WHY WAGE AND HOUR CLAIMS WILL REMAIN AT RECORD HIGHS

I. WHY ARE WAGE AND HOUR CLAIMS AT RECORD HIGHS?

A. Many employees feel cheated since unions and other advocates have created the perception that minimum wage should be set at $15.00 per hour and many state minimum wage laws are scheduled to increase in the near future;

B. Many employees are working in excess of 40 hours a week on a $24,000 salary that do not have exempt duties;

C. Technological advances have allowed certain employees to perform services outside of working hours and respond to e-mails outside of work; which many employers fail to pay for such time;

D. New job positions are creating a gray area as to whether the positions are truly exempt positions;

E. Employees are being charged for business expenses without sufficient reimbursements to satisfy minimum wage laws;

F. Employees are becoming more familiar with wage and hour laws; and

G. Employers may be required to pay reasonable attorneys' fees if there is even a nominal wage and hour violation.

II. WAGE AND HOUR LAW PRIMER

A. What are the primary laws which regulate payment of wages and fringe benefits in Michigan?

1. Federal Law: Fair Labor Standards Act of 1938 (“FLSA”).

2. Michigan Workforce Opportunity Wage Act, which repealed the Minimum Wage Act of 1964 (“MWOWA”).

3. Michigan Law: Wages and Fringe Benefits Act (“MWFBA”).

B. What is minimum wage?

1. As of January 1, 2017, minimum wage is $8.90 ($3.38 for tipped employees).

2. On January 1, 2018, minimum wage will be increased to $9.25 ($3.52 for tipped employees).

3. Starting in 2019 and thereafter, any increases to minimum wage will be calculated by the average annual change in the consumer price index for the midwest region for the most recent five-year period.

C. Overtime. Federal law requires employers to pay non-exempt employees overtime wages at a rate not less than 1 1/2 times their regular rate of pay for each hour or fraction of an hour worked by the employee in excess of 40 for any given work week.

D. Postings. Employers are required to post of copy of minimum wage laws and other related employment posters.

E. Other laws. As is common with many employment laws, employers should also be aware of all other related laws that may be applicable and/or overlapping (i.e. the Michigan Sales Representative Act). To minimize other applicable laws, discretionary bonuses are preferred to commissions.

III. WHAT IS AN EMPLOYEE'S REGULAR RATE OF PAY FOR DETERMINING OVERTIME?

A. Various types of compensation (other than actual wages) must be included in calculating an employee's "regular rate" for overtime purposes. These forms of compensation include:

1. Awards or prizes received based on the quality, quantity or efficiency of work performed;

2. Bonuses based on the quality, quantity or efficiency of work performed;

3. Bonuses that depend on hours worked;

4. Commission payments;

5. Payments for meals, lodging and other facilities;

6. Shift differentials or "dirty work" premiums; and

7. Tip credits taken by an employer to fulfill minimum wage requirements.

B. In calculating an employee's regular wage rate, employers do not need to take into account additional compensation consisting of the following:

1. Discretionary bonuses;

2. Gifts and certain employee benefit plan contributions;

3. Employee referral bonuses;

4. Paid leave from work;

5. Severance pay;

6. Subsistence pay;

7. Talent fees; and

8. On-call or call-back pay.

IV. EXEMPTIONS FROM MINIMUM WAGE AND OVERTIME REGULATIONS

A. The FLSA provides an exemption from both minimum wage and overtime rules for "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of an outside salesman." These are typically called the "white collar" exemptions and are defined by DOL regulations. They do not apply to manual laborers or other "blue collar" workers who perform work involving "repetitive operations with their hands, physical skill and energy."

B. General Rules.

1. For the purpose of the exemptions, "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a "fee basis."

2. Deductions from pay are permissible when an exempt employee:

a. Is absent from work for one or more full days for personal reasons other than sickness or disability;

b. For absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice; or

c. To offset amounts employees receive as jury or witness fees, for military pay; or for certain workplace penalties.

3. The employer will lose an exemption if it has an “actual practice” of making improper deductions from salary (there is, however, a safe haven available to employers).

C. Exemptions for Executives.

1. An employer is not required to pay overtime wages to "executives." The following test can be used to determine if a particular employee qualifies as an "executive" for this purpose (NOTE: All of the factors must be met):

a. The employee's primary duty must be the management of the enterprise or a recognized division or subdivision;

b. The employee must customarily and regularly direct two or more other employees;

c. The employee must have authority to hire and fire employees or the employee’s recommendations as to hiring, firing, promotions, pay or other aspects of the employment status of other employees must be given particular weight; and

d. The employee must be paid on a salary basis and earn not less than $455.00 per week (less if employed in American Samoa).

2. The executive employee exemption also applies to any employee who owns at least a 20-percent equity interest in the enterprise in which the employee is employed, and who is actively engaged in its management (irrespective of the other requirements).

D. Exemptions for Administrators.

1. An employer is not required to pay overtime wages to administrative employees. An "administrative" employee is someone who satisfies ALL of the following criteria:

   a. His or her primary duty is the performance of office or non-manual labor directly related to management policies or the general business operations of his or her employer or the employer's customers. (NOTE: Special definitions and rules apply for persons employed in an administrative capacity by educational institutions which are not addressed in these materials.);

   b. He or she customarily and regularly exercises discretion and independent judgment; and

   c. The employee is paid on a salary or fee basis at a rate of not less than $455.00 per week (less if employed in American Samoa).

2. The phrase “directly related to the management or general business operations” refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished from working on a manufacturing production line or selling a product in a retail or service establishment.

3. The most difficult clause to interpret is that requiring an employee to “exercise discretion and independent judgment.” Insurance claim adjusters, tax experts, and employees in the financial services industry are examples of positions that will

generally qualify for the administrative exemption. Those doing ordinary inspection or screening work will generally not qualify.

E. Exemptions for Professionals.

1. Exemptions to the overtime pay laws also exist for employees who are "professionals." An employee may qualify as a "professional" if the following criteria are satisfied:

a. The employee's primary duty is either:

(i) Performing work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of learning (“learned professionals”); or

(ii) Performing original or creative work in an artistic field (“creative professionals”).

b. The employee receives a salary or fees at a rate of not less than $455.00 per week (less if employed in American Samoa).

2. This creative professional exemption is generally met by actors, musicians, composers, and sometimes journalists. However, the exemption depends on the extent of the invention, imagination, originality, or talent exercised by the employee.

3. Separately, the rules exempt teachers, as well as licensed attorneys and doctors.

F. Exemption for Highly-Compensated Workers.

1. The regulations contain a separate rule for highly-compensated workers. A highly-compensated employee is deemed exempt if the ALL of the following apply:

   a. The employee be paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis);

   b. The employee performs office or non-manual work; and

   c. The employee customarily and regularly performs at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

2. For example, an employee can qualify as an exempt highly-compensated employee if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements for the executive exemption. (NOTE: while the new rule requires only that the employee satisfies one of these duties, the rule demands that the employee customarily and regularly perform these duties.)

3. The regulations include a requirement for those exempt as highly-compensated employees to have a salary of $100,000 a year or almost $2,000 per week. Total annual compensation includes salary, commissions, nondiscretionary bonuses, and other nondiscretionary compensation even if not paid out to the employee as due on at least a monthly basis.

G. Computer Employees.

1. Regulations extend the application of the "professional" exemption to certain computer related jobs and fields. To qualify for the computer employee exemption, the following must be met:

   a. The employee must be compensated either on a salary or fee basis at a rate not less than $455 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour; and

   b. The employee's primary duty consists of one of the following:

      i. The application of systems analysis techniques and procedures;

      ii. The design, development, documentation, analysis, or modification of computer systems or programs; or

      iii. A combination of the aforementioned duties, the performance of which requires the same level of skills.

2. Although job titles are not determinative of the applicability of this exemption, the regulations specifically state that "computer systems analysts, computer programmers, software engineers [and] other similarly skilled workers" are eligible for the exemption.

3. The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment.

H. Exemptions for Outside Salespersons.

1. An exemption from the overtime wage laws also exists for employees who are "outside salespersons." The criteria for determining if an employee qualifies as an “outside salesperson” are as follows:

a. The employee’s primary duty must be making sales, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

b. The employee must be customarily and regularly engaged away from the employer’s place or places of business.

V. LEARN WHAT TO EXPECT UNDER TRUMP ADMINISTRATION

A. Alex Acosta is now the United States Secretary of Labor.

1. On June 7, 2017, the Department of Labor announced that it was rolling back 2015 and 2016 informal guidance that expanded the “joint employer” doctrine and made it harder to classify workers as independent contractors.

2. Prior to 2015, the joint employer doctrine only applied when a company had direct control over another company’s workplace.

3. He also withdrew the 2016 independent contractor informal guidance.

B. Court has yet to rule on the December 1, 2016 Overtime Rule.

1. The Overtime Rule would require:

a. The annual salary level for exempt employees to be increased from $23,660 to $47,476 and remain at the 40% beginning in 2020. Up to 10% of the salary amounts could be satisfied by non-discretionary payments on a quarterly basis (such as bonuses and commissions).

b. The annual salary level for highly compensated employees (minimal duties test) to be increased from $100,000 to $134,004 and remain at the 90% beginning in 2020 (the base annual salary could be at $47,476 so long as the overall compensation reaches $134,004).

2. The Overtime Rule may be:

a. Pursued by the Department of Labor;

b. Withdrawn by the Department of Labor to propose a new version; or

c. Congress may propose different salary amounts.

3. On June 7, 2017, a class action lawsuit was filed against Chipotle claiming that the overtime rule is in effect since:

a. The injunction does not apply to private companies; and

b. The overtime rule is in effect until the court issues a final ruling.

C. Proposed 2017 budget cut of 5% ($676 Million) at the Department of Labor.

D. Proposed 2018 budget cut of 20% ($2.4 Billion). However, the proposal plans to include 6 weeks of paid family leave to new mothers and fathers.

E. Focus on training versus searching for violations.

VI. MILLION DOLLAR LESSONS LEARNED FROM 2016-2017 CASE LAW

A. Misclassifying certain assistant store managers as exempt resulted in a $13.5 million settlement.

B. Failing to pay for off-the-clock duties resulted in a $9.5 million settlement.

C. Time spent waiting for managers to close/open stores or provide breaks resulting in class action lawsuit settlement of $8.5 million for a retail store.

D. Failing to pay for time spent booting up and shutting down computers resulted in a $6.2 million dollar settlement involving call center nurses.

E. Misclassifying independent contractors and failing to pay overtime resulted in a $1.1 million dollar settlement in the manufacturing industry.

VII. JOINT EMPLOYER LIABILITY

A. Vertical joint employment includes relationships with staffing agencies, subcontractors and others that provide services.

B. Horizontal joint employment includes separate employers that have a relationship with each other and receive services from the same employee.

VIII. INTERNS

A. There is a 6 factor test identified in the Department of Labor's Fact Sheet #71.

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

2. The internship experience is for the benefit of the intern;

3. The intern does not displace regular employees, but works under close supervision of existing staff;

4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

IX. COMPENSABLE TIME FOR NON-EXEMPT EMPLOYEES

A. Suffer ***or*** permit to work. This means that even prohibited work must be paid for.

B. Lunch breaks under 30 minutes and regular breaks under 20 minutes must be paid.

C. Time worked remotely must be paid.

D. On-call time is compensable if the employer imposes restrictions on the employee's use of that time.

X. DAMAGES

A. Back pay for all unpaid overtime (typically going back two years…which may be extended to three years if the violation was willful).

B. Double the amount of back pay. This is the rule rather than the exception.

C. Attorneys' fees.

D. Employees may recover emotional distress damages in a retaliation claim asserted under FLSA.

XI. SETTLEMENTS

A. It is unlawful for employees to waive their right to receive overtime for all hours worked.

B. Most settlement agreements will not be valid unless approved by a judge, investor and/or sophisticated attorneys.

XII. TRAINING EMPLOYEES AND MANAGEMENT ABOUT COMPLIANCE AND ENFORCEMENT

A. Job descriptions need to be updated to identify exemptions, if applicable.

B. If hourly employees are permitted to work remotely, procedures need to be put in place to track time.

C. Training needs to be done on at least an annual basis to minimize exposure.

RETIREMENT PLAN LOANS;

DO YOU REALLY WANT TO BE YOUR EMPLOYEE'S BANKER?

By: Charles M. Lax, Esq.

I. WHAT THE INTERNAL REVENUE CODE SAYS ABOUT RETIREMENT PLAN LOANS

A. Under Internal Revenue Code ("IRC") Section 72(p)(2)(A) plan loans are limited to the lesser of:

1. $50,000; or
2. 50% of the participant's vested account balance.

B. Under IRC Section 72(p)(2)(B):

1. Generally, the loan must be repaid in no more than five years.
2. If the loan proceeds are used to acquire a principal residence, it may be repaid over a reasonable period that extends beyond five years.

C. Under IRC Section 72(p)(2)(C):

1. Payments must be made at least quarterly.
2. The loan must be repaid by level amortization.

D. If IRC Section 72 is violated, the loan is treated as a taxable distribution.

II. WHAT ARE THE DEPARTMENT OF LABOR'S REQUIREMENTS FOR RETIREMENT PLAN LOANS?

A. The requirements of DOL Regulation Section 2550.408b-1 must be met.

B. The requirements for the loan include:

1. Must be available to plan participants on a non-discriminatory basis.

2. Must be made pursuant to the terms of the plan.

3. Must bear a reasonable rate of interest.

4. Must be adequately secured.

III. MUST ALL RETIREMENT PLANS (INCLUDING 401(K) PLANS) HAVE A PARTICIPANT LOAN FEATURE?

A. Plan loan features are optional.

B. It has been estimated that almost 90% of all 401(k) plans have some type of loan feature.

C. Loan features are not a “protected benefit” and can be removed prospectively.

D. Loans may not be made from SEPs SIMPLEs, Traditional IRAs or Roth IRAs.

IV. WHERE ARE THE RULES GOVERNING RETIREMENT PLAN LOANS FOUND?

A. Employers have the discretion to decide whether they will offer loans from their retirement plans.

B. If loans are authorized, the retirement plan document will confirm this.

C. Participants can also make this determination by reviewing their Summary Plan Description.

D. The rules governing plan loans are often contained in a Loan Procedure.

V. MUST A PARTICIPANT DISCLOSE THEIR REASON FOR THE LOAN?

A. Unlike certain types of distributions (i.e. hardship in a 401(k) plan) plan loans can be used for any purpose.

B. Employers have the discretion in designing their Loan Procedure to decide what, if any, purpose or standard must be met to qualify for the loan.

VI. WHAT IS THE MAXIMUM AMOUNT A PARTICIPANT MAY BORROW FROM A RETIREMENT PLAN?

A. The IRC specifies that the loan amount can't exceed the lesser of:

1. $50,000; or

2. 50% of the participant's vested account balance.

B. Note that the $50,000 maximum limit must be reduced by the amount by which the highest outstanding loan amount in the past twelve months exceeds the current loan balance.

C. Employers may set lower maximum limits if they desire in their Loan Procedures.

D. The employer may actually permit participants to borrow more than 50% of their vested account balance up to a maximum of $10,000.

