved, as well as individual performance;

3. Developing performance expectations with the participation of employees;

4. Communicating (and documenting) throughout the performance management cycle about employees' goals, performance, and development;

5. Recognizing and rewarding successful performance throughout the cycle;

6. Coaching for improved performance and taking corrective action as necessary;

7. Ensuring that employees have the tools, resources, and training and development needed to carry out their duties successfully.

II. COACHING AND MENTORING FOR SUCCESS

A. Coaching vs. Mentoring: What's the Difference?

1. Coaching: Coaching is a form of development in which a person called a coach supports a learner or client in achieving a specific personal or professional goal by providing training and guidance. The learner is sometimes called a coachee. Occasionally, coaching may mean an informal relationship between two people, of whom one has more experience and expertise than the other and offers advice and guidance as the latter learns; but coaching differs from mentoring in focusing on specific tasks or objectives, as opposed to more general goals or overall development.

2. Mentoring: Mentoring is a process for the informal transmission of generalized knowledge, social capital, and the psychosocial support perceived by the recipient as relevant to work, career, or professional

development; mentoring entails informal communication, usually face-to-face and during a sustained period of time, between a person who is perceived to have greater relevant knowledge, wisdom, or experience (the mentor) and a person who is perceived to have less (the protégé).

B. Critical Steps for Successful Coaching of Employees

1. Build Trust and Rapport: The foundation of any coaching relationship is based upon a relationship of trust between the supervisor and the employee. Without trust, coaching will not be effective.

2. Open the Process in a Positive Manner: The manager must open the meeting with the employee by clarifying in a non-accusatory manner the reason for the coaching process.

3. Get an Agreement from the Employee: The most critical step of the process is getting the employee to agree that an issue exists that needs to be addressed or improved.

4. Explore Alternatives and Creative Solutions: Start with having the employee brainstorm solutions and try to avoid having the supervisor or manager provide their ideas first. Try to be as specific as possible. Be open to discussing the ideas' benefits, drawbacks and the employee's reasons to believe that such idea may be a solution. The purpose is to maximize the number of ideas and alternatives but not to choose one of those options during this step.

5. Commitment: Help the employee choose one of the options as the solution. Do not make the choice for the employee. It is critical that the employee make the choice and own the solution. The supervisor must get verbal commitment from the employee and specific steps and timelines. Be sure to support the employee's choice and offer praise for finding the solution.

6. Handle Excuses: An employee may raise excuses to avoid having to move forward. Recast statements that the employee makes into affirmative statements of encouragement and requests for solutions. Respond empathetically to the employee's perceived situation and reflectively restate the employee's feeling.

7. Give Feedback: Effective coaching requires that the coach give continual feedback to the employee, both positive and requiring re-assessment and solutions. Feedback should:

   a. Be specific. Vague statements like "you did a good job" or "you need to do better addressing the customer's concerns" do not give enough insight into the specific improvement needed.

   b. Be timely. Feedback must be given as soon as practicable after the interaction, the completion of the deliverable or the manager's observation.

   c. Be sincere. Avoid any tone that indicates anger, disappointment, sarcasm or frustration.

   d. Focus on behavior and not the person. Avoid making feedback seem like a judgment upon the person. The manager should focus on the behavior.

   e. Be as positive as possible. Positive feedback strengthens performance. Negative feedback delivered in a positive, encouraging manner can improve performance.

III. DOCUMENTING THE PROCESS

A. The Employee File is available to employees for review so care must be taken as to what documentation (good and bad) is included in the employee file.

B. The Employee File and the presence or lack of critical documentation can make or break an employee lawsuit.

C. The rule of escalating action: A successful performance improvement process includes increasing stages of notice, requirements, deadlines and consequences. The process starts with a warning without counseling/coaching, warning and then the imposition of discipline. For some conduct, discipline is necessary from the outset. The circumstances determine the steps in the documentation process.

HIRING THE RIGHT PEOPLE THE RIGHT WAY:
A GUIDE TO ONBOARDING EMPLOYEES

I. INITIATION OF EMPLOYER-EMPLOYEE RELATIONSHIP

A. AT THE TIME THAT AN EMPLOYEE SUBMITS AN EMPLOYMENT APPLICATION, THE PARTIES ARE AT ONE OF THE MOST CRUCIAL TIMES OF THE EMPLOYER/EMPLOYEE RELATIONSHIP.

B. THIS IS THE TIME WHEN AN EMPLOYER CAN MOST EASILY PROTECT ITSELF FROM WRONGFUL DISCHARGE CLAIMS AND UNQUALIFIED CANDIDATES.

C. ON THE FLIPSIDE, THE APPLICATION AND ONBOARDING PROCESS CAN RESULT IN SIGNIFICANT LIABILITY IF THE PROCESS IS CONDUCTED IMPROPERLY.

II. PAPER, PAPER, PAPER

A. EMPLOYEES ARE MORE WILLING TO SIGN DOCUMENTS AT THE BEGINNING OF AN EMPLOYMENT RELATIONSHIP, AND EMPLOYER'S LEVERAGE IS TYPICALLY MAXIMIZED.

B. EMPLOYERS SHOULD MAKE USE OF THIS FACT AND OBTAIN ALL APPROPRIATE DOCUMENTATION AND CONTRACTUAL PROVISIONS.

1. Mandatory Arbitration
2. Shortened Statute of Limitations (works for some but not all claims, e.g., for ADEA claims but not FLSA)
3. Non-competes and NDAs
4. Confidentiality agreements

III. IMPROPER INQUIRIES

A. PHOTOGRAPHS – IT IS IMPROPER TO REQUIRE OR EVEN REQUEST A PHOTOGRAPH.

B. AGE, RACE, RELIGION, HEIGHT, WEIGHT, MARITAL STATUS, SEX, NATIONAL ORIGIN.

C. NON-JOB RELATED PHYSICAL AND MENTAL CONDITIONS; MEDICAL INFORMATION.

1. Best to leave this line of questioning until after you make a conditional offer of employment. Offers of employment can be conditioned upon fulfillment of a pre-employment physical.

2. It is recommended that no inquiries be made regarding physical handicaps, impairments, or abilities until after a conditional offer of employment. Offers can be conditioned upon fulfillment of a pre-employment physical.

a. Can you perform job-related functions with or without an accommodation?

b. Do you have any impairments, physical, mental, or medical that would interfere with your ability to do the job for which you have applied? (Legal under Michigan's Handicapper's Civil Rights Act, MCL 37.1101 *et seq*.)

