IMPORTANT LEGAL UPDATES ON DISCRIMINATION CLAIMS

I. LEARNING OBJECTIVES

A. Understand legal versus illegal discrimination.

B. Discuss litigation trends/unintentional violations.

C. Identify strategies to reduce liability.

II. WHAT SHOULD YOU KNOW ABOUT DISCRIMINATION?

A. Most discrimination is legal. Engaging in discrimination is not as bad as it sounds. Employers should discriminate to:

1. Determine the best candidate for the job;

2. Identify who has the most growth or management potential; and

3. Evaluate the top performer.

B. Illegal discrimination.

1. Disability, race, religion, age, national origin, gender, sex, marital status, veteran status, genetic information, height, weight, misdemeanor arrest record or any other legally protected status.

2. Unconscious discrimination. Intent is not required. For example, changing interview questions based on stereotypes is improper. For example, don't only ask a man softball interview questions about sports. *EEOC v. Abercrombie and Fitch Stores, Inc.* An employer may not assume an applicant's religious practice prevents the performance of an essential job function.

3. LGBT. Although “sexual orientation” is not specifically identified as a protected class, the EEOC is taking the position that the protected class of “sex discrimination” also includes “sexual orientation.” The argument is summarized as follows: If an employee tells a lesbian employee that “I want to turn you back into a woman”, “you would look good in a dress”, or makes anti-gay epithets; that could mean that a woman is being discriminated against based on her “sex” because she is not conforming to the stereotypes of her sex. Stated another way, the EEOC argues that sexual orientation is a concept that is not understood without reference to sex. Another argument is that sexual orientation discrimination punishes employees that may have a close personal or marital association with members of a particular sex. The EEOC has made coverage of lesbian, gay, bisexual and transgender (“LGBT”) individuals under Title VII’s sex discrimination provisions one of its priorities identified in its Strategic Enforcement Plan. Likewise, many City Ordinances in Michigan already prohibit LGBT discrimination. Regardless of legal protections, employers should also consider how negative social media relating to LGBT discrimination could hurt business.

4. Religion. Employers should be cognizant that co-workers who do not support LGBT employees may argue that they were merely expressing sincerely held religious beliefs. Therefore, employers should also consider the possibility of being exposed to a religious discrimination claim before taking adverse action against an employee that is expressing such beliefs. Before dismissing rights of LGBT employees or exposing your company to religious discrimination claims by taking adverse action against an employee who does not support LGBT rights, employers should consult with an experienced employment attorney to confirm compliance with State/Federal laws, ordinances, and best practices.

5. Bathrooms. The Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) requires all employers under its jurisdiction to provide employees with sanitary and available toilet facilities. A Guide was recently issued by OSHA with its core principle stating: "All employees, including transgender employees, should have access to restrooms that correspond to their gender identity." Below is a sample policy:

> Consistent with the OSHA Guidelines, we respect diversity and acknowledge rights of transgender individuals to utilize the restroom that corresponds to their gender identity. Inquiries should not be made regarding an individual's gender or status of transition. Individuals should be free to decide which restroom corresponds with their full-time gender presentation. If another individual expresses a concern about sharing a restroom with transgender individuals, such individual should be directed to a separate or gender neutral restroom, if available. Denial of access to the appropriate bathroom for transgender individuals may expose the company to sex discrimination claims and/or liability for violating city/county ordinances.

C. Pretext Versus Honest Belief Rule.

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

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

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

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

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

D. Bona Fide Occupational Qualification.

1. Title VII permits an employer to discriminate on the basis of "religion, sex, or national origin in those instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise." 42 USC 2000e-2.

2. Also applies to age discrimination under the Age Discrimination in Employment Act (ADEA). 29 USC 623(f)(1).

3. Race can NEVER be the basis for a bona fide occupational qualification.

E. Americans with Disabilities Act.

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

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

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

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

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

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

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

5. Safety defense.

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

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

6. Reasonable accommodations.

i. Engage in the interactive process.

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

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

7. Associational Discrimination.

i. Expense (cost of insuring).

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

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

AFFORDABLE CARE ACT – DOCUMENTING HEALTH CARE COMPLIANCE - 2016

By Marc S. Wise, Esq.

I. INTRODUCTION

While many employers were focusing their efforts on avoiding the pay or play penalties contained in the Patient Protection and Affordable Care Act ("ACA") in 2015, they may have missed many of the other requirements for maintaining a group health plan. Substantial documentation is required for group health plans under the Internal Revenue Code and the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), in addition to the requirements under the ACA.

II. PLAN DOCUMENTATION AND DISCLOSURE REQUIREMENTS

A. ERISA Plan Requirements.

1. ERISA Section 402 – Establishment of Plan.

a. Named fiduciaries.

Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

b. Requisite features of a plan.

Every employee benefit plan shall (1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the

plan and the requirements of this subchapter, (2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan, (3) provide a procedure for amending such plan and for identifying the persons who have authority to amend the plan, and (4) specify the basis on which payments are made to and from the plan.

B. What is an Employee Benefit Plan?

ERISA Section 3 provides that the terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which is established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act of 1947 (Taft Hartley), other than pensions on retirement or death, and insurance to provide such pensions.

C. Written Plan Requirements.

1. The written plan requirement is intended to enable the employees to determine their rights and responsibilities under the plan and to discover who is responsible for operating the plan.

    a. More than one document – A health and welfare plan can consist of more than one document.

i. Insurance company brochure to employees combined with the insurance policy and other documents can constitute the plan for purposes of ERISA.

ii. Wrap Plan Documents.

(A) Wrap plan document. A wrap plan typically “wraps” together the various welfare benefit plans of the employer into a single plan document. While the wrap plan document generally does not define plan terms or lay out plan benefits, it does provide the important documentation required under ERISA. Elements of the wrap plan usually include detailing who the participating employers are, who pays the cost of plan benefits, which employees are eligible, a claims procedure, language giving the plan sponsor and its delegates the power to amend or terminate the plan and to interpret the plan’s terms, plan administration rules, and other ERISA requirements.

(B) Multiple wrap plan documents. Some employers choose to insure certain welfare plans and self-fund others, often through a voluntary employees beneficiary association (“VEBA”). Such an employer might choose to sponsor two separate wrap plans – one for the insured

component plans, and another for the self-funded component plans funded through the VEBA. The reason for having two wrap plans is that only self-funded welfare plans funded through VEBAs or other funding arrangements are subject to the U.S. Department of Labor's audit requirement. By having two wrap plans, the time and expense of the audit will only apply to the VEBA.

iii. Summary Plan Description ("SPD") as plan document.

Some employers take the approach that the SPD, intended in ERISA to be a shorter, easier-to-understand version of the formal written document, is in fact also the plan document. Although this approach eliminates the need to maintain a separate plan document, it raises issues in its own right, such as whether there needs to be a formal process in place for adopting and amending the SPD, and whether the plan document provisions can be written in plain, understandable language that satisfies the SPD requirements.

D. Fringe benefits and "payroll practices."

While most of the welfare benefit programs are covered by ERISA, some fringe benefits, such as short-term disability, sick leave plans, and severance programs, fall in a gray area. It is often unclear

whether they are just “payroll practices,” which are not subject to ERISA, or whether they are ERISA-covered welfare plans.

The answer may depend in part on how the employer treats the benefits. We would suggest that the benefits be treated as ERISA covered benefits. Typically, it will be to the employer's advantage to have the plan covered by ERISA since the rules that have developed under ERISA are generally more favorable to plan sponsors than the rules that exist under state law. Therefore, employers should take steps to increase the likelihood of ERISA treatment – including asserting ERISA coverage of the plan in the plan document and SPD, complying with the form and filing requirements of ERISA (Form 5500, SPD requirements, claims procedures, etc.) and associating the plan with an insured plan (for example, combining short-term disability with your long-term disability plan) to the extent possible.

Payroll practices. For purposes of ERISA, the terms "employee welfare benefit plan" and "welfare plan" do not include:

1. Payment by an employer of compensation on account of work performed by an employee, including overtime pay, shift premiums, holiday premiums, weekend premiums;

2. Payment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment); and

3. Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his

or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for reasons such as vacation or holidays, to an employee who is absent while on active military duty, while an employee is absent for the purpose of serving as a juror or testifying in official proceedings, while engaged in training (whether or not subsidized in whole or in part by federal, state or local government funds), and to an employee who is relieved of duties while on sabbatical leave or while pursuing further education.

4. On-premises facilities are excluded from ERISA welfare plan coverage. Such facilities would include recreation, dining or other facilities (other than day care centers) for use by employees or members, the maintenance on the premises of an employer of facilities for the treatment of minor injuries or illness or rendering first aid in case of accidents occurring during working hours, and holiday gifts.

5. Voluntary group or group-type insurance programs. For purposes of ERISA, the terms "employee welfare benefit plan" and "welfare plan" do not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which

   a. No contributions are made by an employer or employee organization;

   b. Participation the program is completely voluntary for employees or members;

   c. The sole functions of the employer or employee organization with respect to the program are, without

endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues check-offs and to remit them to the insurer; and

d. The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues check offs.

III. LACK OF A WRITTEN PLAN

A. Although lack of written plan terms may seem to allow employers greater discretion in paying benefits, the absence of a written plan may actually restrict the employer's ability to amend or terminate a welfare benefit plan.

Numerous cases have found that where an employer handles its welfare benefits on an informal basis, the employer's past practices provide the basis on which employees may make a claim for the same benefits.

This type of claim rests on the premise that the employer's past practices have established an ERISA plan, and that the benefit levels previously paid by the employer must be paid to the terminated employees now claiming benefits because the employer has not reserved the express right to reduce them.

In addition, a written plan allows the employer to determine what benefits, if any, would be payable upon a specified event, such as a corporate sale, divestiture of a unit, restructuring, or a lay-off. Having a plan document also allows an employer to grant the plan

administrator or other plan fiduciaries the discretion to make all eligibility and benefit determinations, enabling the employer to have the benefit of deferential review of those determinations in the event of a lawsuit. If the discretion to grant or deny the benefit is not expressly stated in a written plan, then the employer may be left with a court determining what the benefits are.

B. Information Required to be Included in the SPD.

U.S. Department of Labor Regulation 29 CFR 2520.104b-2 provides that the Plan Administrator shall furnish a copy of the SPD and a statement of ERISA rights to each participant covered under the plan. Under 29 CFR 2520.102-3 and the requirements under HIPAA, a health and welfare plan SPD must contain directly or in combination with other documents the following information:

1. Official name of the plan;

2. Name, address and phone number of the plan sponsor;

3. Name, address and phone number of the plan administrator;

4. Employer Identification Number;

5. Plan number (e.g. 501);

6. Type of welfare plan (hospitalization, disability, etc.);

7. Type of administration of the plan (e.g. contract administration, etc.);

8. Name and address of the insurer(s), health service organization(s) or third party organization(s) responsible for the financing or administration of the plan;

9. Name of person designated as agent for service of legal process, address at which process may be served, and a statement that service of legal process may also be made upon a plan trustee (as applicable) or the plan administrator;

10. The plan's requirements respecting eligibility for participation and for benefits. The SPD shall also include a description or summary of the benefits;

11. The SPD must include directly or in combination with other documents, a description of:

    a. any cost-sharing provisions, including premiums, deductibles, coinsurance, and co-payment amounts for which the participant or beneficiary will be responsible;

    b. any annual or lifetime caps or other limits on benefits under the plan;

    c. the extent to which preventive services are covered under the plan;

    d. whether, and under what circumstances, existing and new drugs are covered under the plan;

    e. whether, and under what circumstances, coverage is provided for medical tests, devices and procedures;

    f. provisions governing the use of network providers, the composition of the provider network, and whether, and under what circumstances, coverage is provided for out-of-network services;

    g. any conditions or limits on the selection of primary care providers or providers of specialty medical care; and

h. any conditions or limits applicable to obtaining emergency medical care; and any provisions requiring pre-authorizations or utilization review as a condition to obtaining a benefit or service under the plan.

12. In the case of plans with provider networks, the listing of providers may be furnished as a separate document that accompanies the plan's SPD, provided that the SPD contains a general description of the provider network and provided further that the SPD contains a statement that provider lists are furnished automatically, without charge, as a separate document;

13. Description of relevant provisions of any collective bargaining agreement (as applicable);

14. A statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction, or recovery (e.g., by exercise of subrogation or reimbursement rights) of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits;

15. A summary of any plan provisions governing the authority of the plan sponsors or others to terminate the plan or amend or eliminate benefits under the plan and the circumstances, if any, under which the plan may be terminated or benefits may be amended or eliminated;

16. A summary of any plan provisions governing the benefits, rights and obligations of participants and beneficiaries under the plan on termination of the plan or amendment or elimination of benefits under the plan, and a summary of any plan provisions

governing the allocation and disposition of assets of the plan upon termination;

17. In the case of a group health plan subject to COBRA, a description of the rights and obligations of participants and beneficiaries with respect to continuation coverage, including, among other things, information concerning qualifying events and qualified beneficiaries, premiums, notice and election requirements and procedures, and duration of coverage;

18. Source of contributions to the plan (employer and employee contributions);

19. Source of plan financing (insured, self-insured with no stop loss, etc.);

20. Date of the end of the plan year and whether plan records are kept on calendar, policy or fiscal year basis;

21. Qualified medical child support order procedure (or a statement indication where a participant can obtain a copy of a procedure) at no charge;

22. Statement of ERISA Rights;

23. Notice of Rights under the Newborn's and Mother's Health Protection Act;

24. Women’s Health and Cancer Rights Act Notice;

25. Uniformed Services Employment and Reemployment Rights Act (USERRA) Notice;

26. Family Medical Leave Act (FMLA) Notice;

27. ERISA Claims and Appeals Procedure;

28. HIPAA Pre-Existing Condition Disclosure; and

29. HIPAA Special Enrollment Rights Notice.

C. We Pay Our Health Insurance Company Hundreds of Thousands of Dollars Each Year – Doesn't the health insurer make sure we are in compliance with ERISA?