E. Example of how the maximum loan limit works:

1. Sam has a $110,000 vested account balance on June 1, 2017.

2. Sam took a $50,000 loan on July 1, 2016.

3. Sam's loan balance on June 1, 2017 is $42,000.

4. Sam wants a new loan on June 1, 2017.

5. The $50,000 loan limit is adjusted by $8,000 ($50,000 - $42,000 = $8,000).

6. The new loan limit on June 1, 2017 equals the lesser of:

   a. One-half of the vested account balance; or

   b. $42,000 ($50,000 - $8,000).

7. Therefore, no new loan for Sam.

VII. WHAT IS THE MAXIMUM LOAN REPAYMENT TERM A PARTICIPANT CAN RECEIVE FOR A PLAN LOAN?

A. The general rule is that plan loans must be repaid in no more than five years.

B. Many plans actually limit the term to less than five years.

C. The law permits a plan to extend the term to a "reasonable period" if the loan is for the purpose of acquiring a principal residence.

D. Offering lengthier terms often creates problems so that many employers choose to limit the term to five years.

VIII. WHAT LATITUDE DOES A PLAN HAVE IN SETTING THE TERMS OF REPAYMENT? CAN THERE BE A BALLOON PAYMENT? CAN PAYMENTS BE MADE ANNUALLY?

A. Plan loan repayments must be amortized ratably over the term of the loan. As such, loan repayment amounts will generally be level.

B. Loan repayment amounts must be made no less frequent than quarterly.

C. Employers may require payments to coincide with payroll dates (weekly, bi-weekly, monthly, etc.).

D. Most plans today receive loan repayment through payroll withholding.

IX. LOANS MUST BE ADEQUATELY SECURED. WHAT CONSTITUTES ADEQUATE SECURITY?

A. Most plans accept a participant pledging a portion of their vested account balance.

B. Participants can only pledge 50% of their vested account balance as security for a loan.

C. Theoretically, the plan could also require additional or other assets (i.e., a mortgage on a principal residence) as security.

X. WHAT CONSTITUTES A “REASONABLE” INTEREST RATE?

A. The rate must provide the plan with a return comparable to the interest rate charged on a similar commercial loan.

B. The plan may consider factors such as risk of loss; however, how great is the risk of loss when a participant uses their account as security?

C. As a practical matter, most plans simply use prime, plus one or two percent as the interest for plan loans to participants.

XI. WHAT HAPPENS IF A PARTICIPNT DEFAULTS IN MAKING A PAYMENT?

A. Plans may provide for a grace period for a missed payment.

1. The maximum grace period must end on the last day of the calendar quarter following the calendar quarter in which the payment was due.

2. Some plans use shorter grace periods.

B. When the default occurs, the entire loan balance is treated as a "deemed distribution" and becomes taxable.

1. A 1099R is issued at the year end.

2. Not subject to any withholding, so the participant must make sure the tax is paid.

3. The distribution will also be subject to the 10% early distribution excise tax, if appropriate.

XII. CAN PLAN LOANS BE REFINANCED TO A LOWER INTEREST RATE (AND POSSIBLY BORROW ADDITIONAL AMOUNTS)?

A. Once again, it depends on the plan document and/or the Loan Procedure.

1. Some plans require one loan to be repaid before a participant may be eligible for a new loan.

2. Other plans will allow multiple loans at the same time.

B. In refinancing, you cannot extend the repayment of any of the old loan balance to more than five years.

1. You may re-amortize the loan at a lower interest rate over the remaining term of the original loan.

2. You may amortize the new money based upon the date the new money was loaned.

XIII. WILL THE INTEREST PAID ON A PLAN LOAN BE DEDUCTIBLE?

A, Generally plan loan interest is only deductible if the proceeds are traced to such uses as purchasing a qualified residence or for investment.

B. Generally plan loan interest is not deductible if the proceeds are used for personal purposes.

C. Interest paid on loans secured by 401(k) or 403(b) plan account balances are never deductible.

D. Interest paid on loans to "Key Employees" is never deductible. Key Employees generally include 5% owners, officers with more than $130,000 of compensation, or 1% owners with more than $150,000 of compensation.

XIV. WHAT ARE THE REQUIREMENTS FOR A "HARDSHIP DISTRIBUTION" FROM A 401(K) PLAN?

A. Is a "hardship distribution" provision a good alternative to a loan provision?

B. Hardship distributions may only be made under very limited rules:

1. Generally "in-service" distributions prior to age 59 ½ are prohibited.

2. To qualify for a hardship distribution the following is required:

a. The plan must allow for hardship distributions.

b. The IRS rules will allow distributions for medical expenses, the purchase of a principal residence, tuition and related expenses, funeral expenses, payment to prevent foreclosure on a principal residence, or

payments for repair of casualty damage to a principal residence.

c. The amount available is limited to the amount needed to pay the distribution and taxes owed taking into account other sources that may be available.

XV. WHY SHOULD AN EMPLOYER PROVIDE FOR PLAN LOANS IN THEIR RETIREMENT PLAN?

A. Employees will feel more comfortable deferring amounts in the employer's 401(k) plan if they have a reasonable expectation of those amounts being made available to them in a time of need.

B. Without a plan loan opportunity, employers face the prospect of good employees terminating employment simply to get access to their accounts.

C. Employees may be uncomfortable attempting to qualify for hardship distributions from 401(k) plans, not wanting to disclose to their employer personal hardship situations.

D. Employees will appreciate the ability to borrow funds without jumping through all of the hoops that a commercial lender may require.

E. If the loans get repaid there is no "leakage" of retirement benefits (thereby maximizing retirement benefits) that may otherwise occur if the plan provides for hardship distributions or other in-service distributions.

F. There are no income tax consequences for a plan loan that gets repaid.

G. There is no 10% premature distribution excise tax for a plan loan that gets repaid.

H. Since most 401(k) plans allow participant loans, should an employer allow itself to be perceived as taking away an employee benefit?

I. It's a "cheap benefit" for most employers since the employees usually bear the cost.

J. The costs of borrowing from a retirement plan are often less than from a commercial lender.

XVI. WHY SHOULD AN EMPLOYER FOREGO PLAN LOAN OPTIONS IN THEIR RETIREMENT PLANS?

A. The ability to borrow against an employee's retirement benefits often creates "leakage" (the reduction of retirement benefits) due to the employee's inability to repay the loan.

B. Ready access to retirement plan benefits through plan loans may facilitate impulsive spending or the use of retirement benefits for the wrong reason (a new boat, a vacation, etc.).

C. Many plans provide that a participant who has a loan outstanding must suspend future deferrals until the loan is repaid.

D. The interest that a participant pays to repay a plan loan from a 401(k) plan is generally not deductible. Other loan sources may be available to the employee (an equity line of credit) where the interest is deductible.

E. The interest that any employee pays on a plan loan from a 401(k) plan will likely be subject to "double taxation." Since the interest paid is not deductible and paid with "after tax dollars," they are also taxed a second time when those amounts are distributed from the plan to the employee.

F. The interest rate paid by an employee (which is credited to their account) is often less than they may have earned if their account remained fully invested.

G. Employees will have a smaller take home pay because of the likely payroll withholding to repay the plan loan.

H. The plan loan will become taxable and may be subject to a 10% excise tax on early distributions if there is a default.

I. The plan loan will likely become taxable and possibly subject to a 10% excise tax on early distributions if the employee terminates employment.

J. The plan loan will likely become taxable and possibly subject to a 10% excise tax on early distributions if the employer terminates the retirement plan.

K. Does an employer really want to be the employee’s banker?

BULLARD-PLAWECKI EMPLOYEE RIGHT TO KNOW ACT: MANAGING RISK WHEN PRODUCING A PERSONNEL FILE

By: Michelle C. Harrell, Esq.

I. BULLARD-PLAWECKI EMPLOYEE RIGHT TO KNOW ACT (MCL 423.501 – 512) ("The Act")

A. This Act permits employees to review personnel records; to provide criteria for the review; to prescribe the information which may be contained in personal records; and to provide penalties for non-compliance with the Act.

B. What is a "Personnel Record" under the Act?

1. "Personnel Record" is defined as a record kept by the employer that identifies the employee, *to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action*. A personnel record also includes a record in the possession of a person, corporation, partnership or other association who has a contractual agreement with the employer to keep or supply a personnel record as provided in this subdivision.

2. Just as in life, there are exceptions to the Personnel Record, which include the following:

a. References on documents found within the file that identify the person making the reference. Said another way, the star of the personnel file is the employee (and not his/her manager and/or employer's hiring staff).

b. Staff planning with respect to more than one employee (*i.e.* salary, bonus, promotions, assignments).

c. Staff medical reports or records made or obtained by employer if record is available to employee from doctor or medical facility involved.

d. Personal information about person other than employee should it constitute clearly unwarranted invasion of other person's privacy.

e. Investigation records must also be excluded as a personnel record because when an employer has reasonable cause to believe that an employee is engaged in criminal activity which may result in loss or damage to the employer's property or disruption of the employer's business operation, and the employer's property or disruption of the employer's business operation, and the employer is engaged in an investigation, then the employer may keep a separate file of information relating to the investigation separate from that of the personnel file. Of note, upon completion of the investigation *or* after 2 years, whichever comes first, the employee shall be notified that an investigation was or is being conducted of the suspected criminal activity described in this section. Upon completion of the investigation, if disciplinary action is not taken, the investigative file and all copies of the material in it must be destroyed.

f. Grievance investigations not used for the purpose of personnel record.

g. Records kept by executive, administrative, or professional employees that are kept in sole possession of the maker of the record and not accessible or shared with others. Such a document may be entered into the personnel record if more than six (6) months after date of occurrence or fact about an employee becomes known.

h. An employer shall not gather and keep records of an employee's associations, political activities, publications or communications of non-employment activities, except if the information is submitted by, or authorized to be kept or gathered, in writing by the employee.

C. The ABCs of producing the personnel record to the employee based on Frequently Asked Questions from our clients.

1. The employee may request a copy of the employee record no more than two times in a calendar year or as otherwise required by law or a collective bargaining agreement. The record must be produced at a location reasonably near place of employment and during normal office hours.

2. The employee may obtain a copy, however, the employer may charge a fee for a copy. (The charge is limited to incremental cost of duplicating the record.)

3. The employee may request that the file be mailed, upon a showing that the employee is unable to review it at the employer.

4. An employer may not divulge a disciplinary report/reprimand to a third party (such as a new prospective employer, spouse, newspaper, etc.) without providing written notice to the

employee (mailed on or before the day divulged), unless the employee waived written notice by agreement or disclosure ordered by legal action or arbitration to party in action or arbitration. This goes beyond providing copies of the employee file but statements made by the employer's representatives can be actionable (*i.e.*, comments to a newspaper about an employee's termination).

5. Unless required by legal action or arbitration, an employer must delete disciplinary action information more than 4 years old prior to production.

D. Consequences of violation of the Act. (MCH 423.511)

1. Violations of the Act result in an employer being responsible for the payment of its employee's actual damages plus costs.

2. Willful and knowing violations of the Act by an employer result in a penalty of $200.00 to the employer, in addition to reasonable attorney's fees and actual damages.

II. <u>RESOLVING DISAGREEMENTS WITHIN PERSONNEL RECORD</u>

A. It is not uncommon to have disagreements between the employer/employee regarding certain information within the personnel record. Although an employer should consult with counsel, some general suggestions to address recurring, basic issues relating to contested information include:

1. Remove or correct the subject information or document upon mutual written agreement between the employer and employee.

2. If the parties cannot reach an agreement, an employee may submit a written statement explaining the employee's position, not to exceed five (5) pages (8.5 x 11). The employer must

include the employee's position statement upon request if the original information/document that was contested remains in the file.

B. False information in personnel record that was placed knowingly, by employer or employee, can only be expunged via legal action.

III. HOW COURTS MAY ADDRESS "PAPERING" PERSONNEL FILES CREATED POST-TERIMINATION.

A. Papering a personnel file after an employee files a charge or engages in other protected activity could be enough to establish a prima facie case of retaliation (*i.e*., by soliciting feedback from employees – even when known that everyone has problems with employee). *Upshaw v. Ford Motor Co.* (8/14/09; 6th Circuit Court of Appeals)

B. Courts have been skeptical to find an honest belief of the employer in a legitimate business reason for post-termination inclusions in the employee's file particularly when any incidents or concerns were not timely documented or the documents created post-termination.

1. A*bdulnour v. Campbell Soup Supply Company, LLC* (7/25/07 – 6th Circuit Court of Appeals). In that case, Defendant did not tell Plaintiff he was being fired for poor performance, but rather told him that his termination was the result of an unspecified "personality conflict." While the law does not specifically require an employer to list every reason or incident that motivates its decision to terminate an employee, courts are skeptical of undocumented accounts of employee conduct when those documents may have been created post-termination. Under the facts of this case, however, ample evidence existed that indicated that Plaintiff's performance was inadequate to meet his job requirements.

WORKER CLASSIFICATION AND JOINT EMPLOYER LIABILITY ISSUES

I. WHEN ARE MY CONTRACTORS ACTUALLY EMPLOYEES?

A. Internal Revenue Service: Facts that provide evidence of the degree of control and independence fall into three categories: 1) **Behavioral**: Does the company control or have the right to control what the worker does and how the worker does his or her job? 2) **Financial**: Are the business aspects of the worker's job controlled by the payer (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)? and 3) **Type of Relationship**: Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

1. Example 1: Jerry Jones has an agreement with Wilma White to supervise the remodeling of her house. She didn't advance funds to help him carry on the work. She makes direct payments to the suppliers for all necessary materials. She carries liability and workers' compensation insurance covering Jerry and others that he engaged to assist him. She pays them an hourly rate and exercises almost constant supervision over the work. Jerry isn't free to transfer his assistants to other jobs. He may not work on other jobs while working for Wilma. He assumes no responsibility to complete the work and will incur no contractual liability if he fails to do so. He and his assistants perform personal services for hourly wages. Jerry Jones and his assistants are employees of Wilma White.

2. Example 2: An auto sales agency furnishes space for Helen Bach to perform auto repair services. She provides her own

tools, equipment, and supplies. She seeks out business from insurance adjusters and other individuals and does all of the body and paint work that comes to the agency. She hires and discharges her own helpers, determines her own and her helpers' working hours, quotes prices for repair work, makes all necessary adjustments, assumes all losses from uncollectible accounts, and receives, as compensation for her services, a large percentage of the gross collections from the auto repair shop. Helen is an independent contractor and the helpers are her employees.

3. Consequences: If you classify an employee as an independent contractor and you have no reasonable basis for doing so, you're liable for employment taxes for that worker. In addition, misclassifying employees can result in additional liability under the Affordable Care Act ("ACA") and for failure to provide benefits which the employee is entitled to under the law.

B. Department of Labor/Fair Labor Standards Act: The Economic Realities Test. Factors to consider: 1) The extent to which the work performed is an integral part of the employer's business; 2) Whether the worker's managerial skills affect his or her opportunity for profit and loss; 3) The relative investments in facilities and equipment by the worker and the employer; 4) The worker's skill and initiative; 5) The permanency of the worker's relationship with the employer; and 6) The nature and degree of control by the employer.