3. The ADA limits an employer's ability to make disability-related inquiries or require medical examinations at three stages: **pre-offer, post-offer, and during employment**. The rules concerning disability-related inquiries and medical examinations are different at each stage.

a. At the first stage (prior to an offer of employment), an employer may not ask any disability-related questions or require any medical examinations even if they are related to the job.

b. At the second stage (after an applicant is given a conditional job offer, but before he or she starts work), an employer may ask disability-related questions and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.

c. At the third stage (after employment begins), an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.

   i. an employee will be unable to perform the essential functions his or her job because of a medical condition; or

   ii. the employee will pose a direct threat because of a medical condition.

d. Workers Compensation – It is improper to inquire into an employee's history of prior job-related inquiries which do not impair the ability of the individual to perform the essential functions of the present job.

e. Military Records – Inquiries regarding military discharge may be found to create a disparate impact under federal civil rights law, e.g., disparate impact on certain demographic groups.

f. Arrests – It is improper to inquire into arrests and detentions in which a conviction did not result.

g. Criminal Records – Avoid discouraging applicants, pre-application, because they have a criminal record. The EEOC is actively soliciting employees to report employers doing this. A policy or practice that excludes everyone with a criminal record from employment will not be job related and consistent with business necessity and therefore will violate Title VII, unless it is required by federal law.

i. There are two ways in which an employer's use of criminal history information may violate Title VII. First, Title VII prohibits employers from treating job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin ("disparate treatment discrimination").

ii. Second, even where employers apply criminal record exclusions uniformly, the exclusions may still operate to disproportionately and unjustifiably exclude people of a particular race or national origin ("disparate impact discrimination"). If the employer does not show that such an exclusion is "job related and consistent with business necessity" for the position in question, the exclusion is unlawful under Title VII.

iii. Not all convictions are equal. The EEOC provides some guidance on how they assess an employer's use of criminal records and analyze whether the employer properly denied an applicant because the conviction was "job related and consistent with business necessity." There are two circumstances in which the EEOC believes employers may consistently meet the "job related and consistent with business necessity" defense:

(a) The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or

(b) The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three

factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)). The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen to determine if the policy, as applied, is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.).

IV. MICHIGAN NEW HIRE FORM 3281

A. FEDERAL LAW REQUIRES PUBLIC AND PRIVATE EMPLOYERS TO REPORT ALL NEWLY HIRED OR REHIRED EMPLOYEES WHO ARE WORKING IN MICHIGAN TO THE STATE OF MICHIGAN.

B. SUBMITTED WITHIN 20 DAYS OF HIRE.

C. ONLINE/ELECTRONIC REPORTING AVAILABLE.

V. FAIR CREDIT REPORT ACT (FCRA) COMPLIANCE

A. IF YOUR COMPANY GETS BACKGROUND INFORMATION ON CANDIDATES, SUCH AS CRIMINAL OR CREDIT REPORTS, IT'S VERY LIKELY YOU'RE COVERED BY THE FAIR CREDIT REPORTING ACT, A FEDERAL STATUTE.

B. BEFORE YOU GET A BACKGROUND SCREENING REPORT, THE FCRA REQUIRES YOU TO MAKE CERTAIN DISCLOSURES AND OBTAIN THE CANDIDATE'S AUTHORIZATION. HOW YOU DO SO IS CRUCIAL TO AVOIDING LIABILITY.

C. KISS FOR FCRA

1. Complying with FCRA's disclosure requirement for use of background screening reports is easy; you can do it in a few sentences:

a. Disclosure – "clear and conspicuous"

b. Authorization

c. And nothing else!

2. Don't include language that claims to release you from liability for conducting or using the report.

3. Don't include a certification by the candidate that all info in application is accurate.

4. Delete any wording that purports to require the candidate to acknowledge that your hiring decisions are based on legitimate, non-discriminatory reasons.

5. Get rid of overly broad authorizations that permit release of info that the FCRA doesn't allow to be included in a background report, e.g., bankruptcies that are 10+ years old.

D. THIS EXTRA LANGUAGE OPENS THE DOOR TO A LAWSUIT. IF YOU WANT ANYTHING BEYOND THE DISCLOSURE AND AUTHORIZATION, PUT THEM IN A SEPARATE DOCUMENT.

E. TAILOR THE FCRA CONSENT/AUTHORIZATION FORM TO THE INFORMATION YOU ACTUALLY NEED AND ONLY REQUEST THE INFORMATION FOR A JOB THAT REQUIRES IT:

1. Wouldn't credit check a janitor

2. But you very well might want to credit check a bookkeeper/accountant

3. "I acknowledge and understand that through this authorization the Company and its third-party designee may obtain information, including, but not limited to, credit histories, criminal records, motor vehicle reports or driving records, investigative consumer reports, reference checks, workers' compensation history reports, educational records, and all employment records, including any and all disciplinary

reports, letters of reprimand or other disciplinary action contained in my record with any employer or former employer."

F. NOTIFICATION REQUIREMENT IF THE CREDIT/BACKGROUND REPORT IS "USED AGAINST" THE CANDIDATE.

G. VIOLATIONS = $3,750 PER VIOLATION, PLUS EMPLOYEE GETS ATTORNEY FEES ($$$).

H. COTTAGE INDUSTRY FOR FCRA LITIGATION.

I. CLASS ACTION EXPOSURE.

J. SPOKEO, INC. V. ROBINS

1. Is there any harm? Spokeo requires a "concrete" injury and more than a "bare procedural violation"

2. But the reality is that Spokeo has not killed FCRA suits

K. MUST CERTIFY TO COMPANY OBTAINING REPORT THAT YOU.

1. Notified applicant and got permission

2. Complied with all FCRA requirements

3. Won't discriminate or misuse the info

L. IF YOU TAKE ADVERSE ACTION BASED ON THE REPORT:

1. Provide notice to candidate that includes a copy of the report

2. Provide a "Summary of Your Rights Under the Fair Credit Reporting Act" – opportunity to review report and explain negative info

3. Inform applicant rejected because of the report

4. Inform application right to dispute accuracy of report

VI. LIVE AUDIENCE POLLING REGARDING LAWFUL & UNLAWFUL QUESTIONS

Topic	Unlawful	Lawful
Marital Status	What are your child care arrangements?	Would you be willing to relocate, if necessary?
National Origin and Ancestry	What is your native tongue? Where were your parents born?	Are you authorized to work in the U.S.?
Military and Veteran Status	Have you ever served in the military? Were you honorably discharged?	
Height and Weight	How much do you weigh? (MI law) How tall are you? (MI law)	
Arrest Record	Have you ever been arrested?	Have you ever been convicted of a crime (if relevant to position)
Credit	Do you have good credit?	Are you willing to sign this background check form authorizing us to run a credit report?

PROTECTING ORGANIZATIONAL GOOD WILL AND BUSINESS ASSETS

By: Ronald A. Sollish, Esq.

I. NON-COMPETITION AGREEMENTS

A. History.

1. Until March 29, 1985 virtually all contracts that restricted employment were considered to be void and illegal as a restraint of trade.