1. The obligation to comply with the ERISA disclosure requirements and the corresponding liability belongs to the employer. Third parties, including insurance companies, health maintenance organizations and insurance consultants are not eager to share in this liability.

a. Section 10 of the Blue Cross Blue Shield of Michigan Group Enrollment and Coverage Agreement imposes on the group (the employer) the responsibilities for complying with ERISA, preparing and distributing the SPD, and advising all eligible employees of the benefits available and of any changes in benefits, the termination of coverage and the COBRA rights of the employees.

i. Blue Cross Blue Shield "Your Benefits Guide" does not meet the SPD requirements set out above.

ii. Some insurance consultants are assisting employers with SPDs for clients. These documents should be read carefully before distributing them to the employees.

IV. PARTICIPANT DISCLOSURES

Section 102 of ERISA provides that a SPD of any employee pension plan and welfare plan must be furnished to participants and beneficiaries.

A. The SPD must include certain required information, must be written in a manner calculated to be understood by the average plan participant, and must be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.

Time of Distribution of SPD. New plan participants must receive a SPD within 90 days of first becoming eligible to participate, or if earlier, when first receiving benefits. If no changes are made to a plan, a new SPD must be provided every 10 years. If changes are made to the plan, a new document must be provided once every 5 years. Since employers change their welfare plans on a frequent basis, especially their health care plans, most employers will need to reissue the SPD every 5 years.

B. A summary of any material modification in the terms of the plan ("SMM") and any change in the information required to be included in the SPD must be written in a manner calculated to be understood by the average plan participant.

1. Time of Distribution of SMM. A SMM must be provided within 210 days after close of the plan year in which a change is effective.

2. Special Rule for Health Care Plans. If the material modification is to the health plan and the change is a reduction in covered benefits, the SMM must be distributed within 60 days of the adoption of the change. ERISA 104(b)(1).

V. EMPLOYEE NOTIFICATION REQUIREMENTS

A. Health Care Notifications.

1. Summary of Benefits and Coverage.

The ACA mandated a new plan document called a Summary of Benefits and Coverage ("SBC"). Distribution of the SBC was required effective as of the first enrollment period beginning on or after September 23, 2012, and includes strict timeframes for the generation and distribution of the SBC — penalties apply for noncompliance.

On April 20, 2016, the Centers for Medicare and Medicaid Services (CMS) posted the final 2017 SBC template and sample completed SBC, along with group plan SBC instructions and an updated uniform glossary of health coverage and medical terms, now expanded by two pages.

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

a. Plans Covered. Government regulations provide that the SBC requirements apply to the following types of plans:

    i. Self-funded and insured medical plans.

    ii. Individual plans.

    iii. Limited benefit plans.

    iv. Student health insurance.

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

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

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

b. Who needs to provide the SBC?

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

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

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

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

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

c. When must SBCs be provided?

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

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

The SBC is now part of the annual enrollment processes going forward.

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

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

ii. If there are changes to the SBC - no later than the first day of coverage.

iii. HIPAA special enrollees - no later than 90 days following enrollment. This time period is

coordinated with the requirement for providing the group health plan SPD.

iv. Early delivery required upon enrollee's request.

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

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

vi. Upon request – no later than seven business days.

d. What if plan coverage is materially modified (change to coverage that would be considered by the average plan participant to be an important change)?

i. ERISA requires participant notice to be provided within 60 days after a material reduction in benefits. Notice must be provided within 210 days after adoption of any other amendment.

ii. The SBC requirements impose an advance notice of material modifications if the material modification to the plan affects SBC content, and the modification occurs other than in connection with renewal (new enrollment period).

iii. The timing of the notice depends upon the effective date of the material modification. If a material modification is effective as of the first day of the plan year, the SBC to be provided in connection with the open enrollment preceding the effective date must reflect the modification.

iv. If a material modification is effective during the plan year, the notice of the material modification (or updated SBC) must be distributed at least 60 days before the change takes effect.

2. Grandfather Notice.

Summary of Grandfather Rules.

Group health plans that were in existence as of March 23, 2010 that meet the new grandfathering rules do not need to comply with many of the new health insurance reforms. These health plans are referred to as "grandfathered plans" under the HCA. This protection remains even when new employees or family members are added to the health plan.

a. Most health plans will lose the grandfather status and will be subject to the full rules of the HCA.

b. Disclosure Requirements. In order to maintain grandfather status, a plan or health insurance coverage must include a statement in any plan materials provided to participants that the plan believes it is a grandfathered health plan and must provide contact information for questions (and complaints). This required disclosure is required to be provided for each plan year following the effective date of the ACA (March 23, 2010).

Most materials from insurance companies and insurance agents for fully-insured plans do not include this required language.

c. Model Grandfather Notice. The DOL has provided the following model grandfather notice that can be used, as modified, for compliance with the ACA employer-sponsored health plans:

This [group health plan or health insurance issuer] believes this [plan or coverage] is a "grandfathered health plan" under the Patient Protection and Affordable Care Act (the Affordable Care Act). As permitted by the Affordable Care Act, a grandfathered health plan can preserve certain basic health coverage that was already in effect when that law was enacted. Being a grandfathered health plan means that your [plan or policy] may not include certain consumer protections of the Affordable Care Act that apply to other plans, for example, the requirement for the provision of preventive health services without any cost sharing. However, grandfathered health plans must comply with certain other consumer protections in the Affordable Care Act, for example, the elimination of lifetime limits on benefits.

Questions regarding which protections apply and which protections do not apply to a grandfathered health plan and what might cause a plan to change from grandfathered health plan status can be directed to the plan administrator at [insert contact information]. You may also contact the Employee Benefits Security Administration, U.S. Department of Labor at 1-866-444-3272 or www.dol.gov/ebsa/healthreform. This website has a table summarizing which protections do and do not apply to grandfathered health plans.

d. Substantiation Requirements. For as long as a plan or insurance carrier takes the position that the plan or

coverage is grandfathered, the following records must be maintained:

i. Records documenting the terms of the plan or health insurance coverage in effect on March 23, 2010; and

ii. Any documents necessary to support the status as a grandfathered plan (for example, a copy of a legally binding contract in effect on March 23, 2010).

These documents must be made available for examination by participants, beneficiaries, individual policy subscribers and federal agency officials.

e. Likelihood of Maintaining Grandfather Status. The Preamble to the Grandfather Regulations indicates that the government expects up to 80% of small plans and up to 64% of large plans to lose their grandfathered status. Due to the loss of flexibility in benefit design and well as mandates by insurance companies for fully insured plans, these percentages will likely be much higher.

f. U.S. Department of Labor ("DOL") Health Care Investigations. We have assisted a number of clients over the past few years with DOL health care investigations. The level of documentation that must be provided to the DOL is extensive.

The level of scrutiny and documentation required is magnified if the plan sponsor is claiming grandfather status.

3. 60 Day Advance Notice. The ACA requires plans and issuers to provide at least 60 days' advance notice of any material modification in plan terms or coverage that are not described in the most recent SBC. The DOL regulations offer additional guidance on when plans and issuers must provide the 60-day advance notice to enrollees.

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

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

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

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

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

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

   b. Guidance on Material Modifications. The regulations describe a "material modification" as any change to a plan's coverage that independently, or in connection with other changes taking place at the same time, would be

considered by the average plan participant to be an important change in covered benefits or other terms of coverage.

A material modification may include:

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

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

4. Insurance Exchange.

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

This new disclosure requirement is generally effective for employers beginning on March 1, 2013. Employees hired on or after the effective date must be provided the Notice of Exchange at the time of hiring. Employees employed on the effective date must be provided the Notice of Exchange no later than the effective date (i.e., no later than March 1, 2013).

Regulations implementing the Notice of Exchange requirement will be issued by the Secretary of Labor.

VI. DISCLOSURE THROUGH ELECTRONIC MEDIA

The DOL regulations provide that the administrator of an employee benefit plan furnishing documents through electronic media is deemed to satisfy its disclosure requirements if the following apply:

A. The administrator takes appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents:

1. Results in actual receipt of transmitted information (by using return-receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of the transmitted information);

2. Protects the confidentiality of personal information relating to the individual's accounts and benefits (incorporating into the system measures designed to preclude unauthorized receipt of or access to such information by individuals other than the individual for whom the information is intended);

3. Notice is provided to each participant, beneficiary or other individual, in electronic or non-electronic form, at the time a document is furnished electronically, that informs the individual of the significance of the document when it is not otherwise reasonably evident as transmitted (e.g., the attached document describes changes in the benefits provided by your plan) and the right to request and obtain a paper version of such documents; and

4. Upon request, the participant, beneficiary or other individual is furnished a paper version of the electronically furnished documents.

B. Participants Who May Receive Electronic Disclosure.

1. Employees with work-related computer access. ERISA disclosures may be delivered electronically to employees that have the ability to effectively access documents furnished in electronic form at any location where the employee is reasonably expected to perform his or her duties, and such employees who have such access to the plan sponsor's electronic information system is an intricate part of such duties.

It should be noted that merely providing employees access to a computer in a common area is not a permissible means by which to deliver documents required to be furnished to plan participant.

2. For beneficiaries and other plan participants who do not have work-related computer access, electronic distribution may not be provided without the consent of such participant. The consent may be provided in either electronic or paper form. The consent must include the clear and conspicuous statement that explains:

a. The types of documents to which the consent will apply;

b. That the consent can be withdrawn at any time without charge;

c. The procedures for withdrawing consent and for updating the participant's, beneficiary's or other

individual's address for receipt of electronically furnished documents or other information; and

d. The right to request and obtain a paper version of an electronically furnished document, including whether the paper version will be provided free of charge;

VII. FILING REQUIREMENTS FOR HEALTH AND WELFARE BENEFIT PLANS

A. General Information. U.S. Department of Labor ("DOL") regulations require an employer that sponsors certain health and welfare benefit plans covering 100 or more employees to file a Form 5500 for each plan.

Note: The failure to timely file the Form 5500 can cause the imposition of penalties of up to $1,100.00 for each day the filing is late.

B. Welfare Benefit Plans. A welfare benefit plan is defined by the DOL as:

Any plan providing medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services. 29 CFR §2510.3-1(a)(2).

Basically, the employee benefits that most businesses have that are welfare benefits plans are:

1. Health insurance benefits;

2. Dental insurance benefits;

3. Vision benefits;

4. Short-term disability benefits;

5. Long-term disability benefits;

6. Life insurance; and

7. Accidental death & dismemberment.

C. Annual Reporting Requirements.

1. General Requirements.

Plan administrators are generally required to file an annual report for each plan subject to Title I of ERISA. Plan administrators satisfy this filing requirement by filing the appropriate Form 5500 with the DOL's Employee Benefits Security Administration. There are exceptions to this general rule for certain welfare benefit plans that are unfunded or funded solely with insurance and have fewer than 100 participants at the beginning of the plan year.

2. Timing.

A plan's annual report must be filed for each plan year by the last day of the seventh month after the close of the plan's plan year. An extension of up to two and one-half months may be obtained by filing a request (Form 5558) with the DOL before the expiration of the seven-month period.

3. Exception for Small Welfare Plans.

Annual reports for unfunded welfare plans with fewer than 100 participants (determined as of the beginning of the plan year) are not required, provided that one of the following conditions is met:

a. Benefits under the plans are paid only from the general assets of the employer;

b. Benefits are provided exclusively through insurance policies the premiums for which are paid directly by the employer or employee organization from its general assets or from its general assets together with contributions from employees; or

c. Benefits are provided through a combination of insurance and the general assets of the employer or employee organization.

4. Sanctions for Failure to File.

The DOL may assess a civil penalty of up to $1,100 per day for failure to file an annual report. In practice, the DOL assesses penalties against non-filers of up to $300 per day until a complete annual return is filed. In addition, the DOL takes the position that it is not subject to a statute of limitations with respect to an unfiled annual report. To mitigate the penalties described in this section, a plan administrator that has not timely filed a Form 5500 may file such report under the DOL's Delinquent Filer Voluntary Compliance ("DFVC") program, which is further described below.

5. Use of a Wrap Plan to Minimize the Number of Forms 5500.

As opposed to filing a separate Form 5500 for each welfare plan that is subject to the reporting requirements, the plan sponsor can establish a "wrap" welfare plan. To create a single plan, the company would establish a plan that incorporates the various benefits or insurance policies into one comprehensive

plan document. This would allow the filing of a single Form 5500 going forward.

D. Delinquent Filer Voluntary Compliance ("DFVC") Program.

The Delinquent Filer Voluntary Compliance (DFVC) Program is designed to encourage voluntary compliance with the annual reporting requirements under ERISA. The DFVC Program gives delinquent plan administrators a way to avoid potentially higher civil penalty assessments by satisfying the program's requirements and voluntarily paying a reduced penalty amount.

