HUMAN RESOURCES AND EMPLOYMENT LAW ISSUES

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SELECTED MICHIGAN EMPLOYMENT LAW

I. PRE-HIRE MATTERS

A. Overview

$ Employers are generally free to hire anyone they wish to hire and to follow any posting and hiring procedures they wish to follow

$ Title VII of the Civil Rights Act of 1964 (Title VII), 42 USC 2000e-1 et seq., prohibits employers from discriminating against any individual in hiring because of that individual's race, color, religion, sex, or national origin.

$ Federal law also prohibits discrimination in hiring on the basis of citizenship status (Immigration Reform and Control Act of 1986, 8 USC 1101 et seq.), age (Age Discrimination in Employment Act of 1967 (ADEA), 29 USC 621 et seq.), and disability (Americans with Disabilities Act of 1990 (ADA), 42 USC 12101 et seq.).

$ The State of Michigan=s Elliott-Larsen Civil Rights Act (ELCRA), MCLA 37.2101 et seq., MSA 3.548(101) et seq., prohibits discrimination with respect to hiring because of an individual's:

- race
- color
- religion
- sex
- national origin
- age
- height
- weight
- marital status

B. Applications and Interviews

$ The primary purpose of application forms and preemployment interviews is to eliminate undesirable or unqualified persons from employment consideration.

$ The application is deemed to form a part of the employment contract.

$ The hiring process is closely regulated by state and federal law-employers are prohibited from using practices that disproportionately screen out members of protected groups and are

not valid predictors of successful job performance or that cannot be justified by a business necessity.

$ A "business necessity" is a practice that is necessary to the safe and efficient operation of the business, effectively carries out the purpose it is supposed to serve, with no alternative policies or practices that would better or equally serve the same purpose with less discriminatory impact. Griggs v Duke Power Co, 401 US 424 (1971) (A case which required an employer to show that the requirement of high school diploma was job related.)

$ Minimum height and weight requirements and English language tests are illegal if they screen out a disproportionate number of minority group individuals or women and the employer cannot show that these standards are essential to the performance of the job in question.

$ Avoiding liability for interview questions: Would the answer to a particular question have the effect of screening out minorities and/or members of other protected groups? Is the information requested really needed to judge an applicant's competence or qualifications for the job?

$ Permitted and Nonpermitted Inquiries:

- ❄ Address or duration of residence. It is *lawful* to ask how long the applicant has been a resident of the state or city.

- ❄ Age. It is *lawful* to ask if the applicant is 18 years of age or older- but only for the purpose of determining whether the applicant is of legal age for employment. It is *unlawful* to ask the applicant's age or date of birth, due to the potential for age discrimination.

- ❄ Arrests and convictions. It is *lawful* to ask whether the applicant has ever been convicted of a crime; if so, when, where, and the nature of the offense; and whether there are any felony charges pending against the applicant. It is *unlawful* to make general inquiries as to whether the applicant has been arrested but not convicted.

- ❄ Birthplace. It is *unlawful* to ask either the birthplace of an applicant or the birthplace of an applicant's parents, spouse, or other close relatives.

- ❄ Birth Certificate. It is *unlawful* to require the applicant to submit a birth certificate, naturalization papers, or baptismal record.

- Citizenship. It is *lawful* to ask whether the applicant is a citizen of the United States; whether the applicant intends to become a citizen of the United States if he or she is not a citizen; whether the applicant has the legal right to remain permanently in the United States if not a citizen; and whether the applicant intends to remain permanently in the United States.

  To avoid concerns of discrimination based on national origin, these questions should be asked after the individual has been hired. Unless asked as part of the federal illegal alien inquiry, it is *unlawful* to ask the applicant's country of citizenship; whether the applicant is a naturalized or native citizen; the date the applicant acquired citizenship; and whether the applicant's parents or spouse acquired citizenship. It is also unlawful to require an applicant to produce naturalization papers.

- Education. It is *lawful* to inquire into an applicant's academic, vocational, or professional education and the public or private schools attended by the applicant.

- Experience. It is *lawful* to inquire into work experience.

- Disability. It is *lawful* to ask whether the applicant can perform the essential duties of the job, with or without accommodation. It is *unlawful* to ask questions about an individual's physical or mental condition if that condition is not directly related to the requirements of the specific job.

- Height. It is *unlawful* to inquire about the applicant's height.

- Marital status and children. It is *unlawful* to require an applicant to provide any information regarding marital status or children; to ask whether the applicant is single or married; to ask for the name of the applicant's spouse; to ask whether the applicant's spouse is employed; or to ask whether the applicant has children. It is *lawful* to ask whether the company employs the applicant's spouse.

- Name. It is *lawful* to ask the applicant's full name; whether the applicant has ever worked for the company under a different name; and whether any additional information relative to a different name is necessary to check the applicant's work record (and if so, an explanation as to why). It *is unlawful* to ask either the original name of an applicant

whose name has been changed by court order, or the applicant's maiden name.