2. The exception was a route or customer list. The non-compete was limited to a maximum of ninety (90) days.

B. The Michigan Antitrust Reform Act, MCLA 445.774a, states:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interest and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

1. What is an employer's protectable interest?

   a. The statute does not provide a definition.

   b. The legislative analysis suggests that trade secrets, client lists and confidential employment materials are protectable.

   c. A seminal case on trade secrets is *Hayes Albion Corp v Kuberski*, 421 Mich 170 (1984), rehearing denied, 42 Mich 1202 (1985).

d. Goodwill and customers constitute a reasonable business interest. *Merrill Lynch v Grall*, 836 F Supp 428 (WD Mich, 1993).

e. An agreement prohibiting an ex-stockbroker from soliciting customers he serviced while he worked for his former employer was reasonable because it lasted for one (1) year, did not prevent him from working as a broker and did not restrict him geographically from working. *American Express Financial Advisors v Scott*, 955 F Supp 688 (ND Texas, 1996).

f. Customer lists, profit margins and pricing information are protectable. *Lowry Computer Products, Inc. v Head*, 984 F Supp 1111 (ED Mich 1997).

g. A restrictive covenant entered into as part of an asset purchase agreement is protectable. *Perceptron, Inc. v Sensor Adaptive Machs, Inc.* 221 F 3d 913 (6th Cir 2000).

C. What are Non-Compete Agreements?

1. Agreements to restrict a certain type of business competition between an employer and its employees or a former owner of the business.

2. Names, types, or forms.

a. Non-compete agreements.

b. Restrictive covenants.

c. Non-solicitation agreements.

d. Similar to, but different from, non-disclosure agreements.

e. May be part of other standard employment agreements, including employment manuals, employment relationship statements, severance agreements, non-disclosure agreements, and release agreements.

D. Why use Non-Compete Agreements?

1. Use Non-Compete Agreements to protect legitimate business interests and to prevent unfair business competition.

2. Use to protect the tangible and intangible assets of a business as well as its goodwill.

3. Non-Compete Agreements help prevent unreasonable competition.

4. Non-Compete Agreements help obtain injunctive relief and monetary damages from unreasonable competition.

5. Employees have a legal duty of honesty and loyalty during their term of employment.

6. Employees have no legal obligation not to compete with you after their employment with you, absent a specific written agreement to the contrary.

E. When and How to use Non-Compete Agreements.

1. Non-Compete Agreements should be used as standard operating procedure or as standard method of operation in certain situations.

2. Non-Compete Agreements should be used with most higher level employees and with all independent contractors.

3. Non-Compete Agreements should be used often. There is rarely a reason not to use Non-Compete Agreements.

4. Non-Compete Agreements should be used in conjunction with other standard employment agreements, including employment manuals, employment relationship statements, non-disclosure agreements, severance agreements, and release agreements.

F. What are the elements of a Non-Compete Agreement?

1. There should be a specific restriction or prohibition concerning certain types of competition.

2. There should be a specific remedy and damages in the event of a breach or default of the restriction.

3. The restriction should protect reasonable and legitimate existing business interests and nothing more.

4. The restrictions must be reasonable as to:

    a. Time or Term:

        i. Six (6) months to five (5) years is usually thought of as reasonable and enforceable depending on the industry, position of the employee and the specific facts and circumstances of the matter.

        ii. Ten (10) years to twenty (20) years is usually thought of as unreasonable and unenforceable.

        iii. The shorter the time, the more reasonable and the more likely to be enforced.

    b. Geography or Area:

        i. One (1) mile to twenty (20) miles is usually thought of as reasonable and enforceable.

        ii. Twenty-five (25) miles, a state, the nation, or the world may be viewed as unreasonable and unenforceable depending on the facts and circumstances.

        iii. The shorter or smaller the geographic area, the more reasonable and the more likely to be enforceable.

    c. Scope or Coverage:

        i. Restriction should be limited only to legitimate business interests.

        ii. Legitimate business interests include attempting to protect existing customers, clients, products, services, trade secrets, employees, contractors, and suppliers.

iii. All potential customers, clients, products, services, and suppliers are usually thought of as unreasonable and unenforceable.

iv. The narrower the scope or coverage, the more reasonable and the more likely to be enforced.

5. Restrictions should include:

a. Prohibition against competing with, contacting or soliciting actual and targeted customers or clients.

b. Prohibition against hiring or dealing with, contacting, or soliciting actual employees, contractors, and suppliers.

6. Non-Compete Agreements should provide for damages in the event of a breach or default, which damages should specifically include, but not be limited to liquidated monetary damages and all costs of enforcing the agreement, including reasonable attorney fees.

7. Non-Compete Agreements should provide for equitable remedies, which include injunctions and restraining orders.

G. What should be avoided when using Non-Compete Agreements?

1. Like all written agreements, avoid those terms and restrictions which are unreasonable, over-reaching, and unfair.

2. Unreasonable restrictions are:

a. Restrictions which prevent someone from:

i. Working in the only job or industry which an individual knows or has ever known, or

ii. Making a living, and

b. Restrictions which injure or interfere with another's legitimate business interests.

H. What are the problems with Non-Compete Agreements?

1. Non-Compete Agreements are not a guaranty or an absolute bar from unreasonable competition.

2. Non-Compete Agreements keep only honest people more honest. They will not keep dishonest employees from acting dishonestly.

3. Non-Compete Agreements should not be overly relied upon or used as a substitute for providing quality goods and/or services.

4. Non-Compete Agreements are "double-edged" and can run in both directions.

   a. Employers must be very careful about hiring employees who may be subject to and bound by a Non-Compete Agreement.

   b. Employers must carefully review and analyze all agreements which are signed by or bind prospective employees.

I. Enforcement.

1. To enforce a covenant not to compete, the plaintiff must be reasonable as to its duration, geographical area and type of employment or line of business.

2. Does signing a covenant not to compete at the beginning of an employment relationship provide sufficient consideration to make the covenant enforceable?

   Yes. See *Lowry Computer Products, Inc. v Head*, supra.

3. Does the continuation of employment constitute sufficient consideration to enforce the covenant? Yes, under certain circumstances.

   a. If a new business has acquired the old business which employed the employee. *Lowry Computer Products, Inc. v Head*, supra.

   b. If a new contract is signed with the current employer. *Robert Half International, Inc. v Van Steemis*, 784 F Supp 1263 (ED

Mich 1991).

4. What are the factors that a court considers in determining the reasonableness of time and geographical restrictions?

   a. With respect to time, periods from six (6) months to three (3) years have been considered reasonable. *Superior Consulting, Inc. v Walling*, 851 F Supp 847 (ED Mich 1994).

   b. A five (5) year covenant barring a seller of a business from competing in the office furniture industry in Michigan and Ohio was deemed reasonable but was not enforced for other reasons. *In re Spradlin*, 284 BR 830 (ED Mich 2002).

   c. Also, a five (5) year non-compete provision was enforceable as part of an asset purchase agreement prohibiting the seller from competing in the business of designing, developing, manufacturing, selling and servicing electro-optical measuring products. See *Sensor Adaptive Machs*, supra.

   d. A three (3) year non-compete executed by independent sales representatives formerly employed by a replacement window company was reasonable. *Bristol Window & Door, Inc. v Hoogenstyn*, 250 Mich App 478 (2002)

   e. The issue is fact sensitive to industries. In certain industries (i.e., computer hardware sales, sales of software) a shorter restrictive covenant period of one (1) year should increase the ability to enforce the covenant as written.

   f. With respect to geography, the court in *Walling* held that an unlimited geographic scope is reasonable if the business at issue is international in scope.

   g. Non-solicitation of the former employer's customers has been found to be a reasonable substitute for geographical restrictions.