1. Program Eligibility.

Eligibility for the DFVC Program is limited to plan administrators with filing obligations under Title I of ERISA who comply with the provisions of the program and who have not been notified in writing by the DOL of a failure to file a timely annual report under Title I of ERISA. For example, Form 5500-EZ filers are not eligible to participate in the DFVC Program because such plans are not subject to Title I of ERISA.

2 Program Criteria.

Participation in the DFVC Program is a two-part process. First, file with the Employee Benefit Security Administration ("EBSA") a complete Form 5500 Series Annual Return/Report, including all schedules and attachments, for each year relief is requested. To ensure proper processing, box "D" on the 5500 must be marked and a statement labeled "DFVC Program" must be attached. Special simplified rules apply to "top hat" plans and apprenticeship and training plans. Second, submit to

the DFVC Program a copy of the 5500, without the schedules and attachments, and the applicable penalty amount. The plan administrator is personally liable for the applicable penalty amount, and, therefore, amounts paid under the DFVC Program cannot not be paid from the assets of an employee benefit plan.

3. Penalty Structure.

Per day penalty. The basic penalty under the program is $10 per day for delinquent filings.

“Per filing” cap. The maximum penalty for a single late annual report has been reduced from $2,000 to $750 for a small plan (generally a plan with fewer than 100 participants at the beginning of the plan year) and from $5,000 to $2,000 for a large plan.

“Per plan” cap. The DFVC Program also includes a “per plan” cap. This cap is designed to encourage reporting compliance by plan administrators who have failed to file an annual report for a plan for multiple years. The “per plan” cap limits the penalty to $1,500 for a small plan and $4,000 for a large plan regardless of the number of late annual reports filed for the plan at the same time. There is no “per administrator” or “per sponsor” cap. If the same person is the administrator or sponsor of several plans required to file annual reports under Title I of ERISA, the maximum applicable penalty amounts would apply for each plan.

Small plans sponsored by certain tax-exempt organizations. A special “per plan” cap of $750 applies to a small plan sponsored by an organization that is tax-exempt under Internal

Revenue Code §501(c)(3). The $750 limitation applies regardless of the number of late annual reports filed for the plan at the same time. It is not available, however, if, as of the date the plan files under the DFVC Program, there is a delinquent annual report for a plan year during which the plan was a large plan.

"Top hat" plans and apprenticeship and training plans. The penalty amount for "top hat" plans and apprenticeship and training plans is $750.

4. Program Participation Procedures.

The procedures governing participation in the program are intended to make the program easy to use.

Plan administrators may use the Form 5500 for the year relief is sought or the most current form available at the time of participation. This option allows administrators to choose the form that is most efficient and least burdensome for their circumstances.

5. IRS Participation**.**

Although the DFVC Program does not cover late filing penalties under the Internal Revenue Code, the Internal Revenue Service has agreed to provide certain penalty relief for delinquent Form 5500s filed for Title I plans where the conditions of the DFVC Program have been satisfied.

6. Notification by the DOL Prior to Filing the Form 5500.

If the DOL determines that a Form 5500 filing has not been made or that the filing is incomplete, a Notice of Rejection will

be sent to the plan administrator. The following is what transpired in a recent case which we settled with the DOL.

a. Notice of Rejection. A Notice of Rejection notifies the plan administrator of a problem with the Form 5500 filing. A revised filing must be made within 45 days of the Notice in order to avoid an assessment of penalties.

b. Notice of Intent to Assess a Penalty. If the problem with the Form 5500 is not corrected with the 45 day period or if the DOL rejects the correction, a Notice of Intent to Assess a Penalty is issued. A Statement of Reasonable cause must be filed 35 days from the date of the Notice.

c. Notice of Determination on Statement of Reasonable Cause. This Notice informs the plan administrator as to whether the DOL finds a basis to excuse or modify the penalty based on the information provided in the Statement of Reasonable Cause. An unfavorable response by the DOL will require the plan administrator to either accept the imposition of the penalty or request a hearing and file an Answer within 35 days from the date of the Notice of Determination.

d. Notice of Docketing. This Notice advises the parties of the docketing of the case with the Office of Administrative Law Judges and notifies the parties of the required filing within 30 days of the date of the Notice of:

    i. a short statement of the issues believed to be in dispute;

    ii. a proposed witness list;

iii. a suggestion as to a suitable location for the trial; and

iv. state the approximate number of days for the trial.

e. Stipulation for Dismissal and Order. In this case, we were able to negotiate with the attorney for the DOL a reduction of the proposed assessment of almost $90,000 down to $13,000.

f. Order Approving Stipulation for Dismissal and Order. This Order approves the negotiated settlement and concludes the case.

VIII. IRS W-2 REPORTING

The ACA requires employers to report the cost of coverage under an employer-sponsored group health plan on the employee's Form W-2. Until further guidance is issued, this requirement will only apply to employers that issue 250 or more Forms W-2 for the prior calendar year. The controlled group rules are not currently being applied for this 250 Forms W-2 requirement.

A. What is Required to Be Reported?

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

Applicable Employer-Sponsored Coverage does not include:

1. Coverage only for accident, or disability income insurance, or any combination thereof;

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

3. Coverage issued as a supplement to liability insurance;

4. Liability insurance, including general liability insurance and automobile liability insurance;

5. Workers' compensation or similar insurance;

6. Automobile medical payment insurance;

7. Credit-only insurance;

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

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

10. Hospital indemnity or other fixed indemnity insurance.

Note: Until further guidance is issued by the IRS, contributions to union multiemployer health plans should not be reported on the Form W-2.

Only current and former employees who are required to receive a Form W-2 for the year are to have the cost of health benefits included on the Form W-2. If you are not required to issue a Form W-2 to the individual, there is no additional reporting required.

Current guidance provides that if an employee leaves employment during the calendar year and requests the issuance of a Form W-2 within 30 days of such termination of employment which is before the end of the calendar year, no health care costs are required to be

included. An exception is in the case of a Form W-2 required to be issued after the end of the calendar year. In such case, a reasonable method relating to the cost of such coverage must be listed on the Form W-2.

B. Calculating the Cost of Coverage.

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

2. Self-Insured Plans. Use the method currently used for COBRA purposes for the employee's selected coverage, except that the reported costs must be determined on a calendar year basis. The costs reported on the Form W-2 are calendar year payments and not the payments based on the self-insured plan's fiscal year.

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

WHISTLEBLOWING

I. MICHIGAN WHISTLEBLOWER PROTECTION ACT: MCLA §15.361, et seq.; MSA §17.425, et seq.

A. In General

Michigan's WPA (MCL § 15.362) provides:

> An employer[1] shall not discharge, threaten, or otherwise discriminate against an employee[2] regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

B. Applicability

1. Employers. The WPA applies to all employers with one or more employees. Section 1(b).

2. Employees. Does not apply to prospective employees or job applicants. *Wurtz v. Beecher Metro Dist*, 495 Mich 242 (2014).

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[1] An "employer" is defined under the WPA as "a person who has 1 or more employees. Employer includes an agent of an employer and the state or a political subdivision of the state." MCL § 15.361(b).

[2] An "employee" is defined as "a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied…" MCL § 15.361(a).

C. Elements of the Claim – *all must be proven for a Plaintiff to make a prima facie showing of whistleblower retaliation*

1. "Engaged in protected activity"

A "protected activity" under the WPA refers to actions where any employee (1) **reports** to a public body a violation of the law, a regulation, or rule, (2) **is about to report** such a violation to a public body, or (3) is being asked by a public body to participate in an investigation. *Manzo v. Petrella,* 261 Mich App 705, 712 – 713 (2004).

2. "About to Report"

a. Where there is an <u>actual</u> report made, no further showing is required to satisfy this requirement.

b. To prevail on the "about to report" claim, the plaintiff must show that he or she was "on the verge of" reporting an alleged violation. *Shallal v. Catholic Social Serv of Wayne County*, 455 Mich 604, 612 (1997).

c. Plaintiff must show this by clear and convincing evidence. MCL 15.363(4); *Jennings v. County of Washtenaw*, 475 F Supp 2d 692, 722 (ED Mich 2007).

d. A threat to report is generally not enough; there must be actual actions taken in furtherance of the threat. *E.g. Koller v. Pontiac Osteopathic Hosp*, 2002 WL 1040339 (Mich App). Relevant to the analysis is the steps taken to make the report, such as gathering evidence or making a determination of what agency to contract. *Jennings*, *supra* at 711-713.

e. Examples of where an employee **did meet** the "about to report" requirement

i. The employee told the president of the agency that she was going to report him, discussed the alleged unlawful activity with her supervisor and others, and produced a calendar entry where she had written "we need to report [the president]". *Shallal*, *supra*.

ii. The employee told his manager that he was going to report OSHA violations, took pictures of the premises to document the OSHA violations, and threatened to take the pictures to OSHA the week before he was fired. *Williams v. Boldon's Body Shop, LLC*, 2007 WL 1612116 (Mich App)

iii. The employee copied records, attempted to contact a reporting hotline, obtained a complaint form, and refused to answer her employer's questions about her "intentions to stop pursuing the matter." *Fogwell v. Klein*, 2001 WL 1134883 (Mich App).

iv. The employee reported the alleged violations to supervisors and the board of directors and contacted a state representative to attempt to determine what agency should be contacted about the alleged violations. *Lynd v. Adapt, Inc*, 200 Mich App 305 (1993).

v. The employee sent a detailed memorandum to the employer stating that the employee had no choice but to report the alleged unlawful activity to the "Michigan Department of Wage and Labor . . . and the United

States Department of Wage and Labor." *Caldwell v. Comm Health Ctr of Branch County*, 1998 WL 1990878 (Mich App).

f. Examples of where an employee **did not** meet the "about the report" requirement:

i. The employee called the human resources department to complain about alleged safety violations but did not actually threaten to report them (and, the Court noted, even if the employee had indicated an intent to file a complaint, that statement without more would not meet the test). *Jennings*, *supra*.

ii. The employee obtained a complaint form from OSHA but did not complete it. *Richards v. Sandusky Comm Schools*, 102 F Supp 2d 753 (ED Mich 2000).

iii. Despite the passage of time, the employee took no action after threatening to report. *Trosien v. Bay County*, 2005 WL 3505746 (Mich App). See also *Koller*, *supra* (no protection where threat to act not carried through); *Jiang v. University of Michigan*, 1998 WL 1989768 (Mich App) (holding same).

3. "Violation of law, regulation, or rule"

a. Violations of internal company policy alone do not satisfy this requirement, but the Supreme Court has held that a plaintiff need not advance the "public interest" and that the employee's motivations for filing the complaint are irrelevant. *Whitman v. City of Burton*, 499 Mich 861 (2016).

b. Includes threatened litigation by an employee: In *Trepanier v. Nat'l Amusements, Inc.*, 250 Mich. App. 578 (2002), the Michigan Court of Appeals held that seeking a personal protective order against a co-worker for harassing behavior could constitute "protected activity" for purposes of the WPA.

c. Includes actions taken within scope of employment; i.e., where reporting violations was part of the job description. *Terzano v. Wayne County*, 216 Mich App 522 (1996)

d. Includes actions taken by an employee to report (or about to report) violations of laws by the employer, co-workers, and third parties. *Dudewicz v. Norris-Schmid, Inc*, 443 Mich 68 (1993) (co-worker); *Dolan v. Continental Airlines/Continental Express*, 454 Mich 373 (1997) (customers).

e. Compare to federal standards – Dodd-Frank Act protects those employees who report even unauthenticated fraud.

4. "Public Body"

The Act defines "public body" as employees and officers of any local or state governmental unit, agency, board, commission, legislative body, judicial body, law enforcement agency, etc.

MCL 15.361(d) defines "public body" to mean all of the following:

a. a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.

b. an agency, board, commission, council, member, or employee of the legislative branch of state government.

c. a county, city, township, village, inter-county, intercity or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or a member or employee thereof.

d. any other body which is created by state or local authority which is primarily funded by or through state or local authority, or a member or employee of that body.

e. a law enforcement agency or any member or employee of a law enforcement agency.

f. the judiciary and any member or employee of the judiciary.

5. "Suffered an adverse employment action"

The WPA provides that an employer is prohibited from "discharg[ing], threaten[ing], or otherwise discriminat[ing] against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment" due to the employee's report of actual or suspected illegal activity. MCL 15.362

6. Causation

a. **Definition.** The employee must show that he "suffered an adverse employment action *as a result of* [his] engaging in the protected activity, *i.e.*, that there was some nexus or causal connection between the adverse employment action and the protected activity." *Garg v. Macomb County Mental*

Health Services, 472 Mich 263, 276, n. 5 (2005), emphasis in original.

b. **Timing**. The fact that an adverse employment action took place after alleged whistleblowing, without more, is not enough to prove causation. *West v. General Motors Corp*, 469 Mich 177 (2003).

c. **Required showing.** The employee must provide objective evidence that the employer was aware of the employee's report (or that the employee was about to report), that the employer received notice from the employee of same, that the person making the adverse employment decision knew about the report or threatened report, and the notice was given prior to termination. *Kaufman & Payton PC v. Nikkila*, 200 Mich App 250, 257-58 (1993).

d. Compare to Sarbanes-Oxley/Dodd-Frank (federal): Employees need only prove that the protected activity was "a contributing factor" to the employer's decision to take adverse employment action.