1. Example 1: For a construction company that frames residential homes, carpenters are integral to the employer's business because the company is in business to frame homes, and carpentry is an integral part of providing that service. In contrast, the same construction company may contract with a

software developer to create software that, among other things, assists the company in tracking its bids, scheduling projects and crews, and tracking material orders. The software developer is performing work that is not integral to the construction company's business, which is indicative of an independent contractor.

2. Example 2: A highly skilled carpenter provides carpentry services for a construction firm; however, such skills are not exercised in an independent manner. For example, the carpenter does not make any independent judgments at the job site beyond the work that he is doing for that job; he does not determine the sequence of work, order additional materials, or think about bidding the next job, but rather is told what work to perform where. *In this scenario, the carpenter, although highly-skilled technically, is not demonstrating the skill and initiative of an independent contractor* (such as managerial and business skills). He is simply providing his skilled labor. In contrast, a highly skilled carpenter who provides a specialized service for a variety of area construction companies, for example, custom, handcrafted cabinets that are made-to-order, may be demonstrating the *skill and initiative of an independent contractor* if the carpenter markets his services, determines when to order materials and the quantity of materials to order, and determines which orders to fill.

II. WHEN ARE SOMEONE ELSE'S EMPLOYEES ACTUALLY MY EMPLOYEES?

A. The advent of Professional Employer Organizations ("PEOs") and employee leasing firms has complicated employment relationships. Now, you may be responsible not only for the employees and

contractors on your direct payroll, but also for those employees provided to you by a third party PEO or employee leasing firm.

B. Fair Labor Standards Act. The Department of Labor will use the Economic Realities Test, discussed above, to determine whether a worker is considered an employee for joint employment purposes. The most likely scenarios for joint employment are 1) Where the employee has two (or more) technically separate but related or associated employers, or 2) Where one employer provides labor to another employer and the workers are economically dependent on both employers.

1. Consequences: Joint employers are responsible, both individually and jointly, for compliance with the FLSA. Under the FLSA, each of the joint employers must ensure that the employee receives all employment-related rights under the FLSA (including payment of at least the federal minimum wage for all hours worked and overtime pay at not less than one and one-half the regular rate of pay for hours worked over 40 in a workweek, unless an exception or exemption applies). Furthermore, joint employers must combine all of the hours worked by the employee in a workweek to determine if the employee worked more than 40 hours and is due overtime pay.

2. Family Medical Leave Act. When an individual is employed by two employers in a joint employment relationship under the FMLA (and applies the same standards as the FLSA), in most cases one employer will be the primary employer while the other will be the secondary employer. Determining whether an employer is a primary or secondary employer depends upon the particular facts of the situation.

Factors to consider include: 1) who has authority to hire and fire, and to place or assign work to the employee; 2) who decides how, when, and the amount that the employee is paid; and 3) who provides the employee's leave or other employment benefits. In the case of a temporary placement or staffing agency, the agency is most commonly the primary employer.

Example: A large medical staffing company, Staffing Company ABC, places registered nurses in jobs at public and private hospitals operating in several U.S. states. For purposes of this example, Staffing Company ABC is an FMLA-covered employer, and the nurses meet all of the FMLA eligibility requirements. The nurses are placed at various hospitals throughout the year. Staffing Company ABC pays the nurses and provides them with retirement and insurance benefits. When the employees need leave, they call Staffing Company ABC to request time off. At the hospitals, the nurses are given their job assignments and are supervised by hospital staff. The nurses treat hospital patients, use hospital equipment, and are obliged to follow the same work protocols day to day as the hospital's regular workforce.

In this example, the nurses are jointly employed by Staffing Company ABC and the client hospitals. Staffing Company ABC is the primary employer and therefore is responsible for following all of the FMLA requirements of FMLA-covered employers, including giving FMLA notices, providing FMLA leave, and maintaining health benefits. Each hospital is the secondary employer of the Staffing Company ABC's employees that are placed at that hospital. Each hospital must keep and maintain payroll records for the employees placed at that hospital, as well as count the temporary registered nurses placed at each hospital as employees for their own FMLA coverage and employee eligibility tests. The

hospitals are prohibited from interfering with Staffing Company ABC's employees' FMLA rights, or from retaliating or discriminating against Staffing Company ABC's employees.

C. **National Labor Relations Act**. This area of the law has been in upheaval since the National Labor Relations Board issued its decision in *Browning-Ferris Industries*. In the decision, the Board found that two or more entities are joint employers of a single workforce if (1) they are both employers within the meaning of the common law; and (2) they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating whether an employer possesses sufficient control over employees to qualify as a joint employer, the Board will – among other factors -- consider whether an employer has exercised control over terms and conditions of employment indirectly through an intermediary, or whether it has reserved the authority to do so.

The decision in *Browning-Ferris Industries* continues to be subject to scrutiny from Congressional leaders and the franchising community. Some believe it will be subject to reversal once President Trump fills two vacancies on the Board shifting the Board to Republican control.

III. MINIMIZING THE RISKS OF EMPLOYEE MISCLASSIFICATION AND JOINT EMPLOYMENT RELATIONSHIPS

A. Step 1 – Evaluate whether your business needs to exercise significant control over a particular role. If so, consider employing the worker.

B. Step 2 – Evaluate the potential liabilities in the event of misclassification or a finding of joint employer status. Major risk factors include: 1) significant number of workers in a particular group; 2) contractors or third party workers are frequently working more than 40 hours each week; 3) a change in worker classification will require

additional legal compliance (e.g., 50 employees under the ACA); and 4) third party workers are subject to a collective bargaining agreement or attempting to unionize.

C. Step 3 – Review applicable insurance and obtain appropriate insurance if available.

D. Step 4 – Obtain contractual protections for your business. The types of provisions commonly negotiated include: 1) only do business with contractors and consultants who operate an LLC or other corporate entity; 2) limit the amount of control outlined in a contract to the amount necessary for your business; 3) obtain indemnification for employment related taxes or compliance costs (if the other party maintains sufficient insurance or assets to obtain recovery); 4) obtain representations and warranties regarding key compliance issues (e.g., ensuring another party is responsible for paying minimum wage and overtime); and 5) require notification and coordination of key events, such as a Department of Labor or Internal Revenue Service audit.

EMPLOYMENT LITIGATION UPDATE AND TRIAL CONCERNS

By: Richard M. Mitchell, Esq. CPCU

I. GROWING CONCERNS AND THREATS TO EMPLOYERS

A. Sexual Orientation and Gender Identity – These are two very different concepts. The status of protection for either is not entirely clear. One thing that is clear, however, is that they are not the same for purposes of employment protection.

1. In 2015, the U.S. Supreme Court upheld marriage equality in *Obergefell v Hodges*, 135 SCt 2584 (2015). While this landmark decision held that nontraditional couples may marry, it did not address the status of their protection in the workplace.

2. The Equal Employment Opportunity Commission ("EEOC") has held that workplace discrimination based on sexual orientation violates Title VII of the Civil Rights Act of 1964. *Complainant v Fox*, EEOC Appeal No. 0120133080 (2015).

a. According to this decision, Title VII precludes discrimination based on gender, but not specifically sexual orientation or gender identity.

b. In reaching this decision, the EEOC determined that discrimination based on sexual orientation is akin to discrimination based on gender because it allows an employer to treat one employee less favorably than another because of that employee's gender.

3. EEOC determinations, however, are not binding on Federal Courts. The 11th Circuit addressed this issue in March 2017 in *Evans v Georgia Regional Hospital et al.*, 11 Cir Docket No. 15-15234. The

court held that sexual orientation is not a protected characteristic under Title VII.

a. Plaintiff was a female security guard who wore a male uniform and "failed to match female stereotypes." While she did not expressly tell people she was a lesbian, her employer felt her sexual orientation was apparent.

b. The court allowed plaintiff to proceed on a claim of discrimination based on failing to meet gender stereotypes, but not expressly as to sexual orientation. This could be interpreted as allowing a gender identity based claim, but not an express sexual orientation claim.

B. Hostile Work Place Claims and EEOC Harassment Guidelines

1. In January 2017 the EEOC issued proposed guidelines relative to potential unlawful harassment claims.

a. Employers have always had the obligation to respond to complaints of discrimination or hostile workplace environment by conducting internal investigations. These investigations often include interviews of other employees and potential witnesses.

b. The proposed guidelines clarify the duty of an employer to affirmatively respond to employee conduct that may result in an enforceable legal claim even if the conduct itself does not constitute such a claim.

c. Under these guidelines, the EEOC may pursue claims based on "perceived" membership in a protected class, even if that perception is wrong. The Agency may also pursue claims where harassment exists, although it is not aimed directly at

the complainant. It may even pursue claims of harassment that occur outside the workplace.

C. Joint Employer Status

1. This continues to be a troublesome issue. In August 2015, the NLRB held that Browning Farris Industries was required to negotiate with a union representative representing workers employed by Leadpoint, a staffing agency that contracted with BFI to provide workers for its recycling plant. This decision was particularly significant because the NLRB ruled that a company can be a "joint employer" if it merely has the **right** to control an employee, even if it does not actually exercise any such control. *Browning Farris Industries of Ca, Inc.,* NLRB Case 32-RC-109684.

2. The Board previously ruled that McDonald's USA, LLC was a joint employer along with its franchisees for purposes of alleged unfair labor practices. That matter arose from complaints that McDonald's retaliated against employees of multiple franchisees who participated in demonstrations protesting working conditions and demanding a higher minimum wage. McDonald's claimed that it was not a "joint employer" along with its franchisees. The Board noted, however, that McDonald's retained certain elements of control over all franchisees.

3. The court recently addressed this issue in *Dunn v Pratt Industries, Inc.*, 2017 WL 1405356. In April 2017, the court upheld the lower court's denial of defendant's motion for summary judgment in which it argued that it was not a "joint employer" and therefore took no "adverse employment action" against plaintiff. The court found that plaintiff was not formally employed by the defendant, but defendant controlled important aspects of his work. Therefore, defendant could be held liable under Title VII and 42 USC Sec. 1981.

D. A Post 2016 Administration and Other Considerations

1. Speculation has ranged widely regarding the effect of the new administration on the actions of the EEOC, NLRB and other Federal agencies. One area of concern appears to be requirements for immigration status. Employers should be cognizant of compliance with all immigration requirements. Particular care should be given when hiring foreign employees, especially those with temporary status. In some cases, penalties for noncompliance can be strict and financially severe to an employer.

II. LITIGATION BEGINS, BUT WHERE?

There are generally three potential forums for employment litigation – Federal court, state court or arbitration.

A. Federal Court

1. If a party wishes to pursue a matter under Title VII, Section 1981 or several other Federal statutes, it must first exhaust its administrative remedies. This means, generally, discrimination claims pursuant to Federal law will first be brought before the EEOC.

2. The EEOC will investigate and determine if reasonable cause exists to pursue a matter against a particular employer. The agency may bring the action in its own name. If it does, the matter becomes more complicated than a claim brought solely by an individual.

3. If the EEOC finds no reasonable cause, it will dismiss the claim and issue a right to sue letter. A plaintiff must pay close attention to this letter, as it specifically sets forth the timeframe in which an action

may be brought in Federal court. The plaintiff will have 90 days to bring that action. Additionally, a claimant may request a right to sue letter if a matter has been pending before the EEOC for 180 days without the Agency making a determination.

B. State Court

1. A claimant may bring an action in a Michigan state court without first proceeding to the EEOC or another Federal agency. In doing so, however, the claims must be based exclusively on state law. A plaintiff cannot bring claims based on Federal law, such as Title VII, directly into state court. Generally, a state law action will be brought pursuant to the Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.

2. Many of the remedies permissible under state law are similar to those under Federal law. From an employer's perspective, the most significant is likely recovery of attorney fees by the plaintiff. If plaintiff prevails at all, even one dollar, the employer may be responsible for those fees. Remember the old adage – "A little discrimination goes a long way."

C. Arbitration

1. Employment contracts often contain arbitration clauses. These clauses are also often present in consumer contracts, which has been subject to attack by the Consumer Finance Protection Bureau.

2. Arbitration has often been a favored forum because many people believe it is faster and less expensive than litigation. This may or may not be so. Arbitration may proceed before a panel of three arbitrators or a single individual. Either way, those arbitrators are being compensated for their time, which is cost to the parties.

3. Additionally, many arbitration clauses contain a cost splitting clause. This states that the parties will share equally in the arbitration costs. There is a strong Federal policy in favor of enforcing arbitration agreements, although not necessarily cost sharing agreements. These agreements are often the result of the arbitration process where there is an inequity between the bargaining power of the employer and employee. *Morrison v Circuit City Stores, Inc.*, 317 F3rd 646 (6th Circuit 2003; *Moore v Farrell Gas, Inc.*, 533 FSupp 2nd 740 (WD Mich 2008)).

III. LITIGATION CONCERNS AND EVIDENTIARY ISSUES

A. While a lawsuit may have a lengthy life cycle from complaint through trial, there are several points at which the parties may settle or file a motion to dismiss.

1. Preservation of evidence – A party should preserve all evidence at the first possible sign of litigation, well before a claim is actually made. This includes not only tangible items, but also discontinuing destruction of any data or electronic backup. *Zubulake v UBS Warburg, LLC*, 229 FRD 422 (SD NY 2004).

2. Employees and internal witnesses should be contacted as soon as possible. Statements should be obtained and any potential problems identified early.

3. Document exchange and interrogatories may be voluminous. This is another reason it is critical to preserve any evidence that may be even remotely relevant to plaintiff's claim.

4. Depositions will be taken of key company personnel. It is important to keep in mind that part of plaintiff's discovery will focus on identifying other individuals who have potentially experienced discrimination, even if they did not make formal claims. Initial

discovery will involve questions about prior litigation and employment charges. It will also seek identification of individuals similarly protected in a class.

B. Admissibility of evidence – An EEOC determination can be admitted into evidence at trial for certain purposes, although not in order to prove the truth of the allegations. *Alexander v CareSource*, 576 F3rd 551 (6th Cir 2009). Some courts have noted, however, that "while the EEOC report may fall within the business records hearsay exception, the same cannot be said of the entire EEOC file." *EEOC v Sharp Manufacturing Company of America*, 2008 WL 189847 (WD Tenn 2008)

IV. RESOLUTION AND REASONABLE ACCOMMODATION

A. The majority of litigated matters are resolved and never find their way to a courtroom, especially with the growth of alternative dispute resolution.

1. The parties may agree at any point to resolve their dispute. The determination of what accommodations are "reasonable" is often a subject of dispute. The claimant may also demand reinstatement, back pay and front pay, particularly when the claim is brought by a governmental agency.

2. Other noneconomic relief may be subject to the resolution. This may include re-training of certain employees and posting of notices.

ANALYZING WORK PLACE DISABILITY ISSUES

By: Ronald A. Sollish

I. THE AMERICANS WITH DISABILITY ACTS (ADA) OF 1990. 42 USC §12101 et seq. PROHIBITS DISCRIMINATION AGAINST "A QUALIFIED INDIVIDUAL WITH A DISABILITY".

A. The ADA's General Mandate - Discrimination Prohibited.

General Rule - No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, hiring, advancement, discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 USC §12112(a).