- National origin. It is *lawful* to inquire into languages the applicant speaks and writes fluently. It is *unlawful* to inquire into the applicant's lineage, ancestry, national origin, descent, parentage or nationality (unless pursuant to the federal illegal alien inquiry); the nationality of the applicant's parents or spouse; or how the applicant acquired the ability to read, write, or speak a foreign language.

- Notice in case of emergency. It is *lawful* to ask the name and address of the person to be notified in case of accident or emergency. It is *unlawful* to ask the name and address of the nearest relative to be notified in case of accident or emergency.

- Organizations. It is *lawful* to inquire into the organizations of which an applicant is a member, with the exception of those organizations which indicate the race, color, religion, national origin, or ancestry of its members through the name or character of those organizations. It is *unlawful* to ask the applicant to list all clubs, societies, and lodges to which he or she belongs.

- Photograph. It is *unlawful* to require a photograph prior to hire.

- Race or color. It is *unlawful* to inquire as to the applicant's complexion or skin color.

- Relatives. It is *lawful* to inquire as to the names of the applicant's relatives already employed by the company. It is *unlawful* to ask about the address of any relative of the applicant, other than the address of the applicant's father, mother, husband/wife, and minor dependent children.

- Religion. It is *unlawful* to inquire into an applicant's religious denomination, religious affiliations, church, parish, pastor, or religious holidays observed.

- Sex. It is *unlawful* to identify the applicant by Mr., Ms., Miss, or Mrs. or make any inquiry regarding sex. It is also unlawful to inquire about the applicant's ability to reproduce or his or her advocacy of any form of birth control.

- Weight. It is *unlawful* to inquire about the applicant's weight.

- $ To enhance the reliability of the application form, the application should require that the employee verify that it is accurate and complete. This can also clarify the employer's right to deny employment or subsequently discharge the employee on discovery of any false information or significant omissions.

- $ The application should also contain the applicant's consent for the employer to verify references, credit history, educational records, and criminal conviction history, as well as releasing the employer from liability when verifying those matters.

- $ When interviewing, an employer should:

  - ❄ Review the requirements for the job.

  - ❄ Review the employment application and resume to identify areas for further questions.

  - ❄ Hold the interview in private.

  - ❄ Make sure that all questions are job-related and nondiscriminatory.

  - ❄ Clearly identify the requirements of the job, in order to determine the physical and mental ability of the applicant to perform the job.

  - ❄ Develop an interview rating form to summarize the interview and to rate the applicant based on job-related criteria.

  - ❄ Refrain from indicating that employment would be anything other than at-will.

C. Testing

- $ Testing may not be used to discriminate against minorities or if the tests have an adverse impact on minorities and are not job related.

- $ Skill Tests

  - ❄ Generally upheld by Courts as valid

  - ❄ Tests should be directly related to job skills

II. AT-WILL AND JUST-CAUSE EMPLOYMENT ISSUES

A. Employment for a Definite Term of Years

$ Employment for definite term is implied to be a just-cause relationship, that is, the employee may only be discharged prior to the expiration of the definite term for a good cause

$ At-will employment for a definite term of years must be stated in writing

$ Definite term of years to exceed one year must be contained in writing and signed by the parties

B. Employment for an Indefinite Term of Years

$ Presumed to be at-will, but that presumption may be rebutted by evidence of both a subjective belief that the employee will be discharged for cause only, and objective manifestations of the employer's assent to such for-cause provisions.

$ No necessity for a written agreement.

C. Express Written Promises

$ Express written promise that termination of employment will only be for a just cause.

$ Promise must be clear and unequivocal, and must be such that a reasonable person would have interpreted the promise as a deliberate promise to terminate only for just cause.

$ Statements that an employer has adopted policies that are described as "fair to all employees and in the best interest of the company" and that "the company, by its actions and attitudes, will endeavor to maintain a spirit of good will, loyalty and harmony among all persons in the organization" do not constitute express written promises to discharge for cause.

$ Courts have held that written discipline policies are insufficient as a matter of law to constitute a just-cause employment relationship.

D. The "Legitimate Expectations" Theory

$ ALegitimate expectation@ of just-cause employment

$ Based on an employer=s promises to the workforce in general, <u>not</u> promises made to an individual employee.

- Employee must demonstrate both a subjective belief in just-cause employment and some reasonable objective basis for that belief.

E. At-Will Issues

- An at-will employment relationship may be terminated by either party at any time, with or without notice, with or without cause, for any reason, no reason, or a bad reason (except a legally impermissible reason or one opposed to public policy).

- Employment relationship is presumed to be at will absent special circumstances to the contrary.

- Best for an employer to set forth the at-will nature of the employment relationship in express at-will statements or disclaimers, and to require written employee acknowledgments of the at-will employment relationship.