D. Burden Shifting

1. If the employee succeeds in proving its prima facie case, the burden shifts to the employer to show a legitimate reason for the adverse employment action. *Heckmann v. Detroit Chief of Police*, 267 Mich App 480 (2005).

2. If the employer carries its burden, the employee will have an opportunity to prove that the legitimate reason offered by the employer was not the true reason but was only a pretext for discrimination. *Id.* "A plaintiff can prove pretext either directly by persuading the court that a retaliatory reason more likely motivated

the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Roulston v. Tendercare (Michigan), Inc,* 239 Mich App 270, 281 (2000).

3. Compare to Sarbanes-Oxley/Dodd-Frank (federal): Companies have a heavier burden of proving by clear and convincing evidence that they would have taken the same adverse employment action absent the protected activity. Employees need only prove by a preponderance of the evidence that the protected activity was a contributing factor to the adverse employment action.

E. Statute of Limitations

Employees must file suit within 90 days of the alleged violation, or else the claim is barred. MCL 15.363(1). (Compare to Sarbanes-Oxley/Dodd-Frank, which gives federal whistleblowers 180 days).

F. Arbitration

In the absence of a clear agreement to arbitrate whistleblower claims, the employee's failure to submit the issue to arbitration will not preclude a civil action. *Hopkins v. City of Midland*, 158 Mich App 361 (1987). (Compare to Sarbanes-Oxley/Dodd-Frank, which expressly prohibits requiring arbitration of whistleblower claims).

G. Remedies

1. Damages. The Act allows recovery of back wages, full reinstatement of fringe benefits and seniority rights, and actual damages, as well as civil fines of up to $500. The court, in its discretion, may include reasonable attorney fees in any award.

2. Exclusive Remedy. The WPA pre-empts any public policy common law claim an employee may have arising out of the same facts.

Anzaldon v. Neogen Corp, 292 Mich App 626 (2011). The WPA is the exclusive remedy.

H. Posting Notice.

Covered employers must post notices to keep employees informed of their protections and other obligations under the Act.

II. HANDLING WHISTLEBLOWING IN YOUR WORKPLACE

A. Before the Whistle Blows – Protect yourself from a whistleblowing claim

There are certain steps every organization can take, no matter how large or small, to plan for when an employee "blows the whistle." Planning ahead can greatly reduce the stress and cost of dealing with the issue ad hoc.

1. **Whistleblowing Policy.**

a. Have a policy in your employee handbook that, at a minimum, encourages employees to raise matters of concern internally and explains to them how to do so. The policy may be posted around the workplace as a reminder of the company's stance on employee complaints along with the required governmental WPA postings in public areas (i.e., lunch room).

b. As part of the policy, make it clear that any supervisors or other employees who retaliate against others as a result of employee whistleblowing will face consequences or otherwise be disciplined.

c. The policy should provide multiple reporting channels for disclosures and spells out in exact terms the chain of reporting. This can be through a management

chain, Human Resources, or other designated individuals.

d. Designate a select group of people who will handle whistleblowing disclosures as they arise, to avoid a scramble once an issue comes up, and ensure employees are made aware of the chain(s) of reporting. This will enhance confidentiality and reduces the likelihood of reprisals being taken against whistleblowers by their direct supervisors. If possible, avoid potential conflicts of interest by excluding supervisors and managers from the assessment and investigation of any disclosure made by employees, and distinguish between individuals who discipline employees and who handle whistleblower investigations.

e. Encourage and promote confidentiality. It is important that employees do not fear reprisals or being otherwise ridiculed by their co-workers for "blowing the whistle." Remind those in the reporting chain about the need for confidentiality as well. You may wish to implement an anonymous complaint system or hotline.

2. **Corporate Culture.** Foster a corporate culture of disclosure starting from the top down. Make sure employees at every level understand that they will not be penalized for reporting any suspected issues in the workplace. Do not discourage or otherwise discriminate against employees who report potential issues.

3. **Employee training.**

   a. Whistleblowing. Regularly train and re-train employees across the organization, from top executives to human resources personnel to regular employees, on the existence of the whistleblowing policy and the organization's approach to whistleblowing (namely, that it is encouraged). Training may also include how to recognize retaliatory behavior/adverse employment actions. Also remind employees of the consequences of retaliation against whistleblowers.

   b. Performance Assessments. Train management to correctly and effectively document an employee's poor performance or disciplinary issues.

4. **Keep detailed personnel files and disciplinary records**. While not specifically related to whistleblowing *per se*, having a complete and thorough personnel file of each employee, including disciplinary records, will help disprove any claims of whistleblower (or any other kind) of discrimination following the termination of an employee.

   a. Ensure the records are very specific, including dates, so that there can be no questions about the company's motivations for terminating an employee should it become necessary. This is especially critical where an employee who "blows the whistle" is already in disciplinary trouble at work.

5. If your company is a publicly-traded company, the Sarbanes-Oxley Act requires that your organization have procedures

for employees to submit concerns about accounting or auditing matters without fear of suffering reprisals.

6. Conduct rigorous internal audits and maintain records of same. One way to undercut a whistleblower claim is to show that the organization is committed to transparency and compliance, and by showing a history of internal regulation, it can serve to de-legitimize the employee's claims by questioning the causation.

B. Once the Whistle Blows

Sometimes, it is not always possible to avoid a whistleblower claim. Following these tips will help ensure the process moves forward as smoothly as possible.

1. Upon receipt of a concern or complaint from an employee, ensure that each and every report is acted upon quickly and assessed appropriately. If corrective measures need to be taken, implement changes promptly. If it is determined that no corrections are needed, thoroughly document the investigative efforts and maintain the file.

2. Keep the whistleblower informed as to the status of your investigation as much as possible. You could use this opportunity to explain that the investigation is progressing but, because it is confidential, no further information can be given. That should be enough to reassure him or her that you are taking the disclosure seriously and there is no need to disclose it elsewhere – including to the media or the relevant public body.

3. Should an employee need to be disciplined or terminated during or after the pendency of a whistleblower investigation

he or she initiated, ensure the file is well documented so as to avoid any doubt as to the reason for discipline or termination.

4. Involve human resources in any decisions to discipline or terminate an employee during the pendency of an investigation to ensure there is no retaliatory motive.

5. Under no circumstances should you terminate an employee who has reported an alleged problem to a public body! This is true even if the employee did not come to you first with his or her concern.

6. If it appears the employee is attempting to use whistleblower protection to shield himself or herself from legitimate discipline, proceed warily. Make sure that you have a well-documented and more than adequate basis to establish that the employee's discipline or discharge had absolutely nothing to do with the employee's complaint.

EMPLOYEE LEAVE: NAVIGATING THE MORASS

By: Michelle C. Harrell, Esq.

THE FUNDAMENTALS OF EMPLOYEE LEAVE

I. TYPES OF EMPLOYEE LEAVES OF ABSENCE

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

B. Disability, injury or illness (on the job

C. Family circumstances

II. THE EMPLOYMENT RELATED STATUTES AND LEAVES OF ABSENCE

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

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

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

3. General Rule of ADA: No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms,

conditions, and privileges of employment. 42 USC §12112(a). Employers subject to the ADA must offer to make "reasonable accommodations" of an employee's qualified "disability" as long as it will not cause the employer an "undue hardship."

4. No Express Unpaid Leave Required for an Employee's Medical Reasons But. . . . may have the same effect due to its prohibition against discriminating against a qualified employee relating to discharge, compensation and other terms, conditions and privileges of employment. The EEOC's Technical Assistance Manual and interpretative guidance suggest that "reasonable accommodations" could include permitting the use of accrued paid leave, providing additional unpaid leave necessary for treatment, and modified work schedules. Also, the ADA defines "reasonable accommodation" to include "part time or modified work schedules." *See*, Section 12111(9).

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

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

1. Persons and Entities Covered: Employers subject to FMLA are those engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, any person who acts directly or indirectly on behalf of such employer, any successor in interest of such an employer and any "public agency" as defined in the Fair Labor

Standards Act. To be an "eligible employee" for FMLA, the employee must have been employed by the employer for at least 12 months and worked for at least 1,250 hours of service for that employer during the previous 12-month period.

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

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

4. FMLA provides for leave under the following circumstances:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE EMPLOYEE LEAVE FMLA FLOWCHART

Please see the attached flowchart from the U.S. Department of Labor

PITFALLS: NEW CASE LAW OPENS DOOR ON HUMAN RESOURCE LIABILITY

Please see the attached court decision – *Graziadio v. Culinary Institute of America, et al.*

MANAGING THE RISK OF EMPLOYMENT LITIGATION

By Richard M. Mitchell, Esq., CPCU

I. Preventing the Lawsuit

A. Process and education – a little time and money spent on managing employment risk can avoid much larger expenses later. Education needs to be focused on both employees and supervisors.

1. Educate employees

a. Employees must acknowledge in writing that company procedure has been explained to them, but it is important that you take steps to make sure they actually understand it.

b. An employee handbook is essential.

(i) Employees should sign an acknowledgment that they have received the handbook. That acknowledgment signature and the handbook itself, however, may not constitute a contract. *Johnson v. Vatterott Educational Centers, Inc.*, 410 S.W.3d 735 (2013) In fact, many handbooks actually provide that they do not constitute a binding contract.

(ii) This can be a particular problem when attempting to enforce arbitration and non-compete/non-solicitation provisions.

(iii) This problem can be solved by requiring execution of a formal employment agreement, even if the employee is at-will. Alternatively, the employee may execute an acknowledgment that specifically states that arbitration and/or non-compete provisions

constitute a binding contract in consideration for employment.

c. Complaint procedures. The handbook should clearly state that complaints of harassment for discrimination should be made in writing to the employer.

d. A frequent defense in litigation is that the plaintiff never notified the employer of the discriminatory situation. To prevail on a claim of a hostile work environment, a plaintiff must show that the defendant was "on notice" of the issue and failed to remedy the environment. *Chambers v. Trettco, Inc.*, 463 Mich. 297 (2000)

e. Documentation must be placed in a personnel file of any disciplinary action, including a verbal warning. If it is not in writing, it did not happen.

f. These handbook provisions and notices will be exhibits at depositions and trial.

2. Educate supervisors

a. Supervisors must be educated on all company policies and procedures. A supervisor's failure to comply with them will be used against the employer in litigation.

b. When the employer is notified of a hostile or adverse employment claim, it has a duty to undertake remedial action. *Coley v. Consolidated Railcorp*, 561 F.Supp 645 (E.D. Mich. 1982) this means the employer must undertake an investigation, which will likely include interviews of other employees. The steps undertaken in this investigation must be documented, as they will be useful in litigation.

c. Supervisors must also know the rules so they do not violate them. Training of both employees and supervisors relative to proper workplace conduct should be documented.

II. Shifting the Risk of Litigation

A. Insurance and indemnification

1. Historically, insurance coverage for employment related litigation was limited. Insurers first began writing this coverage as endorsements to other policies, such as commercial general liability.

2. Insurers now provide stand-alone policies applicable to employment related losses.

B. Types of insurance available

1. Employment practices liability (EPL)

a. These policies typically provide coverage for discrimination claim arising under various laws, including the Americans With Disabilities Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination In Employment Act, the Pregnancy Discrimination Act, Genetic Information Nondiscrimination Act of 2008, as well as state law counterparts to these federal statutes.

b. These policies typically exclude or have sub-limits for certain claims, such as failure to pay wages, intentional acts, employee theft, and sexual assault.

2. Directors and officers policies

a. These policies cover claims brought against corporate directors and officers. They may apply to employment litigation, but more commonly involve shareholder litigation, which may be brought by employees.

b. These policies are often written on a reimbursement basis, meaning that the carrier will reimburse defense costs once they are incurred.

3. Other considerations

a. Fully understand the risks that are unique to your business. This is true for all types of insurance.

4. A large deductible or not?

a. This is an important consideration. A policy with a large deductible will almost certainly come at a cheaper premium. Litigation costs, however, can consume the entire amount of such a deductible.

III. Litigation Starts – Important Concerns

A. What is the proper forum for the litigation. Wherever filed, it is important to understand both the defense costs and the potential ultimate exposure, even if you have insurance.

1. Federal court

a. Plaintiff must file in federal court in order to seek the remedies available under federal statutes.

b. Generally, a party must exhaust administrative remedies. Discrimination claims will be brought to the United States

Equal Employment Opportunity Commission. The EEOC will investigate and find either reasonable cause to believe that a statute has been violated, or no reasonable cause and dismiss the action.

c. If reasonable cause, the EEOC may bring an action in its own name of behalf of the plaintiff. Alternatively, it may find reasonable cause, but not pursue the claim with the weight of the federal government.

d. If no reasonable cause is found, the EEOC will likely dismiss the claim and issue a Right to Sue letter. Once this letter is issued, a claimant has 90 days to bring litigation or risk waiver of rights under federal statutes.

2. State court

a. A plaintiff may bring an action directly in state court seeking remedies available only under state law. In Michigan, this will often be the Michigan Elliott-Larsen Civil Rights Act, M.C.L 37.2101, et seq.

b. A claimant may file a complaint with a state agency, such as the Michigan Department of Civil Rights.

c. Many of the remedies are the same, although the form is different. This includes recovery of attorney fees if the claim is successful.