B. What is a "Covered Entity"?

"Covered entity" includes employment agencies, labor organizations, joint labor-management committees, and employers employing 15 or more employees during each of 20 or more calendar weeks in the current or preceding calendar year. 42 USC §12111.

C. Prima Facie Case Under the ADA.

1. Elements - An ADA plaintiff must show by a preponderance of the evidence that:

a. He or she is disabled;

b. He or she is otherwise qualified for the job, with or without "reasonable" accommodation;

c. He or she suffered an adverse employment decision;

d. The employer knew or had reason to know of his or her disability; and

e. After rejection or termination the position remained open, or the disabled individual was replaced.

D. Cap on Damages.

Damages awardable to employees for an employer's violation of the ADA are capped as follows:

1. For an employer with 15-100 employees - $50,000;

2. For an employer with 101-200 employees - $100,000;

3. For an employer with 201-500 employees - $200,000; and

4. For an employer with more than 500 employees - $300,000.

II. WHAT IS A "DISABILITY"?

A. If an individual does not have a "disability," he or she is generally not protected by the ADA. Therefore, courts often dispose of ADA lawsuits by simply finding that the Plaintiff did not have a "disability".

*

B. Under the ADA, a disability is a "physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 USC §12102(2)(a). "Disability" also includes having a "record of such an impairment or being "regarded as" having such an impairment. 42 USC §12102(2)(b),(c).

C. What is an "impairment"?

1. ADA regulations define impairments affecting any number of body systems broadly so as to include: a wide variety of disorders and conditions affecting any number of body systems including the neurological or musculoskeletal systems, special sense organs, respiratory, cardiovascular, reproductive, digestive, genitourinary hemic, lymphatic, or endocrine systems or the skin. In addition, impairments include mental or psychological disorders, including mental retardation, organic brain syndrome, emotional or mental illness, and certain learning disorders. (29 CFR §1630.2(h)).

2. The EEOC has stated that physical characteristics such as left-handedness, common personality traits such as being irresponsible for showing poor judgment, cultural, environmental, or economic disadvantages, homo-sexuality, bi-sexuality, pregnancy, and normal deviations in height, weight or strength are not impairments. Appendix to 29 CFR §1630.2(h). Similarly, traits like irritability and chronic lateness are not themselves impairments. EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, Number 915.002 (March 25, 1997) at page 4. *Johnson v. Billington*, 404 F.Supp.2d 157 (2005); *Duda v. Board of Education of Franklin Park Public School District No. 84*, 133 F.3d. 1054 (7th Cir. 1998) ("mere temperament and irritability" are not covered under the ADA). Courts have stated that conditions like general grief or stress are not covered under the ADA. *Poyner v*. *Good Shepherd Rehab at Muhlenberg*, 202 F.Supp.2d 378, 383 (ED PA 2002); *Johnson* v *Boardman Petroleum, Inc.,* 923 F.Supp. 1563 (S.D. GA 1996); *Mundo* v. *Sanus Health Plan of Greater New York,* 966 F.Supp. 171 (E.D. NY 1997) (Electronic Publication, only) ("an inability to tolerate stressful situations is not an impairment" under the ADA; the ADA "was not intended to categorize people with common personality traits as disabled"); *DeWitt* v *Carsten,* 941 F.Supp.1232

(N.D. GA 1996), affd. 122 F.3d 1079 (11th Cir. 1997) (Job related stress, caused by an unpleasant boss or having unpleasant duties (working around prisoners) is not an ADA disability); "while characteristic predisposition to illness or disease" because of environmental rather, economic, or social conditions is not an impairment, discrimination because of *genetic* predispositions is discrimination based on disability. EEOC Compliance Manual §902.2(C)(2). Some conditions which are *expressly excluded* from ADA'S protections are: transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, many gender identity disorders, other sexual behavioral disorders, compulsive gambling, kleptomania, pyromania, and psycho active substance use disorders resulting from current illegal drug use. 42 USC §12211.

While some courts have held that an "impairment" must actually affect the individual's ability to work, and not just any "major life activity" in order to be covered by the ADA, most courts have not adopted this approach.

3. The voluntariness of the impairment is irrelevant. For example, lung cancer is still an impairment even though the cancer was caused by one's smoking. Similarly, even though plaintiffs "morbid obesity" could have been lessened by behavioral changes, the morbid obesity was still an impairment. *E.E.O.C. v. Watkins Motor Lines, Inc.,* 463 F.3d. 436, 444 (6th Cir. 2006); *Cook v. Rhode Island Department of Mental Health,* 10 F.3d. 17 (1st Cir. 1993).

What is a "major life activity"?

The EEOC has said that major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 CFR §1630.2(1). In the appendix to its

regulations, the EEOC added sitting, standing, lifting, and reaching to its list of major life activities. Appendix to 29 CFR §1630.2(1). In its compliance manual, the agency added "mental/emotional processes such as thinking, concentrating, and interacting with others to its list of major life activities. EEOC Compliance Manual §902.3(B) at page 15. In a1997 policy guidance, the EEOC added sleeping as a major life activity. EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, Number 915.002 (March 25, 1997) at page 4, and in an *Amicus Curae Brief,* the EEOC stated that the "ability to control basic bodily functions, specifically one's bowels" is a major life activity. EEOC's *Amicus Curae Brief,* in - *Pangalos v*. *Prudential Insurance Company of America,* 962022 (Brief filed in 3rd Cir., February 13, 1997).

At least one federal circuit court has held, however, that "interacting with others" is not a major life activity. *Calef v. Gillette Co*., 322 F.3d 75, 86 (1st Cir. 2003); *Soileau* v. *Guilford of Maine,* 105 F.3d 12, 15-16 (1st Cir. 1997) (although "the ability to get along with others" is "a skill to be prized, it is different in kind from breathing or walking," EEOC's manual is "hardly binding"). Another federal circuit court has held that "caring for others" is not a major life activity. *Krauel* v *Iowa Methodist Medical Center,* 95 F.3d 674, 677 (8th Cir. 1996). Another court has stated that "getting a sound night's sleep and reporting to work on time, clear minded" is not a major life activity. *Sarko v*. *Penn-Del Directory. Co.,* 968 F.Supp. 1026 (E.D. P.A. 1997). In *Bragdon v*. *Abbott,* (1998) the U. S. Supreme Court held that reproduction is a major life activity. The court noted that an activity does not have to have a "public, economic, or daily dimension" to be a major life activity and suggested, by stating that "sexual dynamics surrounding" reproduction are "central to the life process itself," that sex itself might be considered a major life activity. Courts have also found that eating, (*Fraser v. Goodale*, 342 F.3d 1032, 1040 (9th Cir. 2003); *Waldrip v. General Elec. Co*., 325 F3d. 652 (5th Cir. 2003); *Coughlal* v *H.J. Heinz*

Co., 851 F.Supp. 808 (N.D. Tex 1994)), and reading (*Head v. Glacier Northwest Inc*., 413 F.3d 1053 (9th Cir. 2005); *Bartlett* v *New York State Board of Law Examiners,* 156 F.3d 321 (2nd Cir. 1998)) are major life activities. However, courts have held that recreational swimming (*Popko v. Pa. State Univ*., 994 F.Supp. 293, 298 (M.D. Pa. 1998); *Martinez* v *City of Roy,* (unpublished) 1998 U.S. App LEXIS 5906 (10th Cir. 1998)), driving (*Winsley v. Cook County*, 563 F.3d 598 (7th Cir. 2009), working on cars, basic chores, shopping in a mall, skiing, golfing, yard work, mowing the lawn, painting, plastering, and shoveling snow (*Moore v. J.B. Hunt Transport, Inc.*, 221 F.3d 944 (7th Cir. 2000); *Soler v. Tyco Elec., Inc*., 268 F.Supp 97 (D.P.R. 2003); *Weber v. Strippot, Inc*., 186 F.3d 907 (8th Cir. 1999); *Colwell* v. *Suffolk County Police Department,* 158 F.3d 635 (2nd Cir. 1998)), climbing (*Otting v. J.C. Penny Co*., 223 F.3d 704 (8th Cir. 2000); *Robinson* v *Global Marine Drilling Co.,* 101 F.3d 35 (5th Cir. 1996)), driving at night, *(Wade* v. *General Motors Corp.,* 165 F.3d 29 (6th Cir 1998)) everyday mobility such as taking vacations or going to a shopping mall alone (*Reeves* v. *Johnson Controls Roll Services, Inc.,* 140 F. 3d 144 (2nd Cir. 1998)), and awareness (*Deas v. River West*, 152 F.3d 471 (5th Cir. 1998)) are not major life activities. The court's ruling in *Deas* that awareness is not a major life activity was part of a decision in which the court held that epilepsy is not a disability. In contrast to the court's decision in *Reeves* that everyday mobility is not a major life activity, the court in *Anderson* v *Gus Mayer Boston Store,* 924 F.Supp. 763 (ED Tex 1996) ruled that asymptotic HIV is a disability because an asymptotic HIV positive individual cannot travel freely without worrying about exposure to bacterial infection and fungi. Similarly, the court in *Kralik v. Durbin,* 130 F.3d 76 (3rd Cir. 1997) suggested that traveling is a major life activity.

Does the impairment "substantially limit" a major life activity?

1. The EEOC has stated that an impairment "substantially limits" a major life activity if the person is either (a) unable to perform a major life activity that the average person in the general population can perform; or (b) significantly restricted as to the condition, manner or duration under which he or she performs the activity as compared to the condition, manner or duration under which the average person in the general population performs the activity. 29 CFR §1630.2(J)(1). *Rawdin v. American Bd. Of Pediatrics*, 985 F.Supp2d 636, 649 (E.D. P.A. 2013); *Davidson* v *Midelfort Clinic, Ltd.,* 133 F.3d 499 (7th Cir. 1998). Therefore, the court in *Vonderheide* v *U. S. Post Office,* (unpublished) 1998 U.S. App. LEXIS 16885 (6th Cir. 1998) held that a plaintiff who was unable to work more than 40 hour work weeks because of an organic brain syndrome was not substantially limited since "most people work 40 hours per week." The ' EEOC has stated that if someone is "extremely nauseous" or "constantly fatigued" while performing a major life activity, that person could be considered substantially limited compared to the average person. EEOC *Amicus Curae Brief* in *Ellison* v *Software Spectrum, Inc.,* No. 95-10704 (Brief in Support of Petition for Rehearing filed in 5th Cir. June 28, 1996). The court in *Roush v*. *Weastc, Inc.* 96 F.3d. 840 (6th Cir. 1996) stated that if the plaintiff suffers pain while she works due to a bladder condition she might be considered substantially limited in working. In contrast, the court in *Hill* v. *Baltimore City Department of Social Services,* (unpublished) 1998 U.S. App. LEXIS 772 (4th Cir. 1998) stated that "severe chronic pain in the shoulder, upper and lower back, and sharp pains, and shooting pain in the arms and legs" would not rise to the level of a disability. When determining whether pain or nausea is considered a disability, courts consider the severity of the

pain and nausea. Typically, pain and nausea must be severe in order to constitute a disability.

Regulations issued by the EEOC require that courts look at a) the nature and severity of an impairment; b) the duration or expected duration of an impairment; and c) the permanent or long-term impact or the expected permanent or long-term impact resulting from an impairment when determining whether an individual has substantially limited "major life activity." 29 CFR §1630.2(J)(2). The court in *Penny v*. *United Parcel Service,* 128 F.2d 408 (6th Cir. 1997) ruled that the plaintiffs walking limitation did not rise to the level of a disability where plaintiff could not walk briskly and had some trouble climbing stairs. Similarly, the Court in *Kelly v. Drexel University,* 94 F.3d 102 (3d Cir. 1996), held that a plaintiff was not substantially limited in walking because he had "trouble climbing stairs, which requires him to move slowly and hold the handrail." Generally, the burden is on the plaintiff to establish that an impairment substantially limits a major life activity. As these cases imply, courts often look at the activities which a plaintiff is *able* to perform in order to assess whether the individual is substantially limited in a major life activity. If an impairment affects, but does not substantially limit, a major life activity, then courts typically dismiss the complaint. Similarly, if an impairment is only short-term and temporary, then courts typically do not consider it substantially limited.

Are mitigating/corrective measures (i.e., medication and/or prosthetic devices) to be taken into account when analyzing substantial limitation?

a. According to the EEOC and the Department of Justice, the effects of medication or prosthetic devices should not be

considered when determining whether an impairment substantially limits a major life activity. That is, an employer must consider whether the person's condition, in the absence of a prosthetic device or medication, would substantially limit a major life activity. EEOC Compliance Manual, §902 at pp 35-36; 28 CFR part 35, app. § 35.104.

b. The EEOC and Department of Justice position had been adopted by most courts prior to 1998. Specifically, the court, in *Washington v. HCA Health Serv. of Texas,* 152 F.3d 464 (5th Cir. 1998), held that when prosthetic devices, medications, or other corrective means are used on a continual basis, the medical condition should be assessed without taking into account the prosthetic device, medication or other corrective measure. On the other hand, if the condition is permanently corrected (such as a knee replacement), the medical condition should be assessed as corrected. One rationale supporting the assessment of medical conditions in the absence of medication is that to do otherwise would create a disincentive to self-help. That is, individuals might be reluctant to use medication or other corrective measures for fear of giving up their status as disabled. Similarly, courts have ruled that medical conditions are to be assessed without considering the behavioral adaptations of individuals. For example, the court, in *Doane v. City of Omaha,* 115 F.3d 624 (8th Cir. 1997), held that although the police officer compensated for the loss of peripheral vision and depth perception by shifting his head, the officer still had a disability because mitigating measures are not to be considered. Also, the court in *Bartlett v. New York State Bd of Law Examiners,* 156 F.3d 321 (2nd Cir.

1998), held that an individual who utilized phonics in order to read at an average level was substantially limited in pursuit of a major life activity because she was only able to read at an average level due to mitigating measures.

c. However, in 1999 the U.S. Supreme Court held that where employees took blood pressure medication *(Murphy v. United Parcel Service, Inc.*, 527 U.S. 471 (1999)) and wore glasses (*Sutton v. United Air Lines, Inc.,* 527 U.S. 471 (1999)), their medical conditions should be assessed only after taking into account the corrective measures for purposes of determining whether they are disabled under the ADA.

F. An impairment resulting from medication taken for another impairment may be substantially limiting. Specifically, the court in *Christian v. St Anthony Medical Ctr., Inc.,* 117 F.3d 1051 (7th Cir. 1997), held that a medical treatment itself can be a disability if the treatment itself is disabling even if the underlying condition does not constitute a disability. However, the court stated that in order to constitute a disability under the ADA the treatment must be "truly necessary, and not merely an attractive option."

G. Substantial limitation in major life activity of working.

Courts are very reluctant to rule that an ADA covered disability exists because of a substantial limitation in the major life activity of working. The court in *Pryor v. Trane Co.,* 138 F.3d 1024 (5th Cir. 1998), stated "If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working."

1. The EEOC and most courts examining the issue require that the individual must be excluded from a class of jobs or a broad range of jobs, not simply his or her particular job. 29 CFR § 1630.2Q and Appendix. Some courts go so far as to say that in order to be considered substantially limited in working, an individual must be excluded from employment in general. Courts have ruled that in order for an impairment to substantially limit the major life activity of working, the impairment must impair the employee's performance level on the job, not just result in pain, discomfort or unusual stress.