- Disclaimers should include:

    - Language describing the ability of both parties to terminate the employment relationship at any time for any reason;

    - Language providing that the relationship may not be modified;

    - Language indicating that the written contract contains all terms governing the employment relationship, and that any verbal statements do not affect or modify the written terms; and

    - Language disclaiming the authority of any supervisor, employee, representative, or other purported agent of the employer to bind the employer to any employment contract.

- Important for employee handbooks to include express statements of at-will employment

- Means by which an employer may preserve the at-will employment relationship:

    - Have the employee subscribe to the at-will employment relationship on the employment application;

    - Have the employee acknowledge, on a separate agreement signed at the time of hiring, that he or she will abide by the employer's policies and procedures;

- ❄ Provide the employee with an employment letter stating the employment relationship is at-will;

- ❄ Have the employee agree to the relationship on employee handbook sign-off sheets containing at-will acknowledgements.

$ What if an employee refuses to sign an at-will employment acknowledgment?

- ❄ The Michigan Supreme Court has held that where such an acknowledgment appears on a sign-off sheet accompanying an amended and reissued employee handbook, the acknowledgment will govern the employment relationship, even if the employee refuses to sign the acknowledgment, as long as the handbook was provided to all affected employees in a manner reasonably calculated to provide them with notice of the handbook's terms.

$ The last and most recent employment handbook distributed during the former employee's tenure will govern.

$ Even if an employee is an at-will employee, they cannot be fired, nor can their employment be adversely impacted, based on race, sex, religion, color, marital status, weight, age, height or national origin.

- ✓ An employee presents a prima facie case of discrimination under McDonnell Douglas Corp v. Green, 411 US 792; 93 S Ct 1817; 36 L Ed 2d (1973), by showing that (1) he or she is a member of a protected class; (2) who suffered an adverse employment decision; (3) was qualified for the position; and (4) the adverse action occurred under circumstances giving rise to an inference of unlawful discrimination.

- ✓ Either party to an at-will employment contract may terminate the contract at any time, for any reason, absent a contrary contractual provision, unless the grounds for discharge violate public policy. An employer may not discharge an employee for exercising a right conferred by a well-established legislative enactment. To establish a claim of retaliatory discharge, a plaintiff must show that (1) he or she was engaged in protected activity, (2) of which the defendant was aware, (3) the defendant treated the plaintiff adversely, and (4) the adverse action was caused by the plaintiff's engagement in the activity.

III. SEXUAL HARASSMENT

$ Courts have broadened the scope of conduct that can give rise to a claim of sexual harassment at both the federal and state level.

$ Conduct and comments with sexual connotations, as well as conduct or comments that single out one sex for unequal treatment, may give rise to sexual harassment claims.

$ The Sixth Circuit Court of Appeals has stated that an Aactionable hostile environment@ is not determined by looking at each incident of harassment, but whether all incidents, taken together, even if directed at employees other than the plaintiff, created a hostile environment.

$ Promptly investigate complaints of sexual harassment - Michigan courts have held that an employer may avoid liability if it adequately investigates and takes prompt and appropriate remedial action upon learning of an allegedly sexually hostile work environment. However, an employer that unreasonably fails to take or unreasonably delays in taking appropriate action when it receives notice of sexual harassment is probably making itself liable.

$ Limiting exposure for employers:

❄ Create policies, communicate those policies to all employees, and strictly enforce those policies.

❄ Create a work environment in which everyone understands that neither harassment, nor retaliation for complaining of harassment, will be tolerated;

❄ Immediately and thoroughly investigate complaints and take effective remedial measures.

IV. EMPLOYEE EVALUATION

A. Formal Evaluation

$ A formal evaluation generally includes a written format and a set time for the evaluation.

$ The formal evaluation process may educate both evaluators and employees about the factors that the employer considers important to successful performance of an employee's particular job, as well as informing the employee of his or her performance.

$ Formal evaluations should encourage explanation or require examples in order to produce employee feedback.

$ Formal evaluations should include established standards and criteria to guide the evaluating management person, to prevent Ainterpretation@ of the applicable standards.

$ Standards and criteria should not be overly burdensome, however, so that the evaluating management person is not discouraged from completing the evaluation.

$ Types of formal evaluations:

Rating Scale

❄ Assign the employee a rating on various job-related criteria

❄ Tend to be reliable, objective and consistent methods of review

❄ May be more expensive and difficult to develop and maintain

Task Checklist

❄ Assign the employee a numerical rating for each of a number of routine tasks

❄ Easier to develop and maintain

❄ Less reliable, less objective, better suited to lower-level positions

$ In sum, an employer performing formal evaluations should:

❄ Create clear-cut standards of performance;

❄ Review evaluation criteria for job-relatedness;

❄ Properly train evaluators; and

❄ Periodically review the evaluations for timeliness, completeness, forthrightness, and consistency.