3. Arbitration

a. Employment contracts often contain provisions requiring disputes to be submitted to binding arbitration.

b. Arbitration is generally less expensive than trial, although

this is not always true. It is also faster in reaching a resolution with limited rights of appeal.

c. Arbitration causes have come under fierce attack in recent years. Parties have argued they did not constitute a bargained-for exchange. *Tillman v. Macy's, Inc.*, 735 F.3d 453 (6th Cir. 2013) they have also argued that such causes are unconscionable or are invalid because they allowed an employer to change the terms. *Carey v. 24 Hour Fitness USA, Inc.*, 669 F.3d 202 (5th Cir. 2012) The Consumer Finance Protection Bureau has challenged these causes in the context of consumer transactions, particularly as they relate to class actions.

IV. Conducting the Litigation

A. The life of a lawsuit has many jumping off points, including settlement, dismissal and trial.

1. Preserve all evidence, particularly electronic data, even before a complaint is filed.

2. Spoliation – when a party destroys or loses evidence, even inadvertently, a rebuttable presumption arises that it would have been damaging to the destroying party.

B. Discovery disputes and managing expense

1. Discovery should be broad, and bring out the key issues

2. Document exchange may be voluminous and depositions extensive. Federal courts have specific rules governing the exchange of electronic discovery. Failure to comply with those rules can result in significant sanctions, as well as other strategic problems.

3. Key managerial personnel will be deposed, as will disgruntled former employees. Whether it is the EEOC or private counsel, the charging party will want to know if you have previously been involved in any similar litigation. They will also want to know of prior complaints. They will speak to former employees who will testify against the company, sometimes even before you know they exist.

4. Deposition preparation is critical. Before the deposition, you will spend the time with your attorney. It is important to answer the question that is actually asked rather than the one you think is being asked. It is also important to answer only that question and avoid lengthy narratives.

V. Resolution and Reasonable Accommodation

A. An accommodation made to a charging party must be "reasonable." This is often a defense before the litigation even commences.

B. Reinstatement may also be a remedy, particularly where the claim is brought by a governmental agency. Back pay will also likely be awarded.

C. The employer may be required to engage in retraining or subject to other injunctive relief.

THE MOST IMPORTANT DOCUMENTS TO PROTECT YOUR ORGANIZATION

By: Ronald A. Sollish, Esq.

DEFENSIVE EMPLOYMENT PRACTICES

I. UNDERSTANDING AND DEFINING THE EMPLOYER/EMPLOYEE RELATIONSHIP.

A. Traditional Rule.

Absent an agreement to the contrary, the traditional rule regarding employer/employee relationships in Michigan is that the relationship exists at the will of the parties. Such a relationship is commonly referred to as "at-will" employment. At-will employment is characterized by being of indefinite or unspecified duration whereby the employer or employee can terminate the relationship at any time, for any reason with or without cause and with or without prior notice. In fact, if an at-will relationship is established, an employer can avoid liability even if the discharge is arbitrary and capricious. Generally, an employer wants to establish an at-will employer/employee relationship.

B. Reducing Wrongful Discharge Liability.

Every employer/employee relationship should be documented and evidenced in writing. Such a writing can take the form of an employment application, formal employment agreement, at-will statement, letter agreement or memorandum of agreement. Accordingly, each employer/employee relationship should be documented as follows:

1. The agreement should be in writing and signed by both the employer and employee prior to the commencement and/or

performance of any employment related duties by the employee.

2. The agreement should specifically state that the nature of the relationship is "at-will" and may be terminated by either party at any time, for any reason, with or without cause and with or without notice.

3. The agreement should specifically state that the nature of the employment relationship cannot be modified except in writing signed by the employer. In most instances the employer should specifically identify an authorized individual who has authority to modify the employment relationships.

4. The agreement should specify that the employee was provided with no oral assurances other than those contained in the written documentation.

5. The agreement should contain an express statement that the employer may unilaterally modify any of the terms of employment.

6. The agreement should contain an alternative dispute resolution agreement.

7. The agreement should contain a provision limiting the statute of limitations.

8. The agreement should contain a provision providing for the reimbursement of attorney fees in the event that an employee is unsuccessful in a claim against the employer.

9. The agreement should establish remedies and limit damages for breach or termination.

10. Any such documentation should contain a merger/non-modification provision which indicates that the written document supersedes any prior oral or written agreement and cannot be modified except in writing signed by the employer.

C. Current Trends in the Law Affecting Termination Practice.

Many employers have commenced the process of defending themselves and have adopted written at-will agreements which have significantly curtailed wrongful discharge litigation. However, creative plaintiff employment counsel have shifted many employment related claims into the civil rights forum asserting claims of age, race, gender and handicap discrimination.

D. Other Limitations on At-Will Employment.

At-will employment is further limited by the following protected activities or agreements:

1. Employees covered by collective bargaining agreements or individual employment contracts.

2. Public sector employees.

3. Whistle blowing.

4. Service on jury duty.

5. Retaliation for filing workers' compensation claims.

II. EMPLOYMENT APPLICATIONS AND EMPLOYERS' DUE DILIGENCE.

A. Initiation of Employer/Employee Relationship.

At the time that an employee submits an Employment Application for employment, the parties are at one of the most crucial times of the employer/employee relationship. This is the time that an employer can

most easily protect itself from wrongful discharge claims, unqualified employees, and/or employees that are generally undesirable. However, the application process can result in significant liability if the process is conducted improperly.

B. Paper, Paper, Paper.

Employees are more willing to sign documents at the beginning of an employment relationship. Employers should take advantage of this and obtain all appropriate documentation to evidence the nature of the potential employment relationship. It is not sufficient to obtain a simple standard form employment application. At the time the employee fills out an employment application the following documentation should be completed:

1. The employee should certify that all information in the employment application is accurate and correct and that the same forms a material part of the employment application and that falsification of the same could lead to discharge or refusal to retain.

2. Obtain authorization to investigate all statements in the application including if applicable, credit histories, driving records, educational records, and all employment records.

3. Obtain a Bullard-Plawecki Employee Right to Know Act, MCLA §423.501 et seq. waiver. If applicable, obtain waiver and consent to medical examination, drug testing, skill testing, honesty testing, etc.

4. Obtain an acknowledgment as to the "At-Will" nature of the relationship.

C. Tailored Applications and Inquiries.

Most employers utilize standard form, off the shelf employment applications, which may not provide sufficient information about the employee for purposes of evaluating the employee's ability to perform the job applied for. Employers should give ample consideration to the positions to be filled and tailor employment applications and pre-employment inquiries in a fashion that is intended to obtain information that will help assess the employee's qualifications. Employers should utilize specific job descriptions for the position being applied for.

D. Employer Due Diligence.

Employers should utilize the information supplied by the employee including references, Bullard Plawecki waivers, past employment records, educational documentation and related materials. Once you have obtained the right to review the employee's historical background information, a review of this information can be your best way of evaluating an employee. In many instances past employers will not give out any information either over the phone or in response to inquiries regarding a past employee. However, the Bullard-Plawecki waiver will enable you to obtain a copy of the employee's entire employment file, including disciplinary reports and attendance records. A review of such information should be a pre-requisite to any offer of employment.

E. Improper Pre-employment Inquiries.

There are various statutes and laws which prohibit employers from making inquiries regarding a potential employee's past and/or using such information in making employment related decisions. The following are areas of concern regarding pre-employment inquiries:

1. Civil Rights. Except where there exists a bona fide occupational requirement and/or job related pre-requisite, it is improper to require or request a photograph or inquire as to age, race, religion, height, weight, marital status, sex, national origin, and non-job related physical and mental conditions.

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

3. Military Records. Inquiries regarding military discharge may be found to create disparate impact under federal civil rights laws in that there is a disproportionate impact on African Americans.

4. Arrests. It is improper to inquire into arrests, detentions, summoning into court in which a conviction did not result and/or which is unrelated to the position sought.

5. Civil Litigation. It is improper to base employment decision on the fact that the employee has been a party to civil litigation, particularly enforcement of rights under any of the civil rights laws.

6. Credit Reporting. Employers may obtain credit reporting information, however, the employer must notify the potential employee that the report has been requested and if the report results in denial of employment, that must be disclosed. There is a risk that such reports may run afoul of the disparate impact standards for federal civil rights laws.

7. Physical Condition. Under the Americans with Disabilities Act, 42 USC §12101 et seq., inquiries regarding disabilities are

prohibited. However, an applicant can be asked whether job related functions can be performed.

8. Under the Michigan Handicapper's Civil Rights Act, MCLA 37.1101 et seq., an employer may ask "do you have any impairments, physical, mental, or medical, which would interfere with your ability to do the job for which you have applied."

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

F. Rejecting an Applicant.

An employer can reduce the potential liability by following the following rules in rejecting applicants:

1. Follow consistent procedures in processing and handling all applicants.

2. Never use symbols on any application.

3. Focus only on key functions and job related requirements.

4. Pay particular attention to note taking on application.

5. Reduce expectations in potential applicants, do not set expectations too high.

6. Respond quickly to all applicants.

7. Do not discuss the qualifications of the selected applicant with any rejected applicant.

G. Retention of Documents.

After employers have completed the hiring process, documents regarding that process should not be discarded. Generally, employment applications and related materials should be retained for a period of at least one year following the conclusion of the employment process. However it is recommended, if possible, that such documents be retained for at least three years so as to be consistent with the statute of limitations regarding the Michigan Elliott-Larsen Civil Rights Act.

III. EFFECTIVE EMPLOYER PRACTICES-CREATING YOUR OWN DISCIPLINE RECORD.

A. Establish Your Own Personnel Department.

Whether you have 1 employee or 1,000 employees, you should establish an internal personnel department. You should have a single individual or group of individuals who are responsible for evaluating and making final decisions regarding employee discipline. Employee disciplinary decisions should be made in conjunction with an employee's supervisor. However, implementation of a process using a personnel department will provide for the fair treatment of all employees and help safeguard against improper employment related decisions. Furthermore, utilizing a personnel department will create an umbrella organization which will be able to more fully inform you of the manner in which your business is operating. Finally, your personnel department will help you to better evaluate your supervisors and their conduct.

B. Educate Your Personnel Department.

There are complex employment rules, regulations and statutes which differ on both the state and federal level. Managers need to be trained

and educated in regard to compliance with all applicable laws and regulations. Every supervisor, manager and officer should receive some training and education in the area of personnel management.

C. Never Promise Fairness.

In establishing workplace guidelines, generally, it is a mistake to promise fairness and/or due process in the treatment of work related infractions. The concept of fairness implies that an employee will be given ample notice, have an opportunity to respond to allegations and that the employee will receive treatment consistent with other similarly situated individuals. In most employment situations, employees are not afforded the foregoing opportunities. Promising fairness may in fact undermine the "at-will" relationship. It is more productive to rigidly establish the "at-will" relationship yet provide for fairness or due process in the implementation of your employment practices.

D. Adhere to Established Guidelines.

Employment manuals, rules and policies should be reviewed on a regular basis. See Employee Manual Checklist attached as Appendix A. Any type of disciplinary action taken in response to employee conduct or performance should strictly comply with the policies established by the employer. Many employers inadvertently violate their own policies when imposing disciplinary action. If you have established a just cause policy or a progressive discipline policy, you should adhere to these policies in administering discipline.

E. Establish Reasonable Policies.

In establishing performance and conduct policies, such policies should be realistic and comport with the realistic business functions of your business. Overbearing conduct requirements will be viewed as such when presented to a jury. The employer must establish guidelines

which, when viewed objectively, are seen as fair. Finally, all rules should be enforceable. Only institute rules that you intend on enforcing and can be enforced in the workplace.

F. Documentation, Documentation, Documentation.

1. Regular Written Evaluations.

Employees should be evaluated, in writing, on a regular basis. Employers should plan on conducting annual or bi-annual written evaluations of employee performance and conduct. In many instances, employers desiring to discharge an employee based on poor performance or conduct have no written record of the substandard performance. Employee evaluations should be specific, fact related and not sugarcoated. The evaluation should be submitted to the employee for review, comment, response and acknowledgment.

2. Incident Report.

An employer should specifically document any disciplinary action taken in response to employee misconduct or substandard performance. Communication with the employee is the best way of obtaining a positive response to the evaluation made. Evaluating the employee in writing will elevate the evaluation to an appropriate level, in essence, getting the attention of the employee. Documenting any such incident creates a record for the employer that will assist the employer in the event there is a subsequent termination and a potential lawsuit. It is difficult to make a case in an employer's defense when there is an employment file devoid of any type of negative employment evaluations.

G. The Proof is in the Writing.

The written documentation contained in any employment file will form the substance of any defense in the event there is employment related litigation. A complete and comprehensive employment file containing all appropriate documentation is an employer's best defense. Documentation should be prepared as follows:

1. All major personnel decisions and/or actions should be documented in writing contemporaneously with the event documented.

2. Generally, if possible, the event should be documented by two supervisory personnel.

3. Don't wait to document any performance or conduct evaluation.

4. Be specific in setting forth facts and events which led to the evaluation.

5. Give the employee an opportunity to respond to the evaluation in writing.

6. At a minimum, obtain the employee's written acknowledgment of receipt of the evaluation.

7. Include all information regarding the employer's attempt to work with the employee and obtain adequate job related performance or conduct. The tone of the evaluation should not be accusatory or mean spirited.