2. Relevant factors identified by the EEOC to determining whether a person is substantially limited in working include:

    a. The geographical area to which the individual has access;

    b. The jobs from which the individual has been disqualified because of an impairment and the number and types of jobs utilizing similar skills in training; and

    c. The jobs from which the individual has been disqualified and the number and types of jobs not using similar skills and training.

    29 CFR § 1630.2Q, Appendix. Such evidence must be presented as part of the plaintiff's *prima facie* case. *Skorup v. Modern Door Corp.,* 153 F.3d 512 (7th Cir. 1998).

"Record of Disability Cases.

1. Where an individual does not currently have an impairment that substantially limits a major life activity, the individual may still be protected by the ADA if he has a record of an impairment that substantially *limited* a major life activity. The U.S. Supreme Court,

in *School Bd. of Nassau Cty v. Arline,* 480 US 273, 281 (1987), held that a plaintiffs lengthy hospitalization for tuberculosis established a record of an impairment substantially limiting a major life activity. Lower courts, however, have subsequently held that hospitalization does not necessarily create a record of a disability. *See Horwitz v. L& J.G. Stickley, Inc*., 122 F.Supp.2d 350, 356 (N.D. NY 2000); *Gutridge v Clure,* 153 F.3d 898, 900-902 (8th Cir. 1998), and *Colwell v. Suffolk Cty Police Dept.,* 158 F.3d 635 (2nd Cir. 1998).

2. An individual is only protected under the ADA "record of doctrine if he or she had in impairment which itself substantially limited a major life activity. EEOC Compliance Manual, §902.7 at pp 40-41.

"Regarded as" Disabled Cases.

1. An individual is protected by the ADA where his or her employer perceives that the individual has a disability. An employer may "regard" an individual as being disabled in several ways: An individual might have an impairment, but one that does not substantially limit a major life activity, and the employer may treat him or her as having an impairment which substantially limits a major life activity; an individual may have an impairment that substantially limits major life activities only because of the attitudes of others; and an individual may not have an impairment, but the employer treats the individual as having a substantially limiting impairment. 29 CFR §1630.2(1), Appendix. Most "regarded as" cases involve an employer perceiving that an employee has an impairment that substantially limits the major life activity of working. Courts have held that an employer could not have "regarded" an employee as substantially limited in the major life activity of working when the employer encouraged the employee to work.

2. The EEOC considers discrimination based on genetic information to be "regarded as" discrimination, and at least one court has indicated that discrimination based on past workers' compensation claims is "regarded as" discrimination. Generally, an employer having made some changes to a job in order to help an individual with a medical condition does not generally mean that the employer has "regarded" the individual as disabled or that the employee has a "record of' a disability. Similarly, merely asking an individual to take a medical examination or offering an employee medical leave does not necessarily mean that the employer "regarded" an individual as " disabled. *Cody* v *Signa Health Care of St Louis,* 139 F.3d 595 (8th Cir. 1998).

III. REQUIREMENT THAT EMPLOYEE BE "QUALIFIED"

A. The ADA only protects individuals who have disabilities *and* who are "qualified." Under the ADA, an individual is qualified if and only if, he or she: (1) has the requisite skills, experience, education, licenses, etc., to perform his or her job; and (2) is able to perform the essential functions of the job, either with or without reasonable accommodation. 42 USC §12111(8); 29 CFR §1630.2(m). *Soto-Ocasio v. Federal Exp. Corp.,* 150 F.3d 14 (1st Cir. 1998). Furthermore, the employee bears the burden of proving that he or she is "qualified." *Mason v. Avaya Communications, Inc.,* 357 F3d. 1114, 1118 (10th Cir. 2004).

B. Reasonable Accommodation. The ADA prohibits an employer from failing to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 USC §12112(b)(5); *E.E.O.C. v. Picture People, Inc.*, 684 F.3d 981, 985 (10th Cir. 2012); *Humphrey v.*

Memorial Hospitals Ass'n, 239 F.3d 1128, 1133 (9th Cir. 2001); *Soto-Ocasio v. Federal Exp. Corp.,,* 150 F.3d 14 (1st Cir. 1998); *Rhoads v. Federal Deposit Insurance Corporation,* 956 F.Supp.1239 (1997).

Therefore, in order to establish discrimination based on denial of accommodation, a plaintiff must demonstrate that he or she is an otherwise qualified individual with a disability and that a reasonable accommodation was denied in a discriminatory fashion. *E.E.O.C. v. Picture People, Inc.*, 684 F.3d 981 (10th Cir. 2012); *Rhoads* v. *Federal Deposit Insurance Corporation,* 956 F.Supp 1239 (1997), *citing Bryant v. Better Bus. Bureau of Greater Maryland,* 923 F.Supp 720, 733 (D. Md. 1996), *citing Myers v. Hose, et. al,* 50 F.3d 278, 28182 (4th Cir. 1995). A request for an accommodation consisting of granting an employee additional sick days has been held to not be reasonable since "it is in substance a request not to perform (one's) job, and hence, facially unreasonable." *Rhoads v. Federal Deposit Insurance Corporation,* 956 F.Supp. 1239, 1248 (1997); *see*, also, *Francis v. Wyckoff Heights Medical Center*, 177 F.Supp.3d 754, 773 (E.D. NY 2016). The court in *Rhoads* did note, however, that the use of accrued sick leave and of part-time or modified work schedules is an appropriate accommodation in some circumstances. *Rhoads* at 1249. Similarly, the Court in *Soto-Ocasio, supra,* stated, "The term 'reasonable accommodation' may include 'job restructuring [and] part-time or modified work schedules.' 42 USC §12111 (9)(B). However, the ADA does not require an employer 'to reallocate job duties in order to change the essential function of a job.'" *Soto-Ocasio, supra,* at 18, *citing Milton v. Scrivner, Inc.,* 53 F.3d 1118, 1124 (10th Cir. 1995), *Cochrum v. Old Ben Coal Co.,* 102 F.3d 908, 913 (7th Cir. 1996), and *Fussell v. Georgia Ports Auth.,* 906 F.Supp 1561, 1571 (S.D. Ga. 1995).

IV. ADA CONTRASTED WITH THE MICHIGAN PERSONS WITH DISABILITIES CIVIL RIGHTS ACT

While the Michigan Persons with Disabilities Civil Rights Act (MPDCRA) is similar to the ADA in many respects, the MPDCRA differs from the ADA in important ways. The primary differences involve the MPDCRA definitions of *reasonable accommodation and undue hardship.* However, there are several other differences which should be considered when assessing one's potential liability under the MPDCRA as opposed to the ADA.

Litigation brought in federal court under the ADA may be more favorable to employers than litigation initiated in state court under the MPDCRA. This is because federal judges are more likely to enter a summary judgment than are state judges. Moreover, there are caps on damages awardable under the ADA, but not under the MPDCRA. On the other hand, the MPDCRA does not allow for punitive damages, while the ADA does. Initiating a disability discrimination case in federal court under the ADA is also beneficial to employers where the issue involves accommodating a disabled employee by placing him or her in a new job. This is because the MPDCRA, as interpreted by the Michigan Supreme Court, does not recognize this form of accommodation. However, where an employee failed to make a written request for accommodation as required by the MPDCRA, defending a suit in state court under the MPDCRA is generally preferable. Finally, if the cost of an accommodation exceeds the "formula" outlined in the MPDCRA, the practitioner may wish to file under the ADA.

A. Administrative Prerequisites

1. ADA General Rule.

Before filing an ADA lawsuit, a plaintiff must file a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") and receive a right-to-sue letter from that agency. As a general rule, a plaintiff may sue only those claims that accrued not

more than 300 days before plaintiff's filing of the discrimination charge. Authority - 41 CFR § 60-741.61(b); *Stepney v. Naperville School Dist. 203*, 392 F.3d 236, 239 (7th Cir. 2004); *Dao* v. *Auchan Hypermarket,* 96 F.3d 787 (5th Cir. 1996).

Michigan is a "dual filing" state, which means that filing a charge of discrimination with the Michigan Department of Civil Rights ("MDCR") has the same legal effect as filing with the EEOC.

2. MPDCRA General Rule.

Under the MPDCRA, an individual has the choice of filing a claim with the MDCR or filing a lawsuit directly in court for injunctive relief, damages, or both. Thus, the MDCR and the circuit courts have concurrent jurisdiction over claims under the Michigan Act. Authority - MCL 37.1605-1607.

An individual has three years from the date of the adverse action to file a claim under the Michigan Act. Thus, the practitioner may wish to file under the Michigan Act if the purpose is to get into court quickly or if the 300-day period for filing a charge with the EEOC has expired. However, by bypassing the EEOC, the claimant is forfeiting the agency's role as a neutral investigator of the discrimination charge.

Burden of Proof.

1. ADA General Rule.

If a disabled individual challenged a particular job requirement as unessential, the employer will bear the burden of proving that the

challenged criterion is necessary. Authority – *Monette v. Electronic Data Sys. Corp.* 90 F.3d 1173 (6th Cir. 1996).

It is important for the practitioner to realize that *Monette* does not shift the overall burden of persuasion in an ADA case. Rather, the burden of persuasion remains with the ADA plaintiff at all times. *Hamlin v. Charter Township of Flint,* 165 F.3d 426 (6th Cir.1999). *Monette* only shifts the burden of persuasion to the employer on the "essential function" issue in a situation when an employer admits relying upon a disability when making an adverse decision or if there exists direct evidence that the employer relied on plaintiff's disability in making the adverse employment decision. *Monette*, 90 F.3d at 118.

2. MPDCRA General Rule.

Plaintiff retains the burden of proof on all qualification issues including the essential nature of a job function. Authority - *Crittenden v Chrysler Corp,* 178 Mich App 324; 443 NW2d 412 (1989); *Brown v. Sprint*, 891 F. Supp. 396 (E.D. Mich.1995).

Definition of "Reasonable Accommodation:

ADA General Rule.

While the ADA does not define the term "reasonable accommodation" the administrative regulations indicate that the term is quite broad. Examples include making existing facilities readily accessible to and useable by individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modification of examinations, training materials or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals

with disabilities. Authority - 29 CFR §1630.2(o)(2) (lists examples of possible types of reasonable accommodations); 42 USC §12112(b)(5)(A) (employer failing to provide reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability commits unlawful discrimination unless it can demonstrate that the proposed accommodation would impose an undue hardship on its business).

If a proposed disability discrimination lawsuit is based solely on a failure to accommodate, and if no written demand for accommodation was made within 182 days (assuming the employer advised its employees of this requirement as required by the statute), an ADA lawsuit might be more appropriate. An ADA action would be suggested because the MPDCRA requires that employees make requests for accommodation in writing.

MPDCRA General Rule.

As a result of 1990 amendments, the MPDCRA recognizes three types of accommodation: (a) the purchasing of equipment and devices; (b) the hiring of readers or interpreters; and (c) the restructuring of jobs and the altering of schedules for minor or infrequent duties. Importantly, the duty to accommodate under the MPDCRA does not include placing the employee in a new job. In addition, under the MPDCRA, a person with a disability may allege a failure-to-accommodate claim only if that person notifies the employer in writing of the need for the accommodation within 182 days after the person with the disability knew or reasonably should have known that an accommodation was needed. The ADA does not contain such a requirement. However, the employer waives the right to notice if it fails to post notice or use other appropriate means to notify all employees and job applicants of the 182-day rule. Authority – MCL 37.1210 (2)-(5),(8)-(11),(18)-(19); *Hall v Hackley Hosp,* 210 Mich App 48; 532 NW2d 893 (1995); *Rourk* v. *Oakwood Hospital Corp,* 458 Mich 25;

580 NW2d 397 (1998) (duty to accommodate under MPDCRA does not include new job placement).

If the requested accommodation involves new job placement, do not file under the MPDCRA; form of accommodation is not recognized. The Michigan Supreme Court takes a strict view as to the types of accommodations available under the Act, namely, the three types of accommodations described in the statute.

Leave of Absence Requests: The Demise of "Reasonable Time to Heal" Doctrine.

ADA General Rule.

The ADA Interpretive Guidance suggests that a possible form of accommodation is permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. ADA Interpretive Guidance §1630.2(o). A growing number of courts have held that while unpaid leave for medical care and treatment may be appropriate under certain circumstances, leave of an indefinite duration is not a reasonable accommodation. *Bennett v. Calabrian Chemicals Corp*., 324 F.Supp. 815, 837 (E.D. Tex 2004); *Cousins v. Howell Corp*., 113 F.Supp. 262, 271 (E.D. Conn 2000); *Mitchell v. Washingtonville. Central School Dist*., 190 F.3d. 1, 9 (2nd Cir. 1999); *Taylor v. Pepsi-Cola*, 196 F.3d 1106, 1110 (10th Cir. 1999). In these cases, the courts reason that the employee is not a qualified individual with a disability. *See e.g*., *L. Nowak v. St. Rita High School,* 142 F.3d 999, (7th Cir. 1998) (employee failed to meet burden that he was a QIWD when absent from position for 18 months and failed to inform employer during that period that he intended to return to his teaching duties); *Hudson v*. *MCI Telecoms Corp.,* 87 F.3d 1167 (10th Cir. 1996) (plaintiff failed to present any evidence of expected duration of impairment).

MPDCRA General Rule.

Under Michigan law, the general rule is that the disability status of an individual is determined as of the date of discharge. *Ashworth* v *Jefferson Screw Products, Inc,* 176 Mich App 737; 440 NW2d 101 (1989). In *Rymar v Michigan Bell Telephone Co,* 190 Mich App 504; 476 NW2d 451 (1991), the court held that an employee who, on the date of his discharge, is unable to perform the requirements of his job because of a disability may still have a claim under the MHCRA (now MPDCRA) if he would have required the capacity to work within a "reasonable time." The soundness of the "reasonable time to heal" requirement was called into question by another panel in *Lamoria v Health Care & Retirement Corp,* 230 Mich App 801; 584 NW2d 589 (1998). However, the *Lamoria* panel felt obligated to honor the holding in *Rymar,* due to its precedential effect. However, on January 21, 1999, the Court did convene a special panel which held that the MPDCRA no longer requires that an employer allow a disabled employee a reasonable time to heal. *Lamoria v Health Care & Retirement Corp,* 233 Mich App 560, 562; 593 NW2d 699 (1999); *see*, also, *Hawkins v. Genesys Health Systems*, 704 F.Supp2d 688, 700 (E.D. Mich. 2010) and *Kerns v Dura Mechanical Components, Inc*, 242 Mich App 1, 16; 618 NW2d 56 (2000).

With the demise of the reasonable time to heal doctrine in Michigan the practitioner should consider the ADA in situations where an employee requires additional time off work due to a disability. One form of the accommodation recognized by the ADA is the use of accrued leave or unpaid leave. In an important recent decision, the Sixth Circuit held that no presumption should exist that uninterrupted attendance is an essential job requirement and that a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances. *Cehrs* v. *Northeast Ohio Alzheimer's Research Center,* 155 F.3d 775, 782 (6th Cir.