B. Informal Evaluation

$ Evaluations that do not adhere to a standardized format

$ Evaluations should still contain a measure of consistency, should clearly identify job-related criteria, should adhere to a schedule, and should contain some confirmatory documentation

$ Types of informal evaluations:

Anecdotal Evaluation

❄ Periodic notes added to the employee's personnel file that memorialize significant or critical job-related events, conversations, or conduct (both positive and negative) at the time they happen.

❄ Preferable to discuss these notes with the employee on a regular basis.

❄ Need to have guidelines for evaluating performance using the anecdotal method.

❄ Can be overly subjective; subject to having only negative information included in employee file

Narrative Appraisal

❄ Job performance dialogue between the evaluator and the employee, guided by the employee's job description.

❄ Great flexibility

❄ Training of evaluators necessary; can be overly subjective

Forced Rankings

❄ Evaluation of employees against each other, resulting in a list that ranks all employees in a unit or job group from best performer to worst.

❄ Ineffective with employee groups that are, as a whole, strong performers

❄ Important to emphasize consistency in ranking through strict adherence to job-related criteria

$ Training necessary to ensure that positive and negative events are documented

C. At-Will Disclaimers

- The existence of an evaluation system does not establish a just-cause standard.

- It is good policy to include specific at-will disclaimer language in any reference to employee appraisal, to the effect that the performance evaluation process does not alter the at-will relationship.

D. Sign-Off Procedures

- Following a performance evaluation, the evaluator and employee should acknowledge either (1) their mutual agreement with the appraisal or (2) that the appraisal took place.

- Sign-off procedures benefit both the evaluator and employee by forcing a focus on any areas of disagreement.

- Provides the employer with documentation that the appraisal actually took place.

- While acknowledgment of the overall evaluation is preferable, it is more realistic to simply have the employee acknowledge that the performance evaluation has occurred.

- If an employee refuses to sign a review, the supervisor should note in the sign-off section that the employee received the appraisal but refused to sign it.

E. Appeals

- Often may be effective to give employees who believe they have been unfairly rated the option to appeal that rating to a manager or human resources representative.

- Benefits employee as he or she is given the option of expressing concerns and making arguments to a more objective person.

- Employer also benefits as an appeal creates an additional opportunity to timely resolve any problems.

- Federal District Court for the Eastern District of Michigan has ruled that an employee who fails to appeal an unfavorable evaluation when a published internal procedure is available is prohibited from challenging that appraisal in court.

V. FAMILY AND MEDICAL LEAVE ACT

A. Synopsis of Law

Covered employers must grand an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

$ for the birth and care of the newborn child of the employee;

$ for placement with the employee of a son or daughter for adoption or foster care;

$ to care for an immediate family member (spouse, child, or parent) with a serious health condition; **or**

$ to take medical leave when the employee is unable to work because of a serious health condition.

B. What Employers Are Covered by the FMLA?

"An employer covered by FMLA is any person 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. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers."

29 CFR 825.104.

C. Common Issues

1. *How much leave is an employee entitled to under FMLA?*

12 weeks of leave for certain family and medical reasons during a 12-month period.

2. *How is the 12-month period calculated under FMLA?*

Employers may select one of four options for determining the 12-month period:

$ the calendar year;

- $ any fixed 12-month "leave year" such as a fiscal year, a year required by state law, or a year starting on the employee's "anniversary" date;

- $ the 12-month period measured forward from the date any employee's first FMLA leave beings; or

- $ a "rolling" 12-month period measured backward from the date an employee uses FMLA leave.

3. *Does the law guarantee paid time off?*

   No. The FMLA only requires unpaid leave. However, the law permits an employee to elect, or the employer to require the employee, to use accrued paid leave, such as vacation or sick leave, for some or all of the FMLA leave period. When paid leave is substituted for unpaid FMLA leave, it may be counted against the 12-week FMLA leave entitlement if the employee is properly notified of the designation when the leave begins.

4. *Does worker's compensation leave count against an employee's FMLA leave entitlement?*

   It can. FMLA leave and workers' compensation leave can run together, provided the reason for the absence is due to a qualifying serious illness or injury and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave.

5. *Can the employer count leave taken due to pregnancy complications against the 12 weeks of FMLA leave for the birth and care of my child?*

   Yes. An eligible employee is entitled to a total of 12 weeks of FMLA leave in a 12-month period. If the employee has to use some of that leave for another reason, including a difficult pregnancy, it may be counted as part of the 12-week FMLA leave entitlement.

6. *Can the employer count time on maternity leave or pregnancy disability as FMLA leave?*

   Yes. Pregnancy disability leave or maternity leave for the birth of a child would be considered qualifying FMLA leave for a serious health condition and may be counted in the 12 weeks of leave so long as the employer properly notifies the employee in writing of the designation.