8. Include chronological references to past warnings and actions on the part of the employer which gave rise to the need for the written evaluation.

H. Investigation.

Whenever an employer elects to take some type of disciplinary action, it is incumbent upon the employer to properly investigate the conduct of the employee. The personnel department head should review the statements of the employee's immediate supervisor. You should obtain a statement from the employee and investigate any ancillary facts which come to light as a result of such investigation. The institution of an investigation will bolster the employer's position in the event that severe disciplinary action is required.

I. Institution of Disciplinary Action.

In the event any employer is required to institute disciplinary action such as suspension or warnings, the employer should specifically describe to the employee the basis for such disciplinary action. The employee should be given the right to explain his/her side of the story. In all situations, the employee should be treated in a dignified manner. The employer should emphasize that such action is being taken for the purpose of assisting the employee. Provide the employee with specific goals, recommendations and deadlines. Always document the manner and method of such disciplinary action.

J. Type of Discipline.

Any discipline instituted by the employer should be consistent with the severity of the offense. Furthermore, the discipline should be consistent with other discipline utilized in conjunction with other employees. There must be internal consistency with regard to the disciplinary policies of the employer.

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

A. General Considerations.

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

B. Exit Interview.

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

C. Releases.

One of the best ways an employer can eliminate liability upon termination of employees is to obtain a signed release from the

employee. In order to be enforceable, a release should contain the following provisions:

1. Voluntary.

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

2. Consideration.

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

3. Time to Review.

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

4. Express Release.

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

5. Execution.

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

6. Additional Provisions for Inclusion in a Release.

a. Reaffirmation of "at-will" relationship.

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

b. Attorney Review.

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

c. Confidentiality.

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

d. Conduct.

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

e. Return of Property.

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

f. Default Provisions.

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

g. Waiver of Right to Tender Back.

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

h. Waiver of Right of Reinstatement.

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

7. Releases Applying to Older Workers.

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

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

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

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

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

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

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

V. NON-DISCLOSURE AGREEMENTS

A. What are Non-Disclosure Agreements

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

2. Names, types, or forms.

a. Non-Disclosure Agreements

b. Confidentiality Agreements

c. Secrecy Agreements

d. Similar to, but different from, Non-Compete Agreements

e. May be part of other standard employment agreements, including Employment Manuals, Employment Relationship Statements, Severance Agreements, Non-Compete Agreements, and Release Agreements.

B. Why use Non-Disclosure Agreements

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

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

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

i. Competitors

ii. General public

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

3. Non-Disclosure Agreements help prevent unnecessary disclosure of confidential information.

4. Non-Compete Agreements help you obtain injunctive relief and monetary damages for unauthorized disclosures of protected business information.

5. Employees have a legal duty of honesty, loyalty and confidentiality while they are employed.

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

C. When and how to use Non-Disclosure Agreements

1. Non-Disclosure Agreements should be used as standard operating procedure or as standard method of operation.

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

3. Non-Disclosure Agreements should be used all the time, almost no reason not to use Non-Disclosure Agreements.

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

   a. Other standard employment agreements, including Employment Manuals, Employment Relationship Statements, Non-Compete Agreements, Severance Agreements, and Release Agreements, and,

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

5. Employment practices which should be used to support and reinforce the Non-Disclosure interest:

   a. Stamping Documents “Confidential”, and

   b. Customizing computer software for

      i. log-on with special confidential acknowledgment,

      ii. printing all confidential documents with a Confidentiality Statement on all pages thereof.

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

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

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

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

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

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

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

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

E. What should be avoided when using Non-Disclosure Agreements?

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

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

3. Typical exclusions or omissions may include:

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

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

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

F. What are the problems with Non-Disclosure Agreements?

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

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

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

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

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

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

VI. NON-COMPETE AGREEMENTS

A. What are Non-Compete Agreements?

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

2. Names, types, or forms.

   a. Non-Compete Agreements

   b. Restrictive Covenants

   c. Non-Solicitation Agreements

   d. Similar to, but different from, Non-Disclosure Agreements

   e. May be part of other standard employment agreements, including Employment Manuals, Employment Relationship Statements, Severance Agreements, Non-Disclosure Agreements, and Release Agreements.

B. Why use Non-Compete Agreements?

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

2. Use to protect the tangible and intangible assets of a business.

3. Non-Compete Agreements help prevent unreasonable competition.

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

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

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

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

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

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

3. Non-Compete Agreements should be used all the time. Almost no reason not to use Non-Compete Agreements.

4. Non-Compete Agreements should be used in conjunction with other standard employment agreements, including Employment Manuals, Employment Relationship Statements, Non-Disclosure Agreements, Severance Agreements, and Release Agreements.

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

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

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

3. Draft or edit restriction to protecting reasonable and legitimate existing business interests and nothing more.

4. The restrictions should be reasonable as to:

a. Time or Term

i. 2 to 7 years, usually thought of as reasonable and enforceable.

ii. 10 to 20 years, usually thought of as unreasonable and unenforceable.

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

b. Geography or Area

i. 1 to 20 miles usually thought of as reasonable and enforceable.

ii. 25 miles, a state, the nation, or the world usually thought of as unreasonable and unenforceable.

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

c. Scope or Coverage

i. Restriction limited to legitimate business interests.

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

iii. <u>All potential</u> customers, clients, products, services, and suppliers usually thought of as unreasonable and unenforceable.

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

5. Restrictions should include:

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

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

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

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

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

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

2. Unreasonable restrictions are:

a. Restrictions which prevent someone from:

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

ii. Making a living, and

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

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

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

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

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

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

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

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

VII. CONCLUSION

"It is the trade of lawyers to question everything, yield nothing, and to talk by the hour."