5. If the covenant not to compete is too broad to render it enforceable, is the court permitted to modify the covenant to make the restriction more narrow and thus the covenant enforceable?

   Yes. Michigan courts have discretion to modify unreasonable covenants.

6. Will a single breach of a covenant not to compete be sufficient for a court to issue an injunction extending the period of the covenant?

   Normally, no. However, when a breach is continuous and systematic, courts have extended the time period of a covenant.

7. What elements does a court consider to determine if an employer is entitled to obtain a preliminary injunction enforcing a covenant not to compete?

   a. Whether the public interest will be harmed if an injunction is issued.

   b. Whether the plaintiff employer will be harmed, if temporary relief is not granted, more than the opposing party (i.e. - former employee).

   c. Whether the plaintiff is likely to prevail on the merits.

   d. Whether the plaintiff will be irreparably harmed if the relief is not granted (monetary damages will not be an adequate remedy).

   e. Whether granting the injunction will preserve the status quo.

8. What choice of law rule applies in determining which state law governs in determining whether to enforce a covenant not to compete?

   a. In *Lowry Computer Products, Inc. v Head*, 984 F. Supp 1111 (ED Mich 1997), a federal court in the Eastern District of Michigan held:

> In determining the state of applicable law in the absence of an effective choice of law by the parties pursuant to …courts take into account the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> *Id*. at 11.

II. NON-SOLICITATION AGREEMENTS

A. What are Non-Solicitation Agreements?

1. Similar to non-compete agreements, non-solicitation agreements restrict a type of business competition between an employer and its employees.

2. In non-solicitation agreements, the employee agrees not to solicit either or all of:

   a. Other employees in the protected business.

   b. Clients and/or customers.

   c. Vendors, suppliers and business contacts.

   d. In some cases, the employee agrees not to do business with a former client and/or customer even if the employee did not solicit the person or business.

B. Why use Non-Solicitation Agreements?

1. Protection of legitimate business interests.

2. Helps prevent unfair and/or unreasonable competition.

3. May result in injunction relief and monetary damages from a violator of the agreement.

4. Courts generally find non-solicitation agreements easier to enforce than non-competition agreements.

C. When and How to Use Non-Solicitation Agreements?

1. Non-solicitation agreements should be used as standard operating procedure or as standard method of operation in certain situations.

2. Non-solicitation agreements should be used with most higher level employees and with all independent contractors.

3. Non-solicitation agreements should be used even in certain situations where a non-compete agreement is not used.

D. Elements of a Non-Solicitation Agreement.

1. The employee agrees not to solicit, initiate contact or, in some cases, not accept new business from existing or targeted clients, customers, vendors and/or employees in the business for a specific period of time.

2. The agreement must be reasonable as to time, similar to non-compete agreements.

3. The agreement should be tied to protect reasonable and legitimate existing business interests and nothing more.

4. There should be a specific remedy and damages in the event of a breach or default of the restriction, including reasonable attorneys fees.

5. The agreement should provide for equitable remedies, which include entry of injunctions and restraining orders.

E. What are the problems with Non-Solicitation Agreements?

1. Similar to non-compete agreements, the agreements are not a guarantee or absolute bar from unreasonable competition.

2. Similar to non-compete agreements, the agreements are "double edged" and may present a problem for an employer who wants to hire an employee subject to a non-solicitation agreement.

F. Enforcement.

1. Easier to enforce than non-compete agreements because the agreements are more limited in scope and less problematic for an

employee to comply with.

2. The time period still must be reasonable.

3. The cases pertaining to non-compete agreements are relevant to non-solicitation agreements as well.

III. NON-DISCLOSURE AGREEMENTS

A. What are Non-Disclosure Agreements?

1. Agreements to restrict the disclosure of certain types of business information between an employer and its employees.

2. Types.

a. Non-disclosure agreements

b. Confidentiality agreements

c. Secrecy agreements

d. Similar to, but different from, non-compete agreements

e. May be part of other standard employment agreements, including employment manuals, employment relationship statements, severance agreements, non-compete agreements, and releases.

B. Why use Non-Disclosure Agreements?

1. Non-Disclosure Agreements protect the unauthorized disclosure of legitimate business information.

2. Non-Disclosure Agreements protect business information which is:

a. Not generally known by anyone outside of your business:

i. Competitors.

ii. General public.

b. Information which is confidential, secret, and proprietary.

3. Non-Disclosure Agreements help prevent unnecessary disclosure of

confidential information.

4. Non-Disclosure Agreements help the company obtain injunctive relief and monetary damages for the unauthorized disclosure of protected business information.

5. Employees owe a legal duty of honesty, loyalty and confidentiality to their employer while they are employed.

6. Employees have no legal duty or obligation of honesty, loyalty, or confidentiality after their employment, absent a specific written agreement to the contrary.

C. When and How to Use Non-Disclosure Agreements

1. Non-Disclosure Agreements are recommended as standard operating procedure or as a standard method of operation.

2. Non-Disclosure Agreements should be used with all employees as well as with all independent contractors.

3. Non-Disclosure Agreements should be used almost all the time. There is virtually no downside to using Non-Disclosure Agreements.

4. Non-Disclosure Agreements should be used in conjunction with:

   a. Other standard employment agreements, including employment manuals, employment relationship statements, non-compete agreements, severance agreements and releases.

   b. Other common sense employment practices, which are consistent with and reinforce the desire to fully protect the confidential information.

5. Employment practices which should be used to support and reinforce the terms and intent of the Non-Disclosure Agreement:

   a. Stamping documents "Confidential," and

   b. Customizing computer software for:

      i. Log-on with special confidential acknowledgment,

ii. Printing all confidential documents with a confidentiality statement on all pages thereof.

c. Conducting periodic in-house training, orientation, and/or education seminars which explain the non-disclosure obligations and importance thereof.

D. What are the Elements of a Non-Disclosure Agreement?

1. Non-Disclosure Agreements should acknowledge that the employer is the sole and exclusive owner of the information.

2. Non-Disclosure Agreements should acknowledge the desire and need to retain all such business information confidential and not to disclose it to anyone whatsoever.

3. Non-Disclosure Agreements should cover and prohibit the unauthorized disclosure of all business information, which should specifically include information which is confidential and non-confidential, secret and non-secret, proprietary and non-proprietary, and generally known and not known.

4. Non-Disclosure Agreements should acknowledge that the information may only be used for the benefit of the employer and for no other person or purpose whatsoever.

5. Non-Disclosure Agreements should require the return of all such business information upon termination of employment or demand.

6. Non-Disclosure Agreements should provide for injunctive remedies and monetary damages for a breach or default of the restrictions, which should specifically include, but not be limited to liquidated monetary damages in a specific dollar amount and all costs of enforcing the agreement, including actual attorney fees.