7. *If an employer fails to tell employees that the leave is FMLA leave, can the employer count the time they have already been off against the 12 weeks of FMLA leave?*

In most situations, the employer cannot count leave as FMLA leave retroactively. Remember, the employee must be notified in writing that an absence is being designated as FMLA leave. If the employer was not aware of the reason for the leave, leave may be designated as FMLA leave retroactively only while the leave is in progress or within two business days of the employee's return to work.

8. *Who is considered an immediate "family member" for purposes of taking FMLA leave?*

An employee's spouse, children (son or daughter), and parents are immediate family members for purposes of FMLA. The term "parent" does not include a parent "in-law." The terms son or daughter do not include individuals age 18 or over unless they are "incapable of self-care" because of mental or physical disability that limits one or more of the "major life activities" as those terms are defined in regulations issued by the Equal Employment Opportunity Commission (EEOC) under the Americans With Disabilities Act (ADA).

9. *May an employee take FMLA leave for visits to a physical therapist, if the employee's doctor prescribes the therapy?*

Yes. FMLA permits an employee to take leave to receive "continuing treatment by a health care provider," which can include recurring absences for therapy treatments such as those ordered by a doctor for physical therapy after a hospital stay or for treatment of severe arthritis.

10. *Which employees are eligible to take FMLA leave?*

Employees are eligible to take FMLA leave if they have worked for their employer for at least 12 months, and have worked for at least 1,250 hours over the previous 12 months, and work at a location where at least 50 employees are employed by the employer within 75 miles.

11. *Do the 12 months of service with the employer have to be continuous or consecutive?*

No. The 12 months do not have to be continuous or consecutive; all time worked for the employer is counted.

12. *Do the 1,250 hours include paid leave time or other absences from work?*

    No. The 1,250 hours include only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave, are not included.

13. *Does an employee have to give his/her employer medical records for leave due to a serious health condition?*

    No. An employee does not have to provide medical records. The employer may, however, request that, for any leave taken due to a serious health condition, an employee provide a medical certification confirming that a serious health condition exists.

14. *Can an employer require the employee to return to work before the employee exhausts the employee's leave?*

    Subject to certain limitations, an employee may deny the continuation of FMLA leave due to a serious health condition if the employee fails to fulfill any obligations to provide supporting medical certification. The employer may not, however, require the employee to return to work early by offering the employee a light duty assignment.

15. *Are there any restrictions on how the employee spends time while on leave?*

    Employers with established policies regarding outside employment while on paid or unpaid leave may uniformly apply those policies to employees on FMLA leave. Otherwise, the employer may not restrict activities. The protections of FMLA will not, however, cover situations where the reason for leave no longer exists, where the employee has not provided required notices or certifications, or whether the employee has misrepresented the reason for leave.

16. *Can the employer make inquiries about the leave during the employee's absence?*

    Yes, but only to the employee. The employer may ask the employee to confirm whether the leave needed or being taken qualifies for FMLA purposes, and may require periodic reports on the status and intent to return to work after leave. Also, if the employer wishes to obtain another opinion, the employee may be required to obtain additional medical certification at the employer's expense, or rectification during a period of FMLA leave. The employer may have a health care provider representing the employer contact the employee's health care provider, with

permission, to clarify information in the medical certification or to confirm that it was provided by the health care provider. The inquiry may **not seek additional information** regarding the employee's health condition or that of a family member.

17. *Can an employer refuse to grant an employee FMLA leave?*

If an employee is an "eligible" employee who has met FMLA's notice and certification requirements (and the employee has not exhausted the employee's FMLA leave entitlement for the year), the employee may **not** be denied FLMA leave.

18. *Will an employee lose his or her job if the employee takes FMLA leave?*

Generally, no. It is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under this law. Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLAL leave be counted under "no fault" attendance policies. Under limited circumstances, an employer may deny reinstatement to work – but not the use of FMLA leave – to certain highly-paid, salaried ("key") employees.

19. *Are there other circumstances in which an employer can deny FMLA leave or reinstatement to a job?*

In addition to denying reinstatement in certain circumstances to “key” employees, employers are not required to continue FMLA benefits or reinstate employees who would have been laid off or otherwise had their employment terminated had they continued to work during the FMLA leave period as, for example, due to a general layoff.

Employees who give unequivocal notice that they do not intend to return to work lose their entitlement to FMLA leave.

Employees who are unable to return to work and have exhausted their 12 weeks of FMLA leave in the designated “12 month period” no longer have FMLA protections of leave or job restoration

Under certain circumstances, employers who advise employees experiencing a serious health condition that they will require a medical certificate of fitness for duty to return to work may deny reinstatement to an employee who fails to provide the certification, or may delay reinstatement until the certification is submitted.

20. *Can an employer fire an employee for complaining about a violation of FMLA?*

No. Nor can the employer take any other adverse employment action on this basis. It is unlawful for any employer to discharge or otherwise discriminate against an employee for opposing a practice made unlawful under FMLA.