1998). Applying *Cehrs,* a factual determination will be whether the leave of absence would unduly burden the employer, much like any other reasonable accommodation analysis.

Differing Interpretations of "Undue Hardship".

ADA General Rule.

"Undue Hardship" is defined as "an action requiring significant difficulty or expense, when considered in light of [certain] factors." As the EEOC indicates in its March 1, 1999, enforcement guidance addressing the subject of reasonable accommodation and undue hardship, undue hardship addresses "quantitative, financial or other limitations" on an employer's ability to provide reasonable accommodation." Undue hardship is an affirmative defense to a failure to provide reasonable accommodation under the ADA. The burden of proving undue hardship is on the employer. In determining whether an accommodation would pose an undue hardship, the ADA indicates that several factors should be considered, as more specifically set forth in the statute itself. Authority- 42 USC §12111(10)(A)(B); 42 USC §12112(b)(5)(A); *Rodal v. Anesthesia Group of Onodaga, P.C*., 369 F.3d 113, 121-122 (2nd Cir. 2004); *Riel v*. *Electronic Data* Sys. *Corp,* 99 F.3d 678 (5th Cir. 1996); 42 USC §12111 (10)(B).

The employer's burden to prove undue hardship under the ADA is an onerous burden, and counsel should be aware that by raising a financial hardship argument. Opposing counsel likely will seek discovery of employer's confidential financial records. On the other hand, it is often very inexpensive to provide an accommodation. Counsel may wish to advise his or her client to work with the disabled employee to reach an accommodation solution. This may avoid the need to produce confidential information in defense of an "undue hardship" defense through discovery.

MPDCRA General Rule.

If a person with a disability establishes a prima facie case that an accommodation is possible, the employer bears the burden of producing evidence that an accommodation would pose an undue hardship on the company. If the employer produces evidence that an accommodation would pose an undue hardship, the person with a disability must demonstrate that the accommodation would not pose an undue hardship. This is contrary to the ADA, under which the burden of *proving* undue hardship falls squarely on the employer. In addition, the MPDCRA sets forth a "formula approach" to determining whether the purchase of any equipment or device or the hiring of readers or interpreters constitutes an undue hardship. The determination whether the proposed accommodations would cause an undue hardship depends on the number of employees employed by the person and is tied to state average weekly wage. The ADA does not adopt a formula approach to proving undue hardship. Authority - MCL 37.1210(1); *Hall* v *Hackley Hosp,* 210 Mich App 48; 532 NW2d 893 (1995); 42 USC §12112(b)(5)(A); MCL 37.1210 (2)-(6),(8)-(12).

Under the MPDCRA, the burden of proving undue hardship falls on the employee. A "formula approach" places definitive limits on the costs which employers must expend to accommodate an individual under the MPDCRA. In addition, a person who employs fewer than 15 employees is not required to restructure a job or alter the schedule of employees as an accommodation. MCL 37.1210(14).

Differences in Construing "Mitigating Measures."

1. ADA General Rule.

Consistent with the legislative history, the EEOC's interpretative guidance and the overall remedial purpose of the ADA, most courts held prior to 1999 that the ADA protects applicants and employees from discrimination based on the individual's medical condition without regard to whether the limitations of the individual are controlled through medications, treatment, or other devices. However, in 1999 the U.S. Supreme Court held that where employees took blood pressure medication (*Murphy v. United Parcel Service, Inc.,* 527 U.S. 471 (1999)) and wore glasses (*Sutton v. United Air Lines, Inc*, 527 U.S. 471 (1999)) their medical conditions should be assessed with regard to whether the limitations of the individual are controlled through medications, treatment, or other devices.

2. MPDCRA General Rule.

The Michigan Supreme Court has held that impairments must be considered in their mitigated state, rejecting the EEOC interpretative guidance. Authority - *Chmielewski v Xermac, Inc,* 457 Mich 593; 580 NW2d 817 (1998) (in a 5-2 decision, trial court did not err in refusing to issue jury instruction that mitigating measures, such as medication, should not be considered in determining whether plaintiffs alcoholism constituted a handicap under the MHCRA (now MPDCRA)).

G. Individual Liability.

1. ADA General Rule.

The ADA does not provide for supervisor liability, only employer liability. Authority- *Wathen v. General Electric,* 115 F3d. 400, 404-404 n.6 (6th Cir. 1997); *Mason v. Stallings,* 82 F.3d 1007 (11th Cir. 1996); *EEOC v. AIC Sec. Investigations,* 55 F.3d 1276 (7th Cir.

1995); *Gruener v. Ohip Cas. Co.,* 416 F.Supp.2d 592, 603 (S.D. Ohio 2005); *Fish v. Ristvedt,* 192 F. Supp.2d 1024, 1028 (2002)*; Montez v. Romer,* 32 F.Supp.2d 1235 (D. Colo, 1999); *Meara v. Bennett,* 27 F.Supp.2d 288 (D. Mass.1998).

2. MPDCRA General Rule.

Under MPDCRA, an owner of a business or a member of management, arguably are "persons" within the meaning of the act, which is defined to include both an individual and an agent of the company. Authority - MCLA 37.1103(h), MSA 3.550(103)[h],

Although authority for imposing individual liability under the Michigan Act, is somewhat questionable, it may be advantageous to sue under that statute rather than the ADA in those cases where judgment against an individual officer or agent is possible.

H. Monetary Relief.

1. ADA General Rule.

Under the ADA, a plaintiff may recover compensatory and punitive damages in addition to any relief authorized by §706(g) of the Civil Rights Act of 1964. 42 USC 2000e-5(g). This additional relief may include injunctive relief, reinstatement with or without back pay, or any other equitable relief the court deems appropriate (e.g., front pay). A prevailing party in an ADA action may be entitled to reasonable attorney fees (including expert fees) as part of costs. The EEOC and the United States are not entitled to attorney fees. Authority - 42 USC §2000e-5(g), 42 USC §2000e-5(k).

The maximum amount of compensatory and punitive damages available under the ADA is $300,000. 42 USC §1981a (b)(3). The limits are lower depending on the size of the employer. *Id*.

MPDCRA General Rule.

The MPDCRA allows a person to bring a civil action for injunctive relief, damages, or both. Damages also include reasonable attorney fees. Punitive damages cannot be recovered under the Michigan Act. However, there is no limit on the amount of compensatory damages that can be obtained under the statute. Authority – MCL 37.1606.

Plaintiff's counsel might consider filing under the ADA if the facts of the case are particularly egregious, thereby warranting the imposition of punitive damages for reckless conduct on the part of the employer. On the other hand, a lawsuit under the Michigan Act might be a good strategy if the facts support a claim for compensatory damages, since Michigan law does not limit the amount of damages that may be awarded for pain and suffering. However, many plaintiff attorneys believe that a particularly egregious case still may be filed under the MPDCRA, and that instead of obtaining punitive damages, a large value for non-economic damages (e.g., pain and suffering) can be sought from the jury.

AFFORDABLE CARE ACT – DESTINATION UNKNOWN

By: Marc S. Wise, Esq.

I. INTRODUCTION

The election of a new president brings uncertainty to health care compliance. Prior to the election, President-elect Trump and the Republicans in Congress talked about the total repeal of the Affordable Care Act. Now that President Trump is in office and the Republicans control both houses of Congress, the political realities are setting in.

The government health care marketplace where individuals can purchase subsidized health insurance is imploding. Due to the high level of claims by many people in the health care marketplace along with the lack of healthy young people, the insurance companies are incurring large losses. In many areas in the country, there will be one or no insurance companies offering coverage on the government health care exchange. With the uncertainties of the future of the Affordable Care Act, there will be additional companies pulling out of the government health care marketplace.

2017 and 2018 will be big years for additional changes in health care. Where the final destination leads us is unknown at this time.

II. SUMMARY OF WASHINGTON HEALTH CARE IDEAS

The House of Representatives passed the American Health Care Act of 2017 (AHCA) on May 4, 2017. The AHCA is a budget reconciliation bill that is part of the 2017 federal budget process; this status means that it cannot be filibustered in the Senate and can thus pass the Senate with a simple majority of votes. It would repeal the parts of the Affordable Care Act within the scope of the federal budget, including provisions contained within the Internal Revenue Code and also modifications to the federal Medicaid program.

The Senate has indicated that it will write its own version of the bill instead of voting on the House version. Ultimately, the House version and the Senate version will go to a conference committee where members of the House and Senate will come up with a final version for each body to vote on.

A. House of Representatives - Major Features of the AHCA.

1. Income-based subsidies would be replaced by an age-based tax credit.

2. The individual and employer mandates, along with the penalties associated for not adhering to those mandates, would be repealed.

3. Medicaid expansion would be eliminated by the start of 2020, and Medicaid disbursements would be given on a per-capita basis to the states. The AHCA cuts the Medicaid program for low income people and lets states impose work requirements on Medicaid recipients. It changes Medicaid from an open ended program that covers beneficiaries' costs to one with fixed amounts of money annually.

4. Older adults could be charged five times as much as younger adults for monthly premiums. The Affordable Care Act only permits three times.

5. $108 billion would be set aside to create a risk-pool fund for sicker patients.

6. Insurers could tack on a 30% surcharge to the premiums of consumers who did not have continuous coverage in the previous year.

7. Health savings accounts could see their annual contribution limits nearly double.

8. The net investment income tax and Medicare surtax would be repealed.

9. Children would be allowed to stay on their parents' plans until age 26, the same as under Obamacare.

10. The Affordable Care Act's 10 essential health benefit provisions stay, but the MacArthur Amendment would allow states to apply for a waiver to be excluded from this mandate.

11. Most of the provisions in the House Bill, by their terms, affect the individual and small group health insurance markets

The version of the AHCA as passed by the House would not repeal all provisions of the Affordable Care Act. Even if the AHCA provided for a total repeal of the Affordable Care Act, the Senate would not have the 60 votes needed to override a filibuster by Senate Democrats. The version of the AHCA as passed by the House would allow Republicans in the Senate to use the Senate reconciliation process to pass the House version.

B. Senate Discussions on Health Care Reform.

A Senate proposal is now being developed by a 12-member working group. It will attempt to incorporate elements of the House bill, but will not take up the House bill as a starting point and change it through the amendment process.

As of June 1, 2017, the U.S. Senate has not released its proposed legislation relating to the AHCA. All we currently know is:

1. Senate Republicans said they will not vote on the House-passed AHCA, but will write their own legislation instead.

2. To proceed under Senate budget reconciliation procedures, which limit debate and amendments and allow for passage with a simple majority, the Senate bill must reduce the federal deficit for the years 2017 through 2026 by $2 billion. The Senate's bill must also be free of "extraneous" material that does not affect federal revenues or outlays. Although no particular timeline has been announced for any Senate legislation, September 30, 2017 is the likely deadline for passage since that is when the current federal fiscal year will end. Any opportunity to pass a new health care bill using a simple majority under the budget reconciliation rules would expire.

3. Some reports indicate Senate Republicans are weighing a two-step process to replace the Affordable Care Act that would postpone a partial repeal until 2020.

4. Reports also indicate that the Senate plan may first take action to stabilize premium costs in the Affordable Care Act's insurance-purchasing exchanges in 2018 and 2019.

5. The Senate plan is likely to continue subsidies that help low-income Americans with co-pays and deductibles.

6. Sometime in 2020 the Senate version would repeal various parts of the Affordable Care Act. A full repeal cannot occur without Senate Democrats also voting for the new law. This is an unlikely event. The law will have to be passed solely by the Republicans using reconciliation, a procedure used by the Senate Democrats in initially passing parts of the Affordable Care Act.

III. WHAT SHOULD EMPLOYERS/EMPLOYEES EXPECT?

A. Projected ACA Repeal Process and Timeline.

1. **May 4, 2017** – House Bill 1628 Passes – American Health Care Act of 2017.

2. **June 2017** – Senate will examine whether the AHCA (or its version) sets out the 6 requirements to meet the Senate reconciliation requirements to pass on a majority vote basis.

3. **June/July 2017** – Senate will negotiate its version of the AHCA bill and vote. This may require several attempts to pass.

4. **August 2017** – Congress goes on vacation.

5. **September 2017 through December 2017** – If the Senate passes its version of the AHCA it will go to a joint House/Senate Conference Committee to agree on a common bill.

6. **Sometime in 2018** – House and Senate vote on a combined bill.

With various transitional rules, expect effective dates for many provisions to occur in 2020 and later.

B. Employees who are currently receiving subsidies for health insurance on the government marketplace may lose all or a portion of the subsidies. Under House version, individuals would receive tax credits based on their ages. This may increase the cost of medical care for marketplace insurance. This may also decrease the cost differential of using the employer's health insurance.

C. Provisions of any new health care law will likely take some time to implement. It will take health insurance companies at least a year to get the approval of state legislators to make changes to health insurance policies offered in each state.

IV. WHAT SHOULD EMPLOYER BE DOING?

A. Employer Actions – ACA/AHCA.

1. Employers should continue with their normal open enrollments and compliance with the Affordable Care Act.

2. Employers should also start to look at the future. If the mandate for employers to provide health insurance is repealed, will employers drop health insurance for those non-full time employees who work 30 hours per week? Will the employers drop any subsidies for such insurance? What kind of employee backlash and negative employee relations are acceptable to the employer? Crunching the numbers now and analyzing the cost and benefits of maintaining the current program should be undertaken.

3. Repeal of the employer mandate gives employers more flexibility in deciding which employees should be eligible for coverage and how generous the coverage should be.

4. If states change the rules for their individual health insurance markets as the House Bill allows, inexpensive, narrow-scope plans could again become available. These types of health plans are attractive to healthier and younger people, particularly if employer coverage is more expensive. These employees could then return to the employer plan during open enrollment in a later year if they get sick and want broader coverage.

V. AHCA WILL NOT REMOVE ALL ACA REQUIREMENTS

A. ACA Section 1557 Requirements.

ACA Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age or disability in “health programs or activities”

any part of which receives federal financial assistance. It also applies to health program or activities administered by a federal executive agency (such as HHS) or any entity established under Title I of the ACA (including state-based Marketplaces).

B. Who is subject to Section 1557?

The Section 1557 regulations apply to any "health program or activity" any part of which receives "financial assistance" from HHS. A health program or activity is defined as the provision of health-related services, health-related insurance coverage or other health-related coverage and the provision of assistance to obtain such coverage. It also includes programs administered by HHS, including the Marketplace.

If an entity is principally engaged in the provision or administration of health services, health insurance or health coverage, all of the entity's operations are considered part of the health program or activity. Such entities would include health insurance issuers, hospitals and group health plans. HHS also defined "employee health programs," which is a subset of health programs or activities, as a group health plan, wellness program and/or employer-maintained onsite health clinic.

C. Does the rule apply to employers who sponsor or participate in group health plans or employee health benefit programs?

HHS views the employer who sponsors the plan separately from the plan or employee health benefit program it sponsors; however, there are three instances in which the employer entity itself can be liable for violations of Section 1557:

1. The entity is principally engaged in the provision or administration of health services.

2. The entity receives financial assistance from HHS and the primary purpose of the assistance is to fund an employee health benefit program. In that case, the employer's provision or administration of that employee health benefit plan would be subject to Section 1557.