E. What Should be Avoided When Using Non-Disclosure Agreements?

1. Like all written agreements, avoid those terms and provisions which are unreasonable, unrealistic, or unfair.

2. With Non-Disclosure Agreements, there is nothing to avoid. Every employer needs to have them and use them.

3. Typical exclusions or omissions may include:

a. Information which is generally available or known in the public.

b. Information legally obtained from other sources or third parties, and not the employer.

c. Information which the employee had knowledge of prior to employment.

F. What are the Problems With Non-Disclosure Agreements?

1. Non-Disclosure Agreements are not a guaranty or an absolute bar from the disclosure of confidential business information.

2. Non-Disclosure Agreements keep only honest people more honest. They will not keep dishonest employees from acting dishonestly.

3. Non-Disclosure Agreements should not be overly relied upon.

4. Non-Disclosure Agreements are "double-edged" and can run in both directions.

a. Employers must be very careful about hiring employees who may be subject to and bound by a Non-Disclosure Agreement.

b. Employers must carefully review and analyze all agreements which are signed by or bind prospective employees.

IV. TRADE SECRETS

A. Uniform Trade Secrets Act ("UTSA").

1. Broader than Michigan trade secret law insofar as it covers programs, methods and techniques as well as employee know how.

2. UTSA applies to any wrongful misappropriation where Michigan law focuses on the deterrence of unethical business practice and conduct.

B. Michigan Law.

1. Up to 1985, Michigan trade secret law was developed in accordance with the State's covenant not to compete statute.

2. For information to be protected, it must be secret. Secrecy alone is not sufficient to establish a trade secret but without this element, a plaintiff may be unable to prevail.

3. In *Kubik, Inc. v Hull*, 56 Mich App 335 (1974) (a pre-Michigan Antitrust Reform Act case), the court determined the following factors to be relevant in evaluating a secrecy case:

   a. The existence or absence of an express agreement concerning disclosure

   b. The nature and extent of security precautions used to prevent disclosure to unauthorized third parties

   c. The circumstances surrounding disclosure to the employee so that the employee understood the significance of not disclosing to others

   d. The degree to which the information is in the public domain or readily ascertainable by or through patent applications or product marketing

C. Enforcement.

1. Seeking injunctive relief is frequently the remedy that an injured plaintiff attempts.

2. Much like covenant not to compete cases, a party may seek actual damages sustained as a result of the violation of the Michigan Antitrust Reform Act, including interest from the date of the complaint, costs and reasonable attorney fees. MCL 445.778(2).

3. If the violation is "flagrant" a trier of fact may award damages up to three times the amount of actual damages sustained. Id.

D. Is there a criminal statute that defines trade secrets?

1. Yes. MCL 752.772 states:

> Any person who, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with an intent to appropriate a trade secret to his own use or to the use of another, steals or embezzles an article representing a trade secret or without authority makes or causes to be made a copy of an article representing a trade secret, is guilty of a misdemeanor and shall be fined not more than $1,000.00 or imprisoned for not more than 1 year, or both.

2. Trade secret is defined as "the whole of any portion or phase of any scientific or technical information, design, process, procedure, formula or improvement which is secret and of value; and a trade secret is considered to be secret when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes."

V. ECONOMIC ESPIONAGE ACT OF 1996 ("the Act")

A. The Act.

1. It is a federal crime to engage in the conduct of misappropriating a trade secret knowingly, for the benefit of foreign and domestic entities.

2. To prove a violation of the Act, intent and conduct must be established.

B. Conduct.

1. Stealing, or without authorization, taking, carrying, concealing, or by fraud or deception obtaining such information.

2. Without authorization, copying, duplicating, drawing, photocopying, downloading, uploading, destroying, altering, sending, mailing, communicating or conveying such information.

3. Receiving, buying, or possessing such information knowing same has been stolen or appropriated, obtained or converted without authorization.

4. Conspiring with others to commit the acts described above.

C. Intent.

In addition to establishing conduct, intent to convert "a trade secret that is related to or included in a product that is produced for and placed in interstate or foreign commerce to the economic benefit of anyone other than the owner" must be proven.

D. Penalties.

A violation could result in a fine for an individual up to $500,000 or imprisonment up to 15 years, or both. An entity found in violation of the Act may be liable for a fine up to $10 million and may be required to forfeit property derived from illegal conduct.

E. Safeguards.

1. Employers, when hiring an employee directly from a competitor, should advise the new employee in writing that he/she is obligated to protect the trade secrets of the former employer and confirm that the Act has been explained to them.

2. The new employee should execute an agreement confirming that they are not contractually or otherwise prohibited from performing their new duties.

VI. INTELLECTUAL PROPERTY RIGHTS

A. Introduction.

1. Work made for hire deals with ownership of copyrightable material between an employer and employee, or independent contractor.

2. When a work for hire agreement is in place, the employer owns the ability to copyright material created by an employee within the scope of his employment, or an independent contractor pursuant to an order or commission from the employer.

3. There is a presumption that the author of a work is the owner of the copyright to that work. Therefore, it is important for employers to include work made for hire language in employment agreements.

4. Employers can run into trouble when a clear work for hire agreement is not in place and a question of the ownership of a copyright arises.

B. Definition.

1. The phrase "work made for hire" is a statutorily defined term at 17 USC §101 and is defined as:

a. A work prepared by an employee within the scope of his or her employment, or

b. A work specially ordered or commissioned for use as

i. a contribution to a collective work,

ii. as a part of a motion picture or other audiovisual work,

iii. as a translation,

iv. as a supplementary work,

v. as a compilation,

vi. as an instructional text,

vii. as a test,

viii. as answer material for a test, or

ix. as an atlas,

c. if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a supplementary work is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forwards,

afterword, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication with the purpose of use in systematic instructional activities.

C. How is "employee" defined for purposes of work for hire?

1. The Supreme Court has held in the notable case, Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989), that for purposes of applying the definition of work made for hire, an "employee" is generally defined pursuant to the common law of agency, and the following aspects of control that an employer may exert over a worker should be considered:

   a. The extent of control by the employer over the work,

   b. The extent of control by the employer over the employee, and

   c. The status and conduct of the employer,

      i. Is the employer in business to produce such works, and does it provide the employee with benefits and withhold taxes?

D. What must be included in an agreement with an independent contractor when making a work made for hire agreement?

1. The work must be specially commissioned and new, not something previously prepared,

2. The work must fall into one of the nine categories outlined in the statute,

3. There must be a writing between the parties, prior to the creation of the work, specifically stating that the parties are agreeing to a work made for hire arrangement, and

4. The writing must be signed by both parties.

E. Because not all work falls within one of the nine statutory categories of work made for hire, employers should also include more general language assigning the copyright/intellectual property rights to the employer as an additional measure to ensure ownership of contracted-for work.

1. This extra language is necessary because not all work is considered work made for hire, regardless of whether there is a writing stating as much.