21. *Does an employer have to pay bonuses to employees who have been on FMLA leave?*

The FMLA requires that employees be restored to the same or an equivalent position. If an employee was eligible for a bonus before taking FMLA leave, the employee would be eligible for the bonus upon returning to work. The FMLA leave may not be counted against the employee. For example, if an employer offers a perfect attendance bonus, and the employee has not missed any time prior to taking FMLA leave, the employee would still be eligible for the bonus upon returning from FMLA leave.

On the other hand, FMLA does not require that employees on FMLA leave be allowed to accrue benefits or seniority. For example, an employee on FMLA leave might not have sufficient sales to qualify for a bonus. The employer is not required to make any special accommodation for this employee because of FM LA. The employer must, of course, treat an employee who has used FMLA leave at least as well as other employees on paid and unpaid leave (as appropriate) are treated.

22. *Under what circumstances is leave designated as FMLA leave and counted against the employee's total entitlement?*

In all circumstances, it is the employer's responsibility to designate leave taken for an FMLA reason as FMLA leave. The designation must be based upon information furnished by the employee. Leave may not be designated as FMLA leave after the leave has been completed and the employee has returned to work, except if;

- $ the employer is awaiting receipt of the medical certification to confirm the existence of a serious health condition;

- $ the employer was unaware that leave was for an FMLA reason, and subsequently acquires information from the employee such as when the employee requests additional or extensions of leave; or,

- $ the employer was unaware that the leave was for an FMLA reason, and the employee notifies the employer within two days after return to work that the leave was FMLA leave.

23. *Can an employer count FMLA leave taken against a no fault absentee policy?*

    No.

VI. E-MAIL POLICIES

- $ Federal courts have upheld employee termination for excessive or in appropriate use of e-mail systems

- $ Employers should consider implementing a policy on e-mail usage, including the following:

  - ❄ Prohibit trade secret and/or proprietary confidential information from being communicated via e-mail.

  - ❄ Advise employees that they have no expectation of privacy in e-mail communications, whether to supervisors, coworkers, or others.

  - ❄ Advise employees that e-mail can be the equivalent of a business memorandum, therefore, it should be used cautiously and words and messages prudently selected.

  - ❄ Remind employees that e-mail may not be used to defame individuals or to convey messages or images that would violate the employer's policy that strictly prohibits discrimination and sexual harassment.

  - ❄ Prohibit the solicitation of employees or distribution of information not related to the company's business.

  - ❄ Remind employees that misuse of e-mail may result in disciplinary action, including discharge from employment.

  - ❄ Emphasize that all e-mail is the employer's property and that the employer reserves the right to monitor the e-mail system.

  - ❄ Emphasize that e-mail may not be used for personal purposes or gain but is to be employed strictly as a business information tool.

  - ❄ Require employees to acknowledge in writing that they have received the e-mail policy.

VII. DRUG TESTING

- $ Fourth Amendment privacy issues are implicated by drug and alcohol testing

- $ Drug-testing on the federal, public-sector level is generally allowed as long as it passes the Abalancing test@ which includes inquiries into the governmental interests in safety and national security, the manner in which the test is given, and the history of drug use in the specific field of employment.

- $ The Supreme Court has held that providing an applicant with notice of drug-testing minimizes the intrusion on a person=s Fourth Amendment rights, since "applicants know at the outset that a drug test is a requirement of those positions.@

- $ No Michigan statute directly addressing drug testing; no Michigan constitutional provision guaranteeing privacy rights of all employees

- $ Some guidelines for administering drug tests:

  - ❄ The employment application should clearly state that the applicant will be required to submit to a drug test. The employment application should be signed, indicating the applicant's consent to the drug test.

  - ❄ Before administering any drug test, the employer should have the applicant sign a consent-and-release form.

  - ❄ The drug test should be administered in a way that respects the privacy and dignity of the applicant.

  - ❄ Both screening and reliable confirmatory tests should be employed, and laboratories should be certified and experienced.

  - ❄ The results of the test should be kept private and disseminated to no one but the applicant and individuals within the company who have a direct need to know.

  - ❄ The results of the drug test should be kept separate from the rest of the application.

  - ❄ Do not leave messages revealing the results of the test at the applicant's home or elsewhere.

  - ❄ In some circumstances, the applicant should be given a chance to explain positive test results.

- ❄ Tailor the policy to the employer=s particular circumstances.

- ❄ The policy should distinguish among alcohol, illegal drugs, and legal drugs and define "under the influence" in a manner tied to job performance.

- ❄ Put the company policy in writing, distribute it to all employees, and ensure that it is communicated throughout the organization.

- ❄ Apply the substance abuse policy consistently and reasonably, regardless of the level of the affected employee.

- ❄ Do not rely solely on the results of a drug test to prove that an employee is "under the influence."

- ❄ Do not allow employees suspected of being under the influence to continue to work.

- ❄ Establish and utilize employee assistance programs.