APPENDIX A

EMPLOYEE MANUAL CHECKLIST

1. ATTENDANCE

    A. NOTIFICATION OF ABSENCE

    B. ABSENCE DUE TO ILLNESS/INJURY

    C. OCCUPATIONAL ILLNESS OR INJURY

    D. MEDICAL STATEMENTS

    E. UNAUTHORIZED ABSENCE

    F. ATTENDANCE RECORDS

    G. PAYMENT FOR ABSENT TIME

    H. LATENESS/PUNCTUALITY

    I. HOURS

2. BENEFITS

    A. VACATIONS

    B. LEAVES

    C. HEALTH & WELFARE

    D. RETIREMENT

3. BULLETIN BOARDS

4. COMPENSATION

A. BASE

B. NONEXEMPT EMPLOYEES

1. UP TO FORTY HOURS

2. OVER FORTY HOURS

C. TIME WORKED

1. LUNCH OR SUPPER PERIODS

2. PAID HOLIDAYS AND PAID ABSENCES

3. REST PERIODS

4. LATE ARRIVALS

5. EARLY ARRIVALS AND LATE DEPARTURES

6. WORK AWAY FROM PREMISES OR AT HOME

7. TRAVEL

8. REPORTING PAY

D. RECORDING WORKING TIME

1. TIME RECORDS FOR NONEXEMPT EMPLOYEES

2. WAGE AND SALARY CHANGES

E. LOANS/ADVANCES

5. COMPLIANCE STATEMENTS

A. EEOC/EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (FEDERAL)

B. MHCR/MICHIGAN HANDICAPPER'S CIVIL RIGHTS ACT (STATE)

C. ADA/AMERICANS WITH DISABILITIES ACT (FEDERAL)

D. ADEA/AGE DISCRIMINATION IN EMPLOYMENT ACT (FEDERAL)

E. ELLIOTT-LARSON CIVIL RIGHTS ACT (STATE)

F. FMLA/FAMILY MEDICAL LEAVE ACT (FEDERAL)

G. NON-DISCRIMINATION

H. SEXUAL HARASSMENT

6. CONDUCT

A. ALCOHOL & DRUG USE

B. OUTSIDE EMPLOYMENT

C. CONFIDENTIALITY

D. SOLICITATIONS

E. HONESTY

F. INTEGRITY

G. DISCLOSURES

H. CHARITY SALES

I. REQUIREMENTS

J. STANDARDS

K. DRESS CODE

L. APPEARANCE

M. NOTICES/REPORTS

N. GAMBLING

O. WEAPONS

7. CONTRIBUTIONS, SOLICITATIONS OR DISTRIBUTIONS

8. COURTESY

9. CREDIT UNION

10. DEMOTION AND SALARY REDUCTION

A. PERFORMANCE RELATED

B. ORGANIZATIONAL REALIGNMENT

C. CHANGE FROM FULL-TIME TO PART-TIME STATUS

11. DISCIPLINE

A. NOTICES/WARNINGS

B. CURE

C. PROGRESSIVE

12. DISCLAIMERS

13. DISPUTES

A. NOTICE

B. ARBITRATION

C. TIME PERIODS

D. EXCLUSIVITY

E. CONFIDENTIALITY

14. DOCUMENTS

A. APPLICATIONS

B. AT-WILL

C. NON-DISCLOSURE/CONFIDENTIALITY

D. NON-COMPETE

E. SEVERANCE/SEPARATION

F. AMENDMENTS/MODIFICATIONS

15. EVALUATIONS

A. SUPERVISOR

B. SELF

C. DISAGREEMENTS

D. TIMING

16. EXPENSES

A. FORMS

B. RECEIPTS

C. PRIOR APPROVALS

D. ADVANCES

20. HOURS OF WORK

    A. WORKWEEK

    B. DAILY HOURS

    C. LUNCH AND REST PERIODS

    D. HOURS OF MINORS

    E. START TIME

    F. WEEKEND

    G. AFTER HOURS

    H. OVERTIME

    I. PRIOR NOTICE

    J. PRIOR APPROVALS

21. IDENTIFICATION

22. ILLNESS

23. INJURIES

    A. ON-THE-JOB

    B. OFF SITE

24. INTRODUCTION PERIOD

    A. PROBATION

    B. ORIENTATION

25. LAYOFFS, BUMPING, RECALLS

A. RECALL PROCEDURE

B. LAYOFF

C. RECALL

26. LEAVES OF ABSENCE

A. DISABILITY

1. SHORT TERM

2. LONG TERM

B. FUNERAL

1. DEATH IN IMMEDIATE FAMILY-LEAVE WITH PAY

C. JURY AND WITNESS DUTY

1. PERMANENT EMPLOYEES

2. REGULAR EMPLOYEES

3. SALES REPRESENTATIVES

4. JURY DUTY

D. MATERNITY LEAVE

E. MILITARY SERVICE

1. CONDITIONS OF LEAVE

2. REINSTATEMENT RIGHTS

3. LEGAL REQUIREMENTS

4. CUMULATIVE SERVICE

5. OTHER MILITARY ABSENCES

a. MILITARY SERVICE

b. RESERVE MILITARY DUTY

F. PERSONAL

1. APPROVAL

2. MINIMUM SERVICE

3. PRIOR NOTIFICATION

4. DURATION OF LEAVE

5. REINSTATEMENT

6. FAILURE TO RETURN FROM LEAVE

G. PERSONAL PAID TIME OFF

H. PERSONAL UNPAID TIME OFF

I. SICK LEAVE

J. APPROVALS

1. PRE

2. POST

K. CUMULATIVE SERVICE

L. INTENT TO RETURN

M. MAXIMUM DURATION OF LEAVE

N. MEDICAL STATEMENT

O. VOTING

P. NOTICES

1. PRE

2. POST

27. LENGTH OF SERVICE

28. LOCKERS

29. LOST AND FOUND

30. MESSAGES, MAIL AND PARCEL POST

31. MODIFICATION

32. NOTICES/DISCLOSURES

A. FORM

B. TIMING

C. COPIES

D. PERSON

E. PROBLEMS

F. CONFIDENTIALITY

33. OVERTIME

A. NOTICE

B. APPROVALS

C. COMPENSATION

34. PARKING

35. PASSES

36. PAY

A. ADJUSTMENTS

B. ADVANCE PAYMENT OF EARNED WAGES AND SALARIES

C. ADVANCES ON UNEARNED WAGES AND NEW SALARIES

D. CALL-BACK PAY

E. CALL-IN PAY

F. GARNISHMENTS

G. HOURLY EMPLOYEES

H. MONTHLY EMPLOYEES

I. PAYCHECKS

1. WAGE POLICY

2. CASHING OF PAYCHECKS

3. FINAL PAYCHECK FOR VOLUNTARILY RESIGNING EMPLOYEES

4. LOST PAYCHECK

5. UNCLAIMED PAYCHECKS

6. PAYROLL DEDUCTIONS

7. PAY TIME DISRUPTIONS

a. EMERGENCY PAY DISRUPTIONS

37. PERFORMANCE REVIEWS

38. PERSONAL DATA CHANGES

39. PERSONAL PROBLEMS

40. PLANS

A. INSURANCE

B. HEALTH

C. WELFARE

D. RETIREMENT

41. PHILOSOPHY

42. PRIVACY

A. MAINTENANCE AND USE OF RECORDS

B. EMPLOYEE KNOWLEDGE AND CONSENT

C. RECOMMENDED POLICY STATEMENTS

D. COLLECTING AND RETAINING PERSONAL INFORMATION

E. INAPPROPRIATE PERSONAL INFORMATION

F. REVIEW OF RECORDS

G. COMPANY ACCESS TO EMPLOYEE RECORDS

H. EMPLOYEE ACCESS

B. RETURN OF COMPANY PROPERTY

C. PERSONAL PROPERTY

D. USE

1. CAR

2. TELEPHONE

3. COMPUTER

E. REMOVAL

F. MAINTENANCE

G. NOTICE

46. PUBLIC AFFAIRS AND POLITICAL ACTIVITY

A. REGISTRATION AND VOTING

B. MAKING ONE'S OWN VIEWS KNOWN

C. PARTICIPATION IN POLITICAL PARTY ACTIVITY

47. PUBLIC RELATIONS

A. INQUIRIES AND RESPONSES

B. COMMENTS

C. CONTACT PERSON

48. QUALITY

49. QUALIFICATIONS

7. GLOVES

8. BRACES

I. EQUIPMENT

J. COMPRESSED GAS CYLINDERS

K. CHEMICAL AGENTS

L. PHYSICAL AGENTS

1. WELDING SPARKS AND LIGHT RAYS

2. NOISE

3. HOT OR COLD AREAS

4. HOT WORK PERMITS

M. GOGGLES AND RESPIRATORS

N. FIRE

O. RULES

P. FIRST AID

Q. HORSEPLAY

R. HOUSEKEEPING

S. USE LADDERS SAFELY

1. STEPLADDERS

2. STRAIGHT LADDERS

3. FIXED LADDERS

4. METAL LADDERS

T. INSPECTION AND MAINTENANCE

U. LIFTING

V. MACHINES

W. OFF THE JOB SAFETY

1. WHEN DRIVING

2. AT HOME

3. AT ALL TIMES

X. PHYSICAL EXAMINATIONS

Y. TRUCKS

Z. WEAPONS

56. SECURITY

A. ENTRANCE GATES

B. IDENTIFICATION BADGES

C. INSPECTION

D. NOTICE

57. SENIORITY RIGHTS

A. SERVICE CREDITED

B. ACCEPTANCE OF SENIORITY

C. APPLICATION OF SENIORITY JOB POSTINGS

F. WHAT HAPPENS WHEN MY SUGGESTION IS ADOPTED?

G. HOW BIG WILL THE AWARD BE?

H. WHAT IF MY SUGGESTION IS DECLINED?

I. WHAT IF I DON'T AGREE WITH THE DECISION?

J. WHAT KINDS OF RIGHTS DOES THE COMPANY HAVE TO MY SUGGESTIONS?

63. TEAMWORK

64. TELEPHONE

A. USE

B. COURTESY

C. MESSAGES

D. VOICE MAIL

E. RESPONSE

F. COMMENTS

G. CONFIDENTIALITY

65. TERM

A. AT-WILL

B. FOR CAUSE

C. INTRODUCTION

D. PROBATION

E. ORIENTATION

66. TERMINATIONS

A. EXIT INTERVIEW

B. NOTICE OF TERMINATION

C. DISCIPLINARY TERMINATION

D. DISCHARGE

E. ELIGIBILITY

F. RESIGNATION

G. FURLOUGH

H. LAYOFF

I. RELEASE

J. DEATH

K. DISCHARGES

L. LACK OF ABILITY

M. RESIGNATIONS

N. DEATH

O. RETIREMENT

P. DISCIPLINARY ACTION

Q. SEVERANCE

1. PERIOD

2. PAYMENTS

3. UNPAID BENEFITS

4. NOTICE

R. AT-WILL

S. FOR CAUSE

T. CURE

U. PROGRESSIVE DISCIPLINE

67. TIME CARDS

68. TIME CLOCKS

69. TOOL CHECKS

70. TRAINING AND EDUCATION

A. ON SITE

B. OFF SITE

C. EXPENSES

71. TRANSPORTATION

A. TRANSPORTATION METHODS

B. BUSES

C. VAN-POOLS AND CAR-POOLS

D. BICYCLES, MOPEDS, MOTORCYCLES, ETC.

E. COMPANY OWNED

72. VACATIONS

A. EMPLOYMENT STATUS AND ACCRUAL YEARS

1. PERMANENT EMPLOYEES

2. REGULAR EMPLOYEES

3. TEMPORARY EMPLOYEES

B. BASIC VACATION ALLOWANCE

C. VACATION CALCULATION: FIRST YEAR OF COMPANY SERVICE

D. SPECIAL VACATION ALLOWANCE

E. VACATION SCHEDULING

1. CALENDAR YEAR LIMITATION

2. APPROVAL OF VACATION PERIOD

3. VACATION SCHEDULE CHANGES

4. ANTICIPATED VACATION

5. PERSONAL TIME OFF SUPPLEMENTING VACATION

6. PAY IN LIEU OF VACATION

F. PAY RATE

1. SALARIED EMPLOYEES

2. SALES REPRESENTATIVES AND COMMISSIONED EMPLOYEES

GIVE YOUR 401(k) PLAN A BOOST

By: Charles M. Lax, Esq.

I. THE BASICS

A. Traditional 401k Plan

1. Features

a. Employees are permitted to make pre-tax contributions

b. The maximum deferral permitted in 2016 is $18,000 with individuals who are age 50 or older permitted to make an additional “catch up” contribution of $6,000

c. The plans are subject to non-discrimination testing to assure that the highly compensated employees (“HCEs”) (generally those earning more than $120,000 in 2016) do not defer disproportionately large contributions relative to the non-HCEs

2. Advantages

a. The plans are generally funded through employee deferrals (Employer Advantage)

b. Employer contributions are discretionary (Employer Advantage)

c. Employees can reduce current taxable income and save for retirement (Employee Advantage)

d. Loans and hardship distributions are often available (Employee Advantage)

e. The employer may make matching contributions to encourage participation in the plan (Employee Advantage)

f. The plan is often combined with a profit sharing feature (Employer and Employee Advantage)

3. Disadvantages

a. The Actual Deferral Percentage (ADP) Test can limit deferrals of HCEs (Employer and HCE Disadvantage)

b. The administration of the plan can be more complicated and expensive than other types of plans (Employer Disadvantage)

B. Roth 401(k) Plan

1. Features

a. Contribution limits, distribution rules and ADP Testing are identical to traditional 401(k) plans

b. Deferrals are made after tax as opposed to before tax

c. In most instances, distributions from the plan are made tax free

d. This type of feature may also be used in a traditional 401(k) plan with a before tax deferral feature

2. Advantages

a. The distributions are tax free, if qualified (Employee Advantage)

b. The distributions may be rolled into a Roth IRA and distributions postponed after age 70 ½ (Employee Advantage)

c. The plan can provide a terrific “death benefit” for younger beneficiaries (Employee Advantage)

3. Disadvantages

a. There are no current tax incentives to save through this vehicle (Employee Disadvantage)

b. There is no certainty of what future tax rates will be (Employee Disadvantage)

II. HOW TO CURE ADP PROBLEMS

A. What is the ADP Test?

1. Plans must meet one of two ADP Tests for the plan year:

a. Test 1. ADP for eligible HCEs is not more than the ADP of all other eligible NHCEs multiplied by 1.25; or

b. Test 2. The ADP for eligible HCEs is not more than 2 percentage points over the ADP for eligible NHCEs, and the ADP for the HCEs is not more than 2 times the ADP of eligible NHCEs

2. Example:

	Comp.	Deferral	ADP
HCE1	$205,000	$13,000	6.34%
HCE2	$180,000	$12,000	6.67%
NHCE1	$60,000	$ 6,000	10.00%
NHCE2	$40,000	$ 3,200	8.00%
NHCE3	$40,000	$ 2,000	5.00%
NHCE4	$40,000	$ 0	0.00%
NHCE5	$20,000	$ 600	3.00%
NHCE6	$20,000	$ 300	1.50%

ADP Test 1 Failed

HCE ADP% = 6.51%

NHCE ADP% = 4.58%

6.51% / 4.58% = 1.42%

Therefore ADP Test 1 Failed

ADP Test 2 Passed

6.51% - 4.58% = 1.93%

1.93% < 2% and

6.51% < 9.15 (2 times the NHCE ADP%)

Therefore ADP Test 2 Passed

B. Common Options to Pass the ADP Test

1. Refund Deferrals to HCEs

a. Most common method is to make corrective distributions of excess deferrals plus earnings

b. If an HCE has unused carryover distributions, the ADP refund may first be offset against unused catch up contributions

c. Then further distributions that are allocated to HCEs are determined by a leveling method starting with the HCE with the largest deferral

d. Refunds must be completed in 2 ½ months of the plan year end

2. QNECs or QMACs

a. The employer may make an additional plan contribution for NHCEs to raise their ADP to a level to pass ADP

i. A QNEC is a fully vested contribution allocated to the NHCEs proportional to their compensation

ii. A QMAC is a fully vested contribution allocated to the NHCEs as an additional match

b. The correction must be made by the last day of the next plan year

C. Suggestions for Curing ADP Problems

1. Adopt a Safe Harbor 401(k) Plan

a. “Safe Harbor 401(k) Plans” automatically pass the ADP Test

b. In order to qualify as a Safe Harbor 401(k) Plan, either of the two required contribution options must be provided:

i. An employer contribution of 3% of every eligible participant’s compensation; or

ii. An employer matching contribution equal to 100% of an eligible participant’s first 3% deferral and 50% of the eligible participant’s next 2% deferral

c. Additionally, participants must be notified in writing before the beginning of the plan year of the contribution methodology that will be used

2. Add or Increase Employer Matches

3. Extend Matches or Use Escalating Match Rates

a. If the plan presently provides for a 100% match on the first 2% of deferrals, consider modifying the match formula to 50% of the first 4% of deferrals

b. If the plan presently provides for a 100% match of the first 4% of deferrals, consider modifying the match formula to 50% of the first 4% of deferrals and 100% of the next 2% of deferrals

4. Provide for automatic enrollment in the plan with a specified deferral rate (i.e. deferrals of 3% will begin automatically)

   a. This requires a new participant to make an affirmative election to either not participate or to defer another percentage

   b. Certain types of automatic enrollment arrangements allow a participant who has deferrals to “claw” them back within a specified period of time

5. Give the participants greater access to their 401(k) account balances through:

   a. Plan loans

   b. Hardship distributions

   c. In-service distributions after 59-1/2

6. Hold regular meetings with the participants to review investment options

7. Increase the opportunities for participants to change deferral elections or investment alternatives

III. PAYMENT OPTIONS FOR PLAN EXPENSES

A. What types of expenses can/can't be paid from the plan?

1. Expenses that can't be paid by the plan and must be borne by the plan sponsor

   a. Generally, the Department of Labor does not permit expenses which relate to "settlor functions" and paid from plan assets. A settlor function is an independent business activity or decision of the plan sponsor

   b. The types of expenses referred to include:

      i. Plan design expenses such as studies of the plan's feasibility and projections

      ii. Preparation of the initial plan document

      iii. Preparation of voluntary plan amendments (required amendments due to law changes may be paid from plan assets)

      iv. Certain plan termination fees

2. Expenses that may be paid from plan assets

   a. Expenses may be paid from the plan if permitted under the plan document and they are prudent and reasonable

   b. The types of expenses that may be paid include:

      i. Participant record keeping

      ii. Non-discrimination/top-heavy testing

      iii. Preparation and distribution of benefit statements

iv. Preparation of Form 5500

v. Accountant's audit reports for large plans

vi. Summary Annual Reports

vii. Various notices such as automatic enrollment, default investments and safe harbor 401(k) plans

viii. Expenses for computing benefit payments or processing loans

ix. Plan amendments and/or restatements required by law changes or new regulations

x. IRS determination letter requests

xi. Purchase of trustees fiduciary bond

xii. Trustee fees

xiii. Investment management fees

xiv. Fees to process participant enrollment and investment elections

xv. Participant education fees

B. Which expenses can be borne directly by the Participant?

1. Generally, if authorized by the plan document, fees may be charged directly to participants for costs incurred for a particular transaction or service

2. Participants should be informed of the amount of the fee in advance

3. The types of fees typically charged directly to participants include:

    a. Fees to prepare distribution packages and consent forms

    b. Hardship withdrawal expenses

    c. Fees to prepare participant loan documents

    d. Qualified Domestic Relations Order determinations and processing fees

C. Allocating other fees among all participants

1. Plan expenses that are not charged to a specific participant's account can be allocated to all plan participants either on a pro-rata or per capita basis

2. A pro-rata allocation is done proportionately based upon account balance

3. Per capita allocation is done in a manner whereby an expense is allocated equally based upon the number of participants in the plan

4. Since the Department of Labor requires the allocation method to be prudent, it must have a rational basis with some reasonable relationship to the service provided

D. Using forfeitures to pay plan expenses

1. Some plans provide that expenses may be paid from forfeitures (created by terminating employees without full vesting)

2. If the forfeitures offset other employer contributions there is little benefit to this practice

3. If forfeitures are allocated to remaining participants as "additional contributions or benefits" this is a cost saving measure for the employer

IV. DON'T OVER LOOK ROTH OPPORTUNITIES

A. Add Roth 401(k) options to an existing traditional 401(k) plan

1. Reasons participants may select a Roth option:

   a. Tax rates during retirement may be higher than their current tax rates

   b. Roth deferrals diversify the future tax risk that rates will increase

   c. Roth IRAs are not subject to required minimum distributions ("RMDs")

      i. RMDs are required from Roth 401(k)s; however, a Roth account could be rolled into a Roth IRA

      ii. No distributions are required out of a Roth IRA until the death of the IRA owner

   d. Roth deferrals/contributions allow participants to maximize retirement benefits

   e. Roth deferrals facilitate estate planning by allowing for the prepayment of income taxes

2. More media coverage is occurring touting the benefits of Roth options

a. Participants may perceive they are being “short-changed” if Roth isn’t available

b. The plan sponsor really incurs little additional expense by including Roth 401(k) options

B. Allow for In-Plan Roth Conversions (“Conversions”)

1. What is a Conversion?

a. A provision to allow a participant to transfer a non-Roth portion of their account in a 401(k) plan into a designated Roth account

b. The amount converted is subject to Federal Income Tax in the year converted (except for any tax basis that the participant may have)

c. The ten percent early distribution penalty does not apply to amounts that are converted

d. What accounts in a 401(k) plan can be converted to a Roth account?

i. Pre-tax elective deferrals

ii. Vested matching contributions

iii. Vested non-elective employer contributions

iv. Rollover contributions

v. Earnings on any of the above accounts

2. Paying the tax created by the Conversion

    a. The big deterrent to a Conversion is the obligation to pay the tax immediately

    b. Ideally, a participant will be in a low tax bracket and have cash available to pay the tax

    c. The participant may have available other distribution opportunities from the plan such as:

        i. A plan loan

        ii. An in-service distribution of other plan assets (which will subject the distribution to taxation and penalties, if appropriate)

3. In what situations should a participant consider a Conversion?

    a. Generally, they would be the same situations where a participant determines that Roth deferrals should be made in lieu of traditional, before tax deferrals

    b. These situations would include:

        i. Participants currently in a low tax bracket

        ii. Participants who believe tax brackets will increase in future years or they will be in a higher bracket at the time of their retirement

        iii. Participants who have no need to utilize funds accumulated in the Roth account

        iv. For estate planning purpose, participants may wish to leave terrific “death benefits” to their

beneficiaries (who will be able to take and then spread the distributions over their own life expectancy)

EMPLOYEE CLASS ACTIONS: WAGE AND HOUR, DISCRIMINATION AND BACKGROUND CHECKS

By: Kathleen H. Klaus, Esq.