3. The entity operates a health program or activity that receives HHS assistance but is not principally engaged in the provision of health services and has an employee health benefit program that does not receive HHS assistance. In this case, the employer is liable for a Section 1557 violation only for health benefits provided to employees who participate in the health program or activity that receives HHS assistance. For example, a state government may need to comply with Section 1557 for its employees who participate in the state Medicaid program (or another program that receives HHS funding) but would not be required to comply overall, and not for its health benefit plan for employees outside of the Medicaid (or other HHS-funded) operations.

The plan receives the retiree Part D (RDS) subsidy or is an employer group health waiver plan (EGWP).

The employer receives the retiree Part D (RDS) subsidy whose primary purpose is to fund a group health plan.

The employer that sponsors the health plan is an entity principally engaged in the provision of health services, health insurance or health coverage that maintains a health program or activity that receives HHS assistance. This would include hospitals and physician's offices.

D. Prohibitions.

Under Section 1557, a covered entity may not:

1. Segregate, delay or deny services or benefits based on an individual's race, color or national origin. For example:

    a. A covered entity may not assign patients to patient rooms based on race.

    b. A covered entity may not require a mother to disclose her citizenship or immigration status when she applies for health services for her eligible child.

    c. Delay or deny effective language assistance services to individuals with limited English proficiency (LEP).

2. The term "national origin" includes, but is not limited to, an individual's, or his or her ancestor's, place of origin (such as a country), or physical, cultural, or linguistic characteristics of a national origin group.

3. Section 1557 protects individuals in the United States, whether lawfully or not, who experience discrimination based on any of Section 1557's prohibited bases.

E. Requirements for communicating with individuals with limited English proficiency (LEP).

1. A covered entity must take reasonable steps to provide meaningful access to each individual with LEP eligible to be served or likely to be encountered in its health programs and activities. Reasonable steps may include the provision of language assistance services, such as oral language assistance or written translations.

2. A covered entity must publish taglines, which are short statements in non-English languages, in significant publications and post in prominent locations and on its website, to notify the

individual about the availability of language assistance services.

3. A covered entity must offer a qualified interpreter when oral interpretation is a reasonable step to provide an individual with meaningful access.

4. Where language services are required, they must be provided free of charge and in a timely manner.

5. A covered entity must adhere to certain quality standards in delivering language assistance services. For instance, a covered entity may not:

    a. Require an individual to provide his or her own interpreter.

    b. Rely on a minor child to interpret, except in a life threatening emergency where there is no qualified interpreter immediately available.

    c. Rely on interpreters that the individual prefers when there are competency, confidentiality or other concerns.

    d. Rely on unqualified bilingual or multilingual staff.

    e. Use low-quality video remote interpreting services.

F. Covered entities must:

1. Provide equal access to health care, health insurance coverage, and other health programs without discrimination based on sex, including pregnancy, gender identity, or sex stereotypes.

2. Treat individuals consistent with their gender identity, including with respect to access to facilities, such as bathrooms and patient rooms.

3. Health care providers cannot deny or limit sex-specific health services based solely on the fact that the gender identity or gender recorded for an individual does not align with the sex of individuals who usually receive those types of sex-specific services (e.g., denying a transgender male a pap smear or denying a transgender woman a prostate exam).

4. Sex specific programs are allowed only if a covered entity can show an exceedingly persuasive justification for the program. That means the sex specific nature of the program must be substantially related to an important health-related or scientific objective.

   For example, a breast cancer program cannot refuse to treat men with breast cancer solely because its female patients would feel uncomfortable.

G. Federal Enforcement.

The U.S. Department of Health and Human Services (HHS), Office for Civil Rights (OCR) enforces Section 1557 as to programs that receive funding from HHS.

When OCR finds violations, a covered entity will be required to take corrective actions, which may include revising policies and procedures, and implementing training and monitoring programs. Covered entities may also be required to pay compensatory damages.

When a covered entity refuses to take corrective actions, OCR may undertake proceedings to suspend or terminate Federal financial

assistance from HHS. OCR may also refer the matter to the U.S. Department of Justice for possible enforcement proceedings.

Section 1557 also provides individuals the right to sue covered entities in court for discrimination if the program or activity receives Federal financial assistance from HHS or is a State-based Marketplace.

H. Federal Court Injunction.

On December 31, 2016, the U.S. District Court for the Northern District of Texas issued a nationwide injunction in *Franciscan Alliance, Inc. v. Burwell*, N.D. Tex., No. 16-cv-108, holding that portions of the final rule issued by the HHS Office for Civil Rights (OCR), which sought to operationalize Section 1557 of the Affordable Care Act (ACA), violated the federal Administrative Procedures Act.

The court did not strike down the entire rule. Entities covered under Section 1557 will still be required to provide assurances and notices of nondiscrimination on the basis of sex. However, the Section 1557 protections against discrimination on the basis of gender identity or termination of pregnancy are subject to the nationwide injunction.

The court also found that Title IX of the Civil Rights Act of 1964, which is incorporated by ACA Section 1557 statute, only prohibits discrimination on the basis of biological sex. The court also noted that the government's own health insurance programs, Medicare and Medicaid, do not mandate coverage for transition surgeries. The court also noted that the military's health insurance program, TRICARE, specifically excludes coverage for transition surgeries.

I. What to Do?

Compliance with the transgender requirements of ACA Section 1557 are on hold due to the federal court injunction. All other requirements

are operational. OCR has already announced that it intends to enforce the rest of the rule, including "its important protections against discrimination on the basis of race, color, national origin, age, or disability and its provisions aimed at enhancing language assistance for people with limited English proficiency, as well as other sex discrimination provisions." OCR will also continue to enforce other requirements such as notice and taglines. Also, the HIPAA Notice of Privacy Practices for covered entities should still be updated to include additional language provided by HHS.

The injunction prohibits OCR from enforcing, for example, the transgender services requirements in the regulation, but would not prevent an individual from bringing a private lawsuit to enforce those requirements. As such, at least for the time being, issuers and plan sponsors should exercise caution in changing plan designs based on the decision.

The District Court's decision distinguished between sex discrimination under Title IX and sex discrimination under Title VII. This may be important to employers, because the Equal Employment Opportunity Commission ("EEOC") has taken the position that sex discrimination includes discrimination against transgender individuals under Title VII, which prohibits employers from discriminating, among other things, in the provision of fringe benefits (like health coverage).

VI. U.S. DEPARTMENT OF LABOR CLAIMS PROCEDURES

A. The U.S. Department of Labor ("DOL") has issued final regulations with respect to their claims and appeals procedures under ERISA for employee benefit plans providing disability benefits.

The final regulations apply to all disability benefit claims filed on or after January 1, 2018. ERISA plans providing disability benefits and

associated documentation (including any ERISA wrap plans, Code Section 125 cafeteria plans, and claims denial forms) should be reviewed and updated to ensure legal compliance with the requirements for claims filings beginning January 1, 2018.

B. Retirement Plans Must Also Comply.

Generally, all ERISA-covered plans that provide benefits conditioned upon a finding of disability must comply with the special rules for disability claims, including pension and 401(k) plans. However, if the disability benefits from the retirement plan are conditioned on a finding of disability by a party other than the retirement plan for that party's own purposes, then the special rules do not apply. For instance, if a pension plan relies on a disability determination made by the SSA or the employer's long-term disability plan, then the retirement plan need not observe the special rules for disability claims.

Funded or insured STD plans and nearly all long-term disability (LTD) plans will generally be subject to the new disability claims procedures. An insurance carrier is liable for following ERISA's claims procedures, but an employer will want some sort of contractual protection that the insurer will follow applicable law, including ERISA.

C. The final DOL regulations require:

1. Independence and Impartiality in Decision-making.

a. Plans must determine claims and appeals "in a manner designed to ensure independence and impartiality of the persons involved in making the benefit determination":

b. The regulations prohibit plans from "making decisions regarding hiring, compensation, termination, promotion, or other matters with respect to any individual (such as a

claims adjudicator or medical or vocational expert)" based on the likelihood that the individual will support the denial of benefits (note: the final regulations add vocational experts).

2. Improved Disclosure.

a. To help ensure reasoned explanations of a denial, the regulations require all notices of adverse benefit determination (claim or appeal level), to discuss and explain the basis for disagreeing with or not following:

i. The views presented by the health care professionals who treated the claimant and the vocational professionals who evaluated the claimant;

ii. The views of medical and vocational experts whose advice was obtained on behalf of the plan without regard to whether the advice was relied upon in making the benefit determination;

iii. The claimant's disability determination by the Social Security Administration ("SSA"), if presented by the claimant.

b. The regulations require disability benefit plans to include the following in adverse benefit determinations at the initial claim and appeal levels:

i. An explanation of the scientific or clinical judgment for any adverse benefit determination that is based on a medical necessity or experimental treatment or similar exclusion or

limit, applying the terms of the plan to the claimant's medical circumstances, or a statement that such explanation will be provided free of charge upon request;

ii. Either the specific internal rules, guidelines, protocols, standards or other similar criteria of the plan that were relied upon in making the adverse benefit determination, or a statement that such rules, guidelines, protocols, standards or other similar criteria of the plan do not exist; and

iii. A statement that the claimant is entitled to receive, upon request and free of charge, reasonable access to and copies of all documents, records, and other information relevant to the claim for benefits (note: the regulations currently in effect do not require this statement in initial claim denial notices).

3. Rights to Review and Respond to New Information or New Rationale Before Final Decision.

a. New Information. If a disability benefit plan, insurer or other person making the benefit determination considers, relies upon or generates new or additional evidence in connection with the review of a denied claim, the plan must provide the claimant, free of charge, with such new evidence as soon as possible and sufficiently in advance of the date on which the notice of adverse benefit determination is required to be provided to give the claimant a reasonable opportunity to respond prior to that date.

b. New or Different Rationale. If a disability benefit plan intends to issue an adverse benefit determination at the appeal level that is based on a new or additional rationale, the plan must provide the claimant, free of charge, with the rationale as soon as possible and sufficiently in advance of the date on which the notice of adverse benefit determination is required to give the claimant a reasonable opportunity to respond prior to that date.

4. Disclosure of Any Contractual Limitations Period in Denial Notices.

Existing claims regulations require denial notices to include a statement of the claimant's right to bring a civil action under ERISA Section 502(a) following an adverse benefit determination on review. To ensure that this statement is complete and not misleading, the regulations now require such denial notices to include a description of any applicable contractual limitations period and its expiration period, if any (for example, 1-year limitations period measured from the date of the adverse benefit determination on appeal that expires on January 4, 2018).

5. Deemed Exhaustion of Claims and Appeals Processes.

The final regulations allow a claimant to file a civil suit under ERISA Section 502(a) immediately without exhausting the plan's administrative procedures if the plan fails to comply with the claims review regulations, unless the violation is (i) de minimis; (ii) non-prejudicial; (iii) attributable to good cause or matters beyond the plan's control; (iv) in the context of an ongoing good faith exchange of information; and (v) not

reflective of a pattern or practice of non-compliance. The regulations further require a plan to provide a written explanation of the violation within 10 days upon a claimant's request, including a specific description of its bases, if any, for asserting that the violation should not cause the administrative remedies available under the plan to be deemed exhausted.

6. Retroactive Rescissions of Coverage Are Appealable. The regulations require a rescission of coverage that has a retroactive effect to be treated as an adverse benefit determination that triggers the claimant's right to file an appeal, except if the cancellation or discontinuance of coverage stems from a failure to timely pay required premiums or contributions towards the cost of coverage.

7. "Culturally and Linguistically Appropriate" Notices. Adopting the standards applicable to non-grandfathered health plans under the Affordable Care Act, the regulations require plans to provide notices in a "culturally and linguistically appropriate manner." This means that if a claimant's address is in a county where 10% or more of the population is literate only in the same non-English language as determined by guidance published by the United States Census Bureau (currently these are Chinese, Tagalog, Navajo and Spanish), any denial notice to the claimant must prominently disclose how to access the plan's language services in that non-English language. The plan must also provide a customer assistance process (such as a telephone hotline) with oral language services in the applicable non-English language (such as assistance with filing claims and appeals) and provide written notices translated in that non-English language upon request.

IT'S COMP-LICATED: TRICKY COMPENSATION ISSUES FOR EMPLOYERS

I. RISKS AND REWARDS WHEN UTILIZING INCENTIVE COMPENSATION

A. Rewards.

1. Motivation.
2. Increased sales or productivity.
3. Loyalty.
4. Increased employee job satisfaction.
5. Teamwork.
6. Increased investment in employer's success.
7. Retention of key employees.

B. Risks.

1. Setting effective metrics.
    a. Incentive compensation must be sufficient so as to motivate employees to increase productivity or meet objective goals.
    b. However, the bonus or compensation cannot be disproportionately large so as to completely offset the gains from the employee's performance.
2. Incentive compensation can promote the wrong behaviors.
    a. Employees can begin to put their own interests ahead of the interests of the employer.

b. Moreover, incentive compensation based on sales performance can lead to employees pushing ethical boundaries (i.e., Wells Fargo sales scandal, 2008 subprime mortgage crisis).

c. Employees may be more apt to engage in risky behavior with the possibility of a large monetary award.

3. Fairness.

a. Often times, the most talented employees are given the most difficult tasks, while weaker employees are given more mundane, rudimentary tasks which are easier to accomplish.

b. Not all employees are eligible to participate in incentive compensation programs.

c. Can cause resentment amongst team members.

4. Lack of clear, objective measures.

a. Objective measures are necessary to give clarity as to when employees are going to be rewarded.

b. Using subjective measures (i.e., improve communication skills, increase efficiency, be more of a team player) will likely lead to a dispute between the employer and the employee over whether or not an incentive compensation award has been earned.

c. Lack of clarity in metrics will likely lead to disputes between employers and employees over awards of incentive compensation.

d. If metrics are confusing, employees will be less likely to "buy in" and the plan will be ineffective.

5. Communicating expectations and monitoring progress.

a. Employers should communicate not only the "what" but more importantly the "why" and the "how" of the incentive compensation plan. Emphasis on the "why" will lead to employee investment in the employer's success.

b. Employers should have an effective tracking system so employees know where they stand in relation to their performance goals.

6. Incentive compensation may not lead to increased performance.

a. Some research shows that certain employees are motivated by things like competence, autonomy and connection with teammates. Offering financial rewards to such employees may not stimulate the behavior sought by the employer.

b. Employers may want to consider doing informal surveys of their employees to see if incentive compensation will promote the behaviors they desire.

II. MICHIGAN'S EQUAL PAY STANDARDS AND STATUTES

A. Elliott-Larsen Civil Rights Act (MCL Sec. 37.2202).

1. Employer is prohibited from discriminating against an individual with respect to compensation because of religion, race, color, national origin, age, sex, height, weight or marital status.

B. Workforce Opportunity Wage Act (MCL Sec. 408.423).

1. An employer having employees subject to this act shall not discriminate between employees within an establishment on the basis of sex by paying wages to employees in the establishment at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs, the performance of which requires equal skill, effort, and responsibility and that is performed under similar working conditions, except if the payment is made under one or more of the following: (a) a seniority system; (b) a merit system, (c) a system that measures earnings by quantity or quality of production; or (d) a differential based on a factor other than sex.