VIII. EMPLOYEE OVERTIME

A. Overtime

Employers must pay overtime to employees who work over 40 hours a week unless the employee is specifically exempt from overtime pay or receives compensatory time off during the same pay period as the overtime worked. There are exceptions to this general overtime rule, some of which relate to specific industries. Most employers are usually confronted with deciding whether an employee is "exempt" from overtime payments.

B. Exemptions

Persons employed in a "bona fide executive, administrative or professional capacity" are exempt. Although there are no hard-and-fast rules for you to follow, the following should be considered in determining whether an employee is exempt:

- $ Is the employee principally involved in management of a recognized department in the company?

- $ Does the employee customarily direct the work of two or more others?

- $ Does the employee have the authority to hire or fire other employees?

- $ Does the employee have discretionary power which is regularly exercised?

- $ Is the work performed by the employee principally nonmanual?

- $ Does the employee's job generally require detailed knowledge of his/her industry or an advanced type of knowledge in a field of science?

- $ What percentage of the time does the employee devote to work which is not set forth above?

If you answered "yes" to the first six questions above and answered "work a small percentage" to the last question, the employee is likely considered exempt.

C. Liability

Unpaid overtime to workers who have been misclassified as exempt employees are a ticking financial bomb just waiting to explode. A worker earning $65,000 a year who worked 50 hours a week for three years – just 10 hours of overtime a week – will be due $146,250 if the unpaid overtime is doubled as a penalty for "willful violation" of the law. (The two-year statute of limitations can be extended for a "willful" violation.)

This explosion could cost a company "thousands or even millions of dollars" depending on the company size and number of violations. It only takes one disgruntled employee to file a complaint with the Wage and Hour Division of the US Department of Labor or the State Department of Labor to open an investigation into an employer's classification system.

D. Salaried Employees

Many HR professionals mistakenly believe that if an employee is salaried, then he or she is correctly classified as exempt, but much more information is needed to make a proper determination. An executive, for example, must have management as his or her primary duty, supervise two or more full time equivalent employees, exercise independent judgment and discretion, and earn at least $250 a week. These are the bare bones areas needed to qualify as exempt. The FLSA also has different requirements for various other job categories such as administrative, professional, inside or outside salespersons and other professionals.

If a company believes it has misclassified workers who are due overtime pay, the company should first survey its employees to ask them to list their overtime hours for the past two years (the federal statute of limitations) – and then pay them while having them sign a legal release. You have a

legal obligation to pay them the money. There is no legal way around that.

E. April 2004 Changes

The new regulations clarify the executive, administrative, professional and outside salesperson exemptions with more precise language, definitions, and examples:

- An exempt executive employee must (1) be paid a salary of $455 per week, (2) have the primary duty of the management of the enterprise or a recognized department or subdivision, (3) customarily and regularly direct the work of two or more employees, and (4) have the authority to hire, fire, promote, etc., or where such recommendations concerning hiring, firing, promoting, etc. are given particular weight.

- An exempt administrative employee must (1) be paid a salary of $455 per week, (2) have the primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and (3) customarily and regularly exercise discretion and independent judgment.

- An exempt learned professional employee must (2) be paid a salary of $455 per week and (2) have the primary duty of performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, or a combination of intellectual instruction and work experience. An exempt creative professional must (1) be paid a salary of $455 and (2) perform the primary duty of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

- An exempt outside salesperson must (1) perform the primary duty of making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer, and (2) be customarily and regularly engaged away from the employer's place of business.

The new regulations increase the minimum salary required for an executive, administrative, or professional exemption from $155 per week (or $8,060 per year) to $455 per week (or $23,660 per year). An employee paid less than the new minimum salary will automatically be eligible for overtime pay. This has the effect of expanding overtime eligibility for low-level supervisors, such as retail store and restaurant assistant managers.

The new regulations allow paying deductions from salaried employees for

a full-day disciplinary absence, i.e., one-day unpaid suspension (in addition to the other salary deductions already authorized in the regulations) without adversely affecting exempt status. In addition, the new regulations expand the safe harbor that prevents the loss of the overtime exemption for either isolated or inadvertent deductions in pay. The exemption is lost only if a pattern or practice of improper deductions exist.

The new regulations make it easier to classify as exempt highly-compensated employees earning over $100,000 annually (including base salary, commissions, and non-discretionary bonuses). To qualify as exempt, these employees must (1) be paid at least $455 per week in base salary, (2) perform office or non-manual work, and (3) customarily and regularly perform one or more of the job duties required for executive, administrative, professional employees, outside salespersons, or computer employees.

IX. IRS INDEPENDENT CONTRACTOR GUIDELINES

A. Introduction

An independent contractor is someone who performs a service for your business, but is not considered to be an employee by federal or state tax authorities.

When a company uses the services of an independent contract, the company does not have to pay employer taxes, process payroll checks, and withhold employee tax shares on behalf of the contractor. The company may also have less potential legal liability when these services are no longer required.