I. WHAT IS A CLASS ACTION?

A. If certain criteria are met, one person can file suit on behalf of a group of people who are "similarly situated."

B. The case is driven by rapacious class action counsel, seldom from concern about remedying any illegal conduct.

C. Expensive to defend, expensive to settle and expensive to lose.

D. No chance of recovering any costs, even if you win the case.

E. You may or may not have insurance, depending on the nature of the claim.

II. THE GOOD.

A. Employment discrimination claims harder to bring on a class basis. ***Dukes v. Wal-Mart Stores, Inc.***

B. Individualized "micro" decisions concerning promotion, wages paid, work assignments do not lend themselves to determination on a "class basis."

C. It took decades of litigation to bring an end to abuse in discrimination class actions. The lawsuit was filed in 2000 and decided by the United States Supreme Court in 2011.

III. THE BAD.

A. Plaintiffs do not need to prove a wage and hour violation for each member of a Fair Labor Standards Act ("FLSA") case. ***Tyson Foods, Inc. v. Bouaphakeo***

B. Verdict for the plaintiff class of $5.9 million in case in which the plaintiffs alleged they should have been paid overtime for time they spent putting on and taking off mandated safety gear.

C. Tyson did not keep time records of how long employees took to dress and undress so the plaintiff relied on "expert" testimony of how long it took a "typical" person to dress and undress. Tyson argued that they were not able to assert defenses to any individual's claim and, therefore, denied the right to due process.

D. Makes it very easy for a class to prove its case and establish damages in some cases.

IV. THE UGLY.

A. Technical violations of consumer statutes can be ruinous to an innocent employer who does not update forms and procedures.

B. For example, disclosures to job applicants when you intend to run a "consumer report" check as a condition of hiring.

C. What does the disclosure need to include and what can it not include? This changes as various issues get litigated through the courts. A form that was valid in 2000 may not be by 2016.

D. A small error can result in damages ranging from $100 - $1000 per person in the class, plus attorneys' fees and costs.

E. Use of internet forms and services may not be a defense.

V. THE RESPONSE

A. Review existing insurance policies. Even if there is not a product that covers damages, you may be able to purchase one that will pay for your defense costs.

B. Review policies, applications, forms and disclosures on an annual basis. It's the "unknown unknowns" that may hurt you.

EMPLOYEE RETALIATION CLAIMS: YOUR WORST NIGHTMARE

By: David E. Hart, Esq.

I. Nature of Retaliation Claims

A. **What is employer retaliation?** A manager may not fire, demote, harass, discipline, take adverse action against or otherwise "retaliate" against an employee where the reason for the adverse action was the employee's exercise of a right conferred by a well-established legislative enactment.

1. Adverse action against an employee after they engage in any of the following activities can be a form of unlawful retaliation:

a. Exercising a right guaranteed by law:

b. Refusing to participate in unlawful activity requested by employer.

c. Executing a duty required by law or acting in accordance with a statutory duty.

B. **Why protect employees against retaliation?** If retaliation for such activities were permitted, it would have a chilling effect upon the willingness of individuals to speak out unlawful employment practices.

C. Michigan Statutory Protections:

1. General Whistleblower Protection: An employee may not be discharged (or discriminated against) in retaliation for reporting a suspected violation of a law (federal, state, or local), or for participating in an investigation, hearing, inquiry, or court action.

a. The report may be made verbally or in writing, but it must be made to a public body (such as a state officer, state agency, school board, law enforcement agency, and member of the judiciary).

b. An employee who discloses wrongdoing to a supervisor is not protected.

c. An employee is not protected if she knows that the report is false.

2. Discrimination & Civil Rights: An employee may not be retaliated against (or discriminated against) for opposing a violation of Michigan's Elliott-Larsen Civil Rights Act, or for making a charge, filing a complaint, or participating in a proceeding/investigation under that statute.

3. Health Care Workers: A healthcare worker may not be retaliated against for reporting an unsafe healthcare practice or condition in a healthcare facility.

4. Occupational Safety and Health: Several activities concerning occupational safety and health are protected:

a. An employee may not be discharged (or discriminated against) in retaliation for filing a complaint, instituting a proceeding, testifying at a proceeding, or exercising a right concerning occupational safety and health.

b. An employee may not be penalized (or discriminated against) in retaliation for refusing to operate equipment or engage in a process that is "tagged" as presenting an imminent danger by a Department of Labor representative.

c. An employee may not be penalized (or discriminated against) in retaliation for participating in an inspection, investigation, or conference concerning occupational safety and health laws.

5. Minimum Wage Laws: An employee may not be discharged (or discriminated against) in retaliation for testifying before the wage deviation board or for serving on the wage deviation board. The wage deviation board enforces the state's minimum wages laws. An employer who violates this provision is guilty of a misdemeanor.

6. Payment of Wages and Fringe Benefits: An employee may not be discharged (or discriminated against) in retaliation for filing a complaint, instituting a proceeding, testifying in a proceeding, or exercising a right concerning payment of wages and fringe benefits.

7. Persons with Disabilities Civil Rights Act: An employee may not be retaliated against (or discriminated against) for opposing a violation of the Persons With Disabilities Civil Rights Act, or for making a charge, filing a complaint, or participating in a proceeding/investigation under that same statute.

D. **Specific acts which are protected**: Employees are protected against adverse action in response to any of the following activities:

1. Refusal to violate the law when requested by employer.

2. Opposing discriminatory conduct against themselves or another employee.

3. Testified, assisted or participated in an investigation or proceeding regarding discrimination.

4. Filing a discrimination complaint.

5. Filing a sexual harassment complaint.

6. Uncovering and reporting fraud in accounting or corporate practices.

7. Filing a worker's compensation claim and/or collecting workers compensation benefits.

8. Exercising rights under FMLA.

E. **Employee's Rights:** Along with protection against retaliation, employees have the right to the following conduct without discrimination, or adverse action:

1. Circumspectly gather evidence to prove a suspected violation

2. Ask to meet with management to discuss a violation

3. Complaint to anyone about a violation or suspected violation, including other employees

4. Advocate for improved representation for covered classes in a union setting

5. Participate in public demonstrations about violations in the industry

6. Advise co-workers of worker's rights

7. Form a one-person picket to protest violations

F. **Employer's rights**: The following actions do not give right to retaliation claims:

1. Discharge employees for poor job performance

2. Discipline or discharge employees for continually violating established rules, or for an accumulation of incidents

3. Question witnesses regarding alleged violations

4. Discharge employees for criminal acts of protest (arson, blocking traffic, vandalism)

5. Discharge employees who lawful actions are excessively hostile (constant, disloyal complaints which cause subordinates to quit or which jeopardize the employer's mission)

6. Refuse to meet with activists organizing for civil rights (but do not discipline employees for requesting a meeting)

7. Bottom line: Employers are entitled to take appropriate disciplinary action against an employee for legitimate reasons even if that employee has complained of or reported a violation. The discipline must not result from the complaint. Both employees and supervisors must use care and prudence when dealing with these situations.

G. Why are retaliation claims an employer's worst nightmare?

1. Employees can bring a claim for retaliation against their employer while remaining employed – presents less risk of lost earnings to an employee

2. Jury verdict research indicates there is a 57% chance of an employee receiving a favorable jury verdict in a retaliation claim

3. Due to the inherent names of retaliation claims, juries tend to return substantial awards, and often punitive damages.

II. Requirements of Retaliation Claim

A. Employee engaged in protected activity.

B. Employee is subject to adverse action:

1. Demotion, harassment, or termination.

2. Subject to treatment that would cause a reasonable person to be less likely to complain about discrimination as a result.

3. Employee subject to different treatment than other employees.

4. Treatment of employee changed after protected activity.

C. The employer or decision maker knew about the protected activity

D. Employee has evidence of a causal connection between the protected activity and the adverse employment action taken against them

1. Common factors: temporal proximity, examples of other employees subject to adverse action for similar activities, written policies, reports, etc.

III. Burden of Proof in Retaliation Claim

A. It is the employee's responsibility to prove that the employer was aware of the employee's participation or opposition, and that the employee was treated adversely because of it.

B. The employer must give reasons for such treatment, and that employee must prove that these reasons were a pretense.

C. The motives of both employer and employee, and the extent of damage resulting from the employee's activities, are all crucial factors.

IV. Retaliation for Employee's Use of Social Media: Employers must use caution when taking adverse employee action due to posting and social media use - posts can be used for evidence against the employer.

A. Comments lamenting that a "f*cking indian" was made department chair and other racist Facebook posts by two professors who were allowed to vote on an employee's tenure (which was denied). The employee's retaliation claim also advanced, partly because the Facebook posts provided a causal link between the denial of tenure and his prior complaints of race discrimination (Hannah v. Northeastern State University).

B. A court found a triable issue on whether a male EMT was fired in retaliation for reporting sexual harassment by a male coworker or because he refused to sign a letter agreeing to attend anger management after he wrote Facebook posts (the same day the coworker touched him near his crotch) threatening "the mother f***er who thought today was a joke" and stating he would "knock [that individual's] f***ing teeth out, break [his or her] jaw [and] every bone in [his or her] left arm." The employee claimed he told HR he was willing to do the training but refused to sign the letter because it purported to exonerate the company for the harassment (Verga v. Emergency Ambulance Service, Inc.).

C. Evidence that an employer suspended, fired, and then sued an employee for defamation because she spoke to the media, was featured on Facebook by the media, and complained to OSHA about workplace exposure to chemicals linked to breathing problems suggested to a federal court that the Secretary of Labor was likely to succeed on a retaliation claim filed on the employee's behalf under the OSH Act. The court enjoined the employer from taking adverse actions against employees who exercise rights under the Act (Perez v. Lear Corporation Eeds and Interiors).

V. How to Prevent Charges of Retaliation

A. Educate Supervisors and Decision Makers about the following:

1. Things to do:

a. Maintain confidentiality in all aspects of the discriminatory harassment complaint process.

b. Make sure there is substantiated evidence to justify treatment of employees.

c. Review work rules and policies – a seemingly neutral policy may affect employees adversely

i. Example: Employees should not be required to obtain permission from employer to cooperate or participate in governmental investigations of discrimination; nonsupervisory workers should be permitted to talk to attorneys seeking evidence for discrimination claims.

2. Things to avoid:

a. Tell other workers to “keep an eye” on an employee after engagement in protected activity.

b. Keep attendance records differently on the employee than for other employees.

c. Accelerate disciplinary actions or dispense unusually harsh discipline on the employee.

d. Increase criticism of employee’s work unless there is a substantial reason.

e. Treat employee adversely because of spouse' or friend's protected activity.

f. Discharge employees for refusing to testify in supervisor's favor during investigations.

g. Discharge employees based on evidence obtained during retaliatory surveillance.

h. Tell applicants not to call a department official to report a violation.

i. Refuse to hire applicants on pretext, when the real reason was due to their history of reporting violations against a former employer.

j. Avoid reactive behavior such as denying the employee information/equipment/benefits provided to others.

B. Employer protection through Handbook Provisions:

1. Policy against retaliation.

2. Open door policy requiring all complaints or grievances be brought to management's attention.

3. Provide access to outside counsel for opportunity to voice grievances if employee is uncomfortable talking to management.

4. Claim limitations which require employees to bring all claims relating to their employment within 180 days of the occurrence giving rise to the claim and limit claims to be brought in employee's individual capacity, as opposed to a class.