C. The Michigan Penal Code (MCL Sec. 750.556).

1. Any employer of labor in this state, employing both males and females, who shall discriminate in any way in the payment of wages as between sexes who are similarly employed, shall be guilty of a misdemeanor. No female shall be assigned any task disproportionate to her strength, nor shall she be employed in any place detrimental to her morals, her health or her potential capacity for motherhood. Any difference in wage rates based upon a factor other than sex shall not violate this section.

III. AVOIDING CLAIMS UNDER MICHIGAN SALES REPRESENTATIVE COMMISSION ACT ("SRCA")

A. Michigan Sales Representative Commission Act (MCL Sec. 600.2961).

1. Principal - A person who does either of the following: (a) manufactures, produces, imports, sells or distributes a product

in this state; or (b) contracts with a sales representative to solicit orders for or sell a product in this state.

2. Sales representative - A person who contracts with or is employed by a principal for the solicitation of orders or sale of goods and is paid, in whole or in part, by commission. Sales representative does not include a person who places an order or sale for a product on his or her own account for resale by that sales representative.

3. Commission - Compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the amount of orders or sales or as a percentage of the dollar amount of profits.

B. When are commissions due and payable?

1. If there is a contract, then the terms of the contract will dictate when commissions will be paid.

2. If there is no contract, the past practices between the principal and sales representative shall control or, if there are no past practices, the custom and usage prevalent in this state for the business that is the subject of the relationship between the parties.

3. All commissions that are due at the time of termination of a contract between a sales representative and principal shall be paid within 45 days after the date of termination. Commissions that become due after the termination date shall be paid within 45 days after the date on which the commissions became due.

C. What if principal fails to pay commissions?

1. Principal is liable for both of the following:

a. Actual damages caused by the failure to pay the commissions when due; and

b. If the principal is found to have intentionally failed to pay the commission when due, an amount equal to two times the amount of commissions due but not paid as required by this section or $100,000.00, whichever is less.

2. What constitutes “intentional” failure to pay a commission?

a. Does not require a showing of bad faith.

b. Only requires a showing that principal purposefully withheld the payment of a commission.

3. Attorneys’ Fees.

a. If a sales representative brings a cause of action pursuant to this section, the court shall award to the prevailing party reasonable attorneys’ fees and court costs.

D. Waiver of Rights.

1. A provision in a contract between a principal and a sales representative purporting to waive the sales representative’s rights under the act is void.

E. Oral agreements to pay commissions are also covered under the statute.

F. Can a principal set-off amounts owed by the sales representative against the commissions owed?

1. *Peters v. Gunnell*, 253 Mich App 211; 655 NW2d 382 (2002).

2. Principal must pursue amounts owed by sales representative by way of a separate action and cannot offset those amounts against commissions owed to the sales representative.

G. The “Procuring Cause Doctrine”.

1. An agent is entitled to commissions, even if he or she did not personally complete the sale, if his or her efforts were the procuring cause of the sale.

2. Applies only where the parties have not addressed the subject of post-termination commissions, and seeks to ensure that the manufacturer does not unfairly benefit from the opportunistic termination of a sales representative after he or she has procured a sale but before the sale is consummated.

H. Steps for employers to protect themselves from claims under the SRCA.

1. Avoid oral or “back of the napkin” agreements with sales representatives. Always have a written agreement that clearly sets forth the rights and responsibilities of both the employer and the sales representatives.

2. Things to consider in putting together a sales representative agreement:

a. What are the sale representative’s duties?

b. When are commissions earned and when they should be paid?

c. Is the sales representative compensated for completed customer “sales” or for customer “procurement”?

d. What constitutes grounds for termination of the agreement?

e. What happens after the sales representative is terminated by the employer?

f. Should the sales representative be subject to non-competition and non-solicitation provisions?

EMPLOYER CYBERSECURITY:

PROTECT YOUR COMPANY'S DATA AND TRADE SECRETS

WHAT I'M NOT COVERING

- ***External Threats.***
    - Phishing.
    - Malware / Spyware.
    - Ransomware.
    - Social engineering.
- ***My focus today.***
    - Internal fraud, theft, and destruction – employees and management.
    - Issue spotting.
    - Spot checking.
    - Resources.

WHICH HANDBOOK POLICIES MUST I IMPLEMENT NOW, BEFORE A DATA BREACH OCCURS?

Our current environment.

- Employee mobility.
- Electronic media and data.
- Information sharing.

- Business collaborations.
- 25% of data loss incidents in 2013 happened, not because of hacking, but because of human error.
- Another 14% were caused because of theft or loss of devices.

Association of Certified Fraud Examiners - 2015 Study on Occupational Fraud.

- $6.3 billion in losses over 2,410 fraud cases in 2015.
- 30% of fraud cases occur in small businesses.
- Over half of small businesses never recover losses caused by occupational fraud.

COMMUNICATION - Make clear in policies what constitutes "Employer Property"

- Baseline – sometimes it's truly unclear to an employee WHO owns an invention or emails. So you should spell it out in your policies and employee agreements.
- Sample provision.
    - All files, records, proposals, specifications, or other documents, and all electronically stored information, computer software, software applications, **EMAILS**, files, data bases, and the like relating to the business of the employer or which contain Proprietary Information, **whether prepared by me or otherwise coming into my possession**, shall remain the exclusive property of the employer. Upon the termination of my employment, for any reason, I will promptly deliver to the employer all such material in my possession, custody, or control.

- **THEFT VS DESTRUCTION of electronic data.**
    - It's property, but not like your typical property – employees can duplicate with relative ease, and without drawing attention.
    - But still damaging in multiple ways; interruptions, disclosure to competitors, use for own purposes and in competition.
    - If destroyed…
        - Business continuity problems.
        - Client/customer materials gone.
        - Violates record retention policies and requirements imposed by governmental entities.
    - If taken. . .
        - Strictly prohibit employee duplication or "backups."
        - Policies should spell out that the taking of electronic data, including emails, constitutes theft, and will be treated as theft.
        - Require return of all data upon termination of employment.

CONFIDENTIALITY/NON-DISCLOSURE AGREEMENT

- STATE SPECIFIC REQUIREMENTS.
- Non-Disclosure clauses
    - Applies to what? Proprietary information - broadly define for maximum protection.
    - Sunset provisions on non-disclosures – make **indefinite**.

- **Non-Solicitation Agreements.**
    - Customers.
    - Clients.
    - Vendors.
    - Employees.
    - Existing and Prospective.

WHAT ARE BEST TECHNOLOGY PRACTICES TO PREVENT AND ADDRESS DATA THEFT AND DESTRUCTION?

I. ***Prevention***

- Talk to your IT department, and consider consulting with an IT security expert and digital forensics firm ***before*** something goes sideways.
    - They can do a vulnerability test.
- **ISO 27001 Information Security Policy.**
    - The main purpose of the policy is that the top management defines what it wants to achieve with information security.
    - The second purpose is to create a document that the executives will find easy to understand, and with which they will be able to control everything that is happening within the ISMS – they don't need to know the details of, say, risk assessment, but they do need to know who is responsible for the ISMS, and what to expect from it.
- End-to-end encryption of data.
- Keep software up to date with all recent patches.

- Ensure access to data is only given to those who need it to perform their job responsibilities.

- **Ethics and Security Hotline or dedicated email account.**

    - Most fraud tips come from company hotlines; 50% of tips come from employees/co-workers.

    - Report suspicious employee activity.

    - Confidential.

    - Create a policy, but also foster a culture encouraging use.

    - For data and proprietary information violations, make sure the report is immediately routed to the pertinent person, e.g., a Security Director, IT Manager, Chief Security Officer.

- **Annual audits and certifications.**

    - Management oversight.

    - I certify that the Division has a Crisis Management and Business Continuity Plan and an annual test was conducted . . .

- **Employee off boarding.**

    - Revoke access: passwords, remote logins; email accounts, etc.

    - Replicate computer, laptop, and email account – then inspect. Give counter-example where client replicated but failed to inspect until two years later – and discovered employee suspiciously deleted emails over particular timeframes.

- Who is responsible for doing this? Coordinate IT and HR.

- **Business Continuity Plan (BCP) incorporating data breach policies.**

    - The BCP is a comprehensive document designed to ensure the business unit can continue operations in the event of significant business interruptions.

    - Do you have protocol for a serious data breach?

    - Complements and syncs with your Data Breach Response Plan?

II. ***Mitigation.***

- **Routine Backups, including email.**

- **Data Breach Response Plan.**

    - Breach notification to customers and governmental entities.

    - Companies that can swiftly conduct IT and computer forensics to figure out what happened.

    - How quickly does your DBRP allow you to return.

    - Data backup / system redundancy.

- **Cybersecurity Insurance for data breaches:**

    - What does it cover?

        - Intellectual Property insurance.

        - network security and privacy liability.

        - plaintiff lawsuits.

        - computer forensics investigations.
        - breach notification mailings.
        - regulatory defense, penalties and fines.
        - attorney fees.

- **General liability policy is no longer enough.**
    - It covers third-party claims of bodily injury or property damage, but the trend among insurance providers is to exclude electronic records and data.
- **Cookie-cutter policies do NOT work.**
- **Different industries have different kinds of risks –**
    - financial services.
    - health care.
    - retail.
- **What does it cost?**
    - Depends on size and industry, but many annual premiums range from $6,000 to $37,000.
    - KNOW WHAT YOU'RE BUYING.
    - Shop for a policy based on the limits, exclusions, and conditions, and less so on cost.

- **Exclusions.**
    - If a data breach happens, coverage will be denied for companies that failed to use their best efforts to install software updates or releases.
    - Disclosure of personally identifiable, confidential corporate, or personal health information due to $$$$$$$$$.
    - Claims brought by the government or regulators, including the Office of Civil Rights, the Department of Health and Human Services, and the Office of the Attorney General.
    - Negligent computer security and policies.
- Which brings us full circle: <u>have the right IT and employment policies</u>.

Cybersecurity insurance takeaways.

- Insurance is smart if you're smart about picking your policy.
- But it cannot repair your reputation.
- And no matter how good the coverage the loss IP and data, and related business interruptions, can be game-enders.
- Cyber insurance policy premiums are "not one size fits all", as premiums are factored on a company's industry, services, type of sensitive data stored/collected/processed, total number of PII/PHI records, data risks and exposures, computer and network security, privacy policies and procedures and annual gross revenue, and more.

HOW DO I WIELD THE NEW DEFEND TRADE SECRETS ACT TO PROTECT MY COMPANY?

- ***Why?***
    - Before passing the DTSA, much of the discussion in Congress centered on protecting U.S. businesses from trade secret misappropriation abroad.
    - Senate Judiciary Committee's Report - American losses due to trade secret theft exceed $300 billion and 2.1 million jobs annually. S. Rep. 114-220 (2016).
    - The report concludes with the observation that "[a]s trade secret owners increasingly face threats from both at home and abroad, the [DSTA] equips them with the tools they need to effectively protect their intellectual property and ensures continued growth and innovation in the American economy." Id.
- ***What?***

    Protects TRADE SECRETS – as title might suggest—from MISAPPRO-PRIATION.

    What is a trade secret?

    1. Secrecy (not generally known or readily ascertainable)
    2. Derives independent economic value from not being generally known or readily ascertainable by others.
    3. Subject to reasonable efforts to maintain secrecy.

What is misappropriation?

1. Wrongful *acquisition.*

2. Wrongful *disclosure.*

3. Wrongful *use.*

So What?

- Actual Damages PLUS taking whatever money the employee (or competitor) made from the trade secret.
- Multiply the above by two, in essence DOUBLE damages as a penalty ("exemplary damages").
- ATTORNEY FEE'S & The American Rule.
- Before, no federal civil cause of action available to private litigants for trade secrets misappropriation.
- Unless diversity jurisdiction, or some other federal issue, like a patent lawsuit, there was no way to get into federal courts for trade secret misappropriation.
- You get access to federal courts and judges – speak to in-house; some people prefer, and it's always nice to have options.

What you need to do to ensure DTSA is available to you

- DTSA Whistleblower Immunity.
- Immunity from liability and prosecution for trade secret misappropriation under specified conditions.
- Ability of employee to disclose trade secrets in retaliation action under specified conditions.

- NOTICE REQUIREMENT and consequences.

- Employers must provide employees notice of the new immunity provision in “any contract or agreement with an employee that governs the use of a trade secret or other confidential information.”

- Notice requirement met if employer provides a “cross-reference” to a policy given to the relevant employees that lays out the reporting policy for suspected violations of law.

- IF NO NOTICE, EMPLOYER MAY NOT RECOVER EXEMPLARY DAMAGES OR ATTORNEY FEES IN AN ACTION AGAINST AN EMPLOYEE TO WHOM NO NOTICE WAS EVER PROVIDED.

- Definition of employee includes contractor and consultants.

- SAMPLE PROVISION for your handbook or non-disclosure/confidentiality agreement:

> The Defend Trade Secrets Act of 2016 (“DTSA”) provides that an individual shall not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made (i) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney, and solely for the purpose of reporting or investigating a suspected violation of law; or (ii) in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal. In addition, the DTSA provides that an individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual (i) files any document containing the trade secret under

seal; and (ii) does not disclose the trade secret, except pursuant to court order.

Computer Fraud and Abuse Act.

- Federal cause of action that sometimes applies where the DTSA does not, e.g., when an employee destroys work emails that do not rise to level of Trade Secret.

- Example of successfully using the CFAA: in International Airport Centers, L.L.C. v. Citrin (2006), defendant Citrin deleted files from his company computer before he quit, in order to conceal alleged bad behavior while he was an employee. Court authorized employer to proceed against Citrin on CFAA theory.

Recap Table

Item	Do I have?
Data Breach Response Plan?	
Business Continuity Plan?	
Data Breach Insurance?	
Automated Backups?	
Offboarding procedures that include replication and review of electronic devices?	
DTSA Whistleblower Immunity clause to ensure you can recover double damages and attorney fees?	
Confidentiality/non-disclosure agreement?	
Non-solicit agreement?	
Handbook clearly define what is “employer property” – including data and emails?	

EMPLOYEE HANDBOOK POLICIES:
THE IMPORTANCE OF REGULAR UPDATES AND TRAINING

By: Kaitlin A. Brown, Esq.

I. PURPOSE OF EMPLOYEE HANDBOOK

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

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

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

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

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

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

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

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

II. POLICIES THAT EXPAND AN EMPLOYER'S POTENTIAL LIABILITY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[7] MCL 445.84.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. POLICIES THAT REDUCE AN EMPLOYER'S POTENTIAL LIABILITY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. TRAINING EMPLOYEES AND MANAGEMENT ABOUT COMPLIANCE AND ENFORCEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[63] Employer-Provided Leave and the Americans with Disabilities Act, EEOC publication (May 9, 2016), *available at https ://www .e eoc . gov /eeoc/publications/ada-leave . cfm.*

[64] Michigan Medical Marihuana Act.

[65] *Collette v. Stein–Mart, Inc.*, 126 Fed.Appx. 678, 686 (6th Cir. 2005) (quoting *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001).

[66] *Id*. (quoting *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001).

[67] MCL 423.501(c).