2. The work made for hire agreement should include "belt and suspenders" language that assigns ownership rights of all material created by the worker, that pertains to the employer's business, to the employer so that the employer does not have to determine whether the work falls into a specific section of the definition, and regardless, ownership of the work is assigned to the employer.

a. This type of catch all is more akin to an assignment of all intellectual property rights of material created by the worker and would ideally include the following points:

i. An assignment to the employer of the employee's right to any ideas, inventions, discoveries, improvements, and works of authorship relating to the employer's business.

ii. An agreement to assist the employer in preparing documents for the protection of intellectual property rights, such as powers of attorney, affidavits, patent application and copy right registrations.

iii. Cooperation by the employee in the assignment and delivery of all necessary papers, including assignments of patent applications and patents.

iv. An agreement to give all information and testimony, sign all papers, and do all things whatsoever which may be

requested by the employer to obtain, extend, reissue, maintain or enforce such intellectual property rights.

F. Pitfall of characterizing something as work made for hire.

1. Employers could run into unforeseen obligations toward workers by characterizing work as work made for hire under subsection one, in an attempt to avoid the lack of a written agreement as required under subsection two.

a. If a worker is not otherwise considered an employee, but an employer is characterizing a work as work made for hire under the first section of the definition, this could impose a responsibility on the employer for workers compensation insurance, unemployment compensation, and other benefits that a worker may not otherwise be eligible for.

2. When working with an independent contractor who may be using third party copyrighted material in his creation of a work made for hire, an employer should be sure to include in any agreement a condition requiring all permission letters for the use of third party copyrighted material prior to final payment.

a. This will avoid the messy situation of an employer having to ask for third party permission to use material produced for the employer.

3. Employers should include work made for hire language and assignment of copyright language in any employment agreement or independent contractor agreement to avoid the pitfalls mentioned above.

WORKPLACE TRAINING: THE IMPORTANCE OF EMPLOYEE EDUCATION AS A PREVENTATIVE MEASURE

I. OVERVIEW

A. Understanding the Purpose and Benefits of Employee Training.

B. Mandated Training Versus Recommended Training: Understanding Federal, State, and Local Law Requirements, As Well As Industry Standards and Best Practices.

C. Setting and Understanding Training Goals and Implementing Proper Training Protocol.

D. Tailoring Training to Your Audience: Training for Employees, Managers, and Executives.

E. Best Practices for Documenting Employee Training.

F. The Importance of Revisiting Training as an Ongoing and Evolving Process.

II. EMPLOYEE TRAINING: WHY BOTHER?

A. Prevention of Claims Brought Against the Company.

1. Review of company policies, including Anti-Harassment and Discrimination Policies, to educate employees regarding lawful and unlawful conduct. By educating employees regarding acceptable/unacceptable behavior and the perceptions of others, you can prevent unlawful behavior in the future.

2. In a recent survey regarding sexual harassment, 70% of the people surveyed said they wished it was easier to understand what is and is not sexual harassment.

B. Minimizing Employer Liability: Establishing an Affirmative Defense Against Claims.

1. EEOC , MDCR, MIOSHA, and DOL Investigations

a. Two of the first questions asked in most investigations are (1) does the employer have an anti-harassment/discrimination policy? and (2) were the employees trained regarding their rights and responsibilities?

b. The EEOC outlines the components of an effective anti-harassment/discrimination policy in Notice No 915.002, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999) and specifically calls for employee training.

i. "It generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures . . . An employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically. The policy and complaint procedure should be written in a way that will be understood by all employees in the employer's workforce. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations and incorporating them into employee handbooks. If feasible, *the employer should provide training to all employees to ensure that they understand their rights and responsibilities.*"

ii. "An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedure. Periodic training of those individuals can help

achieve that result. *Such training should explain the types of conduct that violate the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation*."

c. Training is also becoming a common *requirement of settlement* agreements with these agencies.

2. Lawsuits.

a. Under *Faragher v City of Boca Raton*, 524 US 775 (1998), and *Burlington Indus v Ellerth*, 524 US 742 (1998), an employer can assert an affirmative defense to avoid liability for hostile environment harassment by a supervisor so long as the harassment has not led to an adverse employment action such as termination or demotion. *Ellerth*, 524 US at 765.

i. The defense involves proving two elements: (1) the employer exercised reasonable care to prevent and promptly correct the harassing behavior, and (2) the employee unreasonably failed to avail themselves of the employer's preventative or remedial apparatus. *Id.*

ii. Employee training can be used as evidence for both of these elements. Discrimination and harassment training can be used to show that the employer took steps to prevent the harassment and it can be evidence that the employee knew of the employer's preventative or remedial apparatuses (such as a complaint procedure). The Court in *Faragher* went so far as to state "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, ***train*** them, and monitor their

performance." *Faragher*, 118 S. Ct. at 2291.

C. Understanding Concerns and Sharing Perspectives.

1. By allowing for group discussion, Q & A, and interaction, employers can uncover concerns they would not otherwise know about.

2. Implementing hypotheticals that are specifically tailored to the theme of the training will often reveal varying perspectives on the same situation and foster sensitivity for others.

3. This also provides an opportunity for employees to feel acknowledged and heard by being able to voice their concerns, experiences, and perspectives.

4. Group discussion and Q & A Basics:

a. Who should be present? The pros and cons of including the "bosses."

ii. Training can uncover unknown systemic issues if employees feel "safe" in speaking up.

iii. However, by having all parties present, concerns may be addressed more "directly."

b. Use the experiences and knowledge that individual employees have as a resource.

c. Ensure group discussions are conducted in a mutually respectful manner.

d. Follow up on issues raised or questions left unanswered; make note of issues raised for future training.

D. Reviewing Company Culture and Policies.

1. Training can be a tool for reviewing and reinforcing existing company policies.

2. Training can be a tool for "rolling out" new company policies, such as a

revised Employee Handbook.

3. Use the opportunity to discuss the company's vision, mission and core values. This can help to foster a sense of community and loyalty among employees.

E. Employee Retention/Performance.

1. Training employees is a cost-effective way to reduce employee turnover. Poor performance may simply be the result of employees not knowing what is expected of them.

2. Job satisfaction increases when employees better understand the policies and culture of the company. One recent survey indicated that as much as 40% of employees who receive poor job training leave their job within the one year.

3. Training allows employees to feel like "part" of the company, which in turn increases loyalty to the company.

F. Societal Expectations.

1. For companies in the public eye, it has simply become unacceptable to fail to properly train employees.

2. In particular, failure to train employees regarding discrimination, harassment, sexual harassment, and implicit bias has brought negative attention to many well-known companies.

3. For example, see recent developments pertaining to Starbucks.

a. On April 12, 2018, a Philadelphia Starbucks store manager called the police on two black men. The men were waiting for a business associate and asked to use the bathroom prior to placing an order when the manger choose to call the police. The store protocol for such a situation was to ask the non-paying patrons to leave—not to call the police and have them forcibly removed from the store.

b. The public outcry was swift and Starbucks acknowledged its fault. The CEO stated "You can and should expect more from us," and "We will learn from this and be better."

c. In order to "be better," Starbucks initiated a massive employee training initiative. On May 29, more than 8,000 Starbucks across the country closed for mandatory "racial-bias education." The four hours training reached approximately 175,000 employees, who watched videos about the history of workplace discrimination and engaged in interactive group discussions and Q & A concerning race, privilege, and implicit bias.

G. Required Under Law?

1. Know your federal, state, and local requirements.

2. Training may be dependent on industry.

III. MANDATED TRAINING VERSUS RECOMMENDED TRAINING

A. Mandated Training.

1. Federal Requirements. No federal training regulation applies to all employers, however certain federal laws and agency regulations may explicitly require training for specific industries or employers. Additionally, training might be implicitly required as the only way to achieve compliance obligations under certain laws and regulations.

a. Safety Training Examples

i. Emergency Action Plan. Certain employers are required by OSHA to have an "emergency action plan" and must train a sufficient number of employees to assist emergency situations and evacuations (see 29 CFR 1910.38).

ii. Hazard Training. Employers with hazardous chemicals in the workplace must provide employees with effective training at the time of their initial assignment and again

whenever a new chemical hazard is presented into their work area (see 29 CFR 1910.1200).

b. Compliance Programs.

i. Foreign Corrupt Practices Act and the Sarbanes-Oxley Act. Under certain circumstances, companies can be held responsible for criminal misconduct by employees. Training can be a strong defense to show efforts at compliance. The training should cover the company's policies, procedures, and systems designed to prevent, deter, uncover, and address non-compliance.

ii. Health Insurance Portability and Accountability Act (HIPAA). Under HIPAA, health care providers must train their employees on proper procedures for handling protected health information.

2. Michigan Requirements. No state training regulation applies to all employers, however certain state laws and agency regulations may explicitly require training for specific industries or employers. It is important to research your particular industry against state requirements.

a. MIOSHA. "Employers are required to hold employee training sessions during which employees receive information and have questions answered regarding the chemical hazards they may be exposed to, how to read and interpret labels and SDSs, how to locate a specific SDS, ways to protect themselves from chemical hazards, and the details of the hazard communication program."[1]

[1] https ://w w w. michigan . gov / documents/cis_wsh_cet0101_119296_7.htm.

B. Recommended Training.

1. FMLA/ADA and Michigan Persons with Disabilities Civil Rights Act Training. Training management and HR on leave of absence procedures and disability accommodation to ensure that they respond lawfully to requests for leave and accommodation. Training should provide an overview of applicable leave laws, how to handle accommodation and leave requests, notice requirements and employee rights, and job restoration requirements upon the employee's return. Mishandling is very common and can result in DOL citations and penalties, along with EEOC charges (disability discrimination is the second most frequent claim in Michigan, accounting for 33.4% of all claims).

   a. Qualified individuals with a disability may request a reasonable accommodation that would permit them to perform the essential functions of their job. Managers must know how to engage in an *interactive process* in evaluating whether an accommodation would pose an *undue hardship* on the company.[2]

   b. Managers need to understand how rights under the FMLA and the ADA work in conjunction.

   c. The Michigan Persons with Disabilities Civil Rights Act requires the employee to provide written notice of any need for an accommodation within 182 days of when the employee knew or should have known about the need.[3]

2. Fair Labor Standards Act (FLSA) Training. Training management and HR on employee versus independent contractor status, exempt versus non-exempt status, timekeeping requirements, meals and breaks,

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[2] 42 U.S.C. § 12112(b)(5)(A).

[3] Michigan's Persons with Disabilities Civil Rights Act (PWDCRA).

travel time as hours worked, and overtime rules in order to ensure FLSA compliance. Mishandling is very common and can result in DOL citations and penalties and charges being filed.

a. Non-compliance is costly: if employees can establish that they were not paid as required by the FLSA, they can recover unpaid wages going back two years. If the employer's violation is "willful," the back-pay period is 3 years and the recovery is doubled as "liquidated damages."

i. Managers need to understand how to properly enforce overtime policies.

ii. Human Resources needs to understand even if overtime was worked without authority, overtime still must be paid.

iii. A concern raised by one individual employee can turn into a DOL audit that affects all employees.

3. Discrimination, Harassment, and Retaliation Training. Training management and HR on requirements under Title VII of the Civil Rights Act of 1964 and the Michigan Elliott-Larsen Civil Rights Act. Training should provide an overview of protected classes under federal, state, and local law; focus on the importance of diversity and sensitivity in the workplace; emphasize the notion of perception as reality; review real life examples of acceptable and unacceptable behavior; and cover best practices and procedures for handling complaints.

a. Mishandling is very common and can result in EEOC and MDCR charges being filed.

b. In 2017, there were 84,254 EEOC charges of discrimination in

the US.4 There were 2,489 claims in Michigan alone, making Michigan 12th in the US for EEOC filings.5 Handling EEOC and Michigan Department of Civil Rights claims are costly and can lead to drawn-out investigations and litigation.

i. Training for managers should focus on the difference between disparate treatment and disparate impact discrimination; the difference between quid pro quo and hostile work environment harassment; review investigation procedures; and emphasize importance of protection against retaliation.

ii. Training for employees should emphasize complaint procedures and alternative avenues for reporting concerns.

4. Sexual Harassment Training. While this type of training is often included in Discrimination and Harassment training, in light of the #MeToo movement and trends associated with the movement, it is often worth its own session. Training should focus on the types of conduct involved (verbal, non-verbal, physical, and visual); the difference between quid pro quo and hostile work environment harassment; the impact of sexual harassment on the company, mangers, and employees; and review complaint procedures for employees.

a. A recent study found that at least 30% of women have encountered unwanted advances from male co-workers.

b. According to the EEOC, 75% of those who experience sexual harassment at work never report, typically because they fear

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[4] https://ww w.eeoc . gov/eeoc/statistics/enforcement/charges . cfm.

[5] https://www1 .eeoc . gov/eeoc/statistics/enforcement/state_17 . cfm.

blame, inaction, or retaliation.

i. Training can be for men, women, or both in order to encourage an openness and dialogue between genders.

ii. Training should emphasize that sexual harassment happens to both men and women.

iii. Such training often leaves participants empowered to speak up and increases sensitivity regarding how to respond when a concern is articulated.

5. Accountability Training for Managers. This type of specific leadership training should focus on company values and future goals; the role of management within the company and the notion of leading by example; how to handle performance evaluations; responding to complaints and anti-retaliation.

a. Having strong leaders who implement best practices and understand procedures is often the best means of avoiding claims.

b. Retaliation claims are the most common type of EEOC charge in Michigan, accounting for 39.6% of all claims.

IV. SETTING TRAINING GOALS AND IMPLEMENTING PROPER PROTOCOL

A. Understanding Training Goals.

1. Be Realistic.

a. Training should not be based on unattainable goals. Employers won't be able to change long-held beliefs and attitudes in a single one-hour session.

b. Focus instead on smaller changes, such as increasing awareness, which can eventually work to shift thinking and the culture of the company.

2. Don’t Make Unilateral Asks of Employees.

    a. While training can certainly focus on employee expectations, it should also involve a component showing what the company is doing to achieve its goals (or how the company supports its employees in doing so).

3. Educational Component.

    a. Understand what knowledge you want employees to take with them from the training session.

    b. Reinforce this information throughout and test the employee’s knowledge where possible.

4. Conveying a Message to Employees.

    a. Understand what message the training is designed to convey to employees. For example, if the training is based on discrimination and harassment, the message might be to convey the employer’s commitment to non-discrimination. If so, the training should reinforce this message throughout.

5. Compliance/Minimizing Liability.

    a. Be sure to cover required elements of a compliance program or touch on necessary issues so that training can be used as an affirmative defense.

6. Know Your Audience.

    a. Training should have content designed to educate the workforce and not leave them feeling confused or overwhelmed.

B. Implementing Training Protocol.

1. Create an informal, safe and supportive environment (may be adjusted based upon audience).

2. Ensure that ground rules are set concerning mutual respect and confidentiality.

3. Set clear goals and learning objectives and communicate them to the audience. Reinforce each objective as you address it in the presentation.

4. Include numerous opportunities for employee participation.

5. Use a problem-centered approach and examples to foster group brainstorming.

6. Connect new policies and material with the employee's past learning and work experience

7. Provide employees with an opportunity to reinforce what they have learned.

8. Ensure that training is designed to promote positive self-esteem and not point to failures.

V. UNDERSTANDING YOUR AUDIENCE: TRAINING FOR EMPLOYEES, MANAGERS, AND EXECUTIVES.

A. General Employee Training.

1. An opportunity to create an inclusive and supportive environment and to bolster loyalty.

2. A review of company goals and values, procedures and expectations, and employee rights (but not a roadmap for bringing false claims against the company).

3. Review of company complaint procedures.

B. Management Training.

1. Review best practices for preventing claims.

a. Managers should be trained regarding consistency in enforcement to prevent disparate treatment of employees.

i. In a race discrimination case, employer asserted that the employee violated multiple policies in the employee handbook. Although this was sufficient to establish a

legitimate, non-discriminatory business reason for disciplining the employee, pretext was established by showing that other similarly situated employees were exempted from enforcement of these handbook policies.[6]

b. Managers should be trained regarding employee performance issues.

i. Be sure that company procedures are being consistently followed (Performance Improvement Plans, disciplinary action, positive feedback, etc.) and familiarize managers with necessary forms.

2. Review protocol for responding to claims—"the 6 R's."

a. Respect: Listen to various perspectives to learn the facts with an open mind

b. Restraint: Prevent any unlawful conduct from continuing and disclose information on a need-to-know basis to maintain confidentiality to the extent possible

c. Rules: Evaluate application of the handbook policies (be sure these are being applied consistently to all employees).

d. Respond: Be swift in investigation and taking appropriate remedial action, if necessary. "The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified." Collette v. Stein–Mart, Inc., 126 Fed.Appx. 678, 686 (6th Cir. 2005) (quoting Swenson v. Potter, 271 F.3d 1184, 1193 (9th Cir. 2001).

e. Record: Document, document, document.

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

f. (No) Retaliation: Do not take adverse action against complainant (who makes claim in good faith) or witness participating in investigation. "An employee may not be retaliated against (or discriminated against) for opposing a violation of Michigan's Elliott-Larsen Civil Rights Act, or for making a charge, filing a complaint, or participating in a proceeding/investigation under that statute." Mich. Comp. Laws § 37.2701.

C. Executive Training.

1. Approximately 50%–60% of executives fail within the first 18 months of being promoted or hired. The turnover costs for executives can be as much as 213% of annual salary. In order to retain, shape, and maximize company executives, specialized training should be implemented that is designed to:

a. Help executives connect to their company and understand its inner-workings. In 2016, "it was estimated that 67% of well-formulated [executive] strategies failed due to poor execution."7

b. Understanding leadership styles and their impact on employee performance.

c. Learning effective communication.

d. When to be involved in HR and employment issues.

VI. BEST PRACTICES FOR DOCUMENTING EMPLOYEE TRAINING.

The Importance of Keeping Training Records.

1. Defense against claims. If the EEOC is investigating a claim, being able to provide tangible evidence of employee training can be strong

[7] https :/ / hbr . org/2017/11/executives-fail-to-execute- strategy-because-theyre-too-internally-focused .

support for the employer's position.

2. Demonstrate compliance. For training that is required under law, periodic reviews may require proof that training took place as required.

3. Support for employment actions. In the case of violations of law or company policy, employers can point to training records to demonstrate that the employee should have known their conduct was a violation.

4. Employee recognition. This is a great opportunity to boost employee morale by recognizing the employee's participation and mastery of the training concepts.

B. Required Documentation?

1. Mandatory training may require particular documentation. For example, some OSHA standards require training be certified with the following information:

a. Employee name

b. Date of training

c. Content of training

d. Evaluation results

e. Name and title of trainer

C. Suggested Documentation: Protect Yourself with a Paper Trail.

1. Certificate of Completion.

a. Although this is the most basic form of documentation, it does provide an opportunity to praise/acknowledge employees for their participation.

b. This can also be given to employees in conjunction with other documentation.

c. If this is the only form of documentation used, be sure that at a minimum: (1) it adequately describes the training, (2) includes employee name, (3) is dated, and (4) employer retains a copy for their records.

2. Signed acknowledgement.

a. A signed acknowledgement is a tool for the employer. It should at a minimum: (1) adequately describe the type of training, (2) require that the employees acknowledge that they were given an opportunity to ask any questions they had, (3) require that the employee acknowledge that they understood the material covered and know their responsibilities moving forward, and (4) is signed and dated.

3. Quiz testing knowledge and understanding.

a. At a minimum, a quiz should include the following identifying information in order to be a useful training record: (1) description of the type of training, (2) employee name and date, and (3) signature.

b. To be effective, a quiz should test substantive information covered in the training.

c. The quiz should be designed to reinforce the learning objectives of the training.

d. Aim to give employees positive reinforcement as opposed to setting them up to fail (acknowledge high scores and do not create an impossibly hard quiz).

D. How Long Should Documentation Be Kept?

1. Length of employment plus a minimum of three to five years.

2. However, federal, state and local laws may have other record retention requirements, so it is important to know your industry standards and applicable laws (e.g. OSHA).

VII. EMPLOYEE TRAINING - AN ONGOING PROCESS

A. Training is not a one-time, one-size-fits-all occurrence. It must be an ongoing process.

1. Included for new employees (recorded training during orientation for all employees).

2. New training based on updates in the law and social movements such as #MeToo.

3. Regular "maintenance" training throughout the year to review key employer policies and changes, cover applicable laws and updates, and provide an opportunity to gather employees together and foster group discussion.