In the United States, however, the IRS and state revenue departments are vigorously trying to minimize lost revenue by carefully examining the status of "independent contractors" at many firms. If the company's "independent contractors" are deemed employees by the tax authorities, a company may be forced to pay back taxes, employee benefits, interest and penalties.

B. IRS Independent Contractor Guidelines

The federal Internal Revenue Service provides 20 guidelines in its *Publication 937* and it's *Form SS-8* for determining whether a service provider is an employee or an independent contractor, but even the IRS itself says that its interpretation of these guidelines is subjective and depends on the specific circumstances. Furthermore, the IRS does *not* necessarily require that all 20 criteria be met: that determination is also subjective, though some sources say that satisfying any 10 of the criteria is sufficient.

1. *Instructions:* "An employee must comply with instructions about when, where, and how to work. Even if no instructions are given, the control factor is present if the employer has the right to control how the work results are achieved.

2. *Training:* "An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods and receive no training from purchasers of their services."

3. *Integration:* "An employee's services are usually integrated into the business operations because the services are important to the success or continuation of the business. This shows that the employee is subject to direction and control."

4. *Service Rendered Personally:* "An employee renders services personally. This shows that the employer is interested in the methods as well as the results."

5. *Hiring Assistants:* "An employee works for an employer who hires, supervises, and pays workers. An independent contractor can hire, supervise, and pay assistance under a contract that requires him or her to provide materials and labor and to be responsible only for the result."

6. *Continuing Relationship:* "An employee generally has a continuing relationship with an employer. A continuing relationship may exist even if work is performed at recurring although irregular intervals."

7. *Set Hours of Work:* "An employee usually has set hours of work established by an employer. An independent contractor generally can set his or her own work hours."

8. *Full-Time Required:* "An employee may be required to work or be available full-time. This indicates control by the employer. An independent contractor can work when and for whom he or she chooses."

9. *Work Done on Premises:* "An employee usually works on the premises of an employer, or works on a route or at a location designated by an employer."

10. *Order or Sequence Set:* "An employee may be required to perform services in the order or sequence set by an employer. This shows that the employee is subject to direction and control."

11. *Reports:* "An employee may be required to submit reports to an employer. This shows that the employer maintains a degree of control."

12. *Payments:* "An employee is paid by the hour, week, or month. An independent contractor is usually paid by the job or a straight commission."

13. *Expenses:* "An employee's business and travel expenses are generally paid for by an employer. This shows that the employee is subject to regulation and control."

14. *Tools and Materials:* "An employee is generally furnished significant tools, materials, and other equipment by an employer."

15. *Investment:* "An independent contractor has a significant investment in the facilities he or she uses in performing services for someone else."

16. *Profit or Loss:* "An independent contractor can make a profit or suffer a loss."

17. *Works for More than One Person or Firm:* "An independent contractor is generally free to provide his or her services to two or more persons or firms at the same time."

18. *Offer Services to General Public:* "An independent contractor makes his or her services available to the general public."

19. *Right to Fire:* "An employee can be fired by an employer. An independent contractor cannot be fired so long as he or she produces a result that meets the specifications of the contract."

20. *Right to Quit:* "An employee can quit his or her job at any time without incurring liability. An independent contractor usually agrees to complete a specific job and is responsible for its satisfactory completion or is legally obligated to make good for failure to complete."

X. AMERICANS WITH DISABILITIES ACT

A. The Act

The Americans with Disabilities Act ("ADA") furthers the goal of full participation of people with disabilities by giving civil rights protections to individuals with disabilities that are like those provided to individuals on the basis of race, sex, national origin and religion. It guarantees equal opportunity for individuals with disabilities in employment, public accommodations, transportation, state and local government services and telecommunications. President Bush signed the ADA into law July 26, 1990.

B. Provisions

- $ Employers may not discriminate against an individual with a disability in hiring or promotion if the person is otherwise qualified for the job.

- $ Employers can ask about one's ability to perform a job, but cannot inquire if someone has a disability or subject a person to tests that tend to screen out people with disabilities.

- $ Employers will need to provide "reasonable accommodation" to individuals with disabilities. This includes steps such as job restructuring and modification of equipment.

- $ Employers do not need to provide accommodations that impose an "undue hardship" on business operations.

- $ Employees may reject applicants or fire employees who pose a direct threat to the health or safety of other individuals in the workplace.

- $ Applicants and employees who are current users of drugs have no rights to claim discrimination on the basis of the illegal drug use under the ADA.

- $ Drug testing is not prohibited by the ADA.

- $ Employers may not discriminate against a qualified applicant or employee because of the known disability of an individual with whom the applicant or employee is known to have a relationship or association.

- $ Religious organizations may give preference in employment to their own members and may require applicants and employees to conform to their religious tenets.

- $ ADA provides the remedies available under Title VII of the Civil Rights Act of 1964. They include back pay and court orders to stop discrimination.

- $ Complaints may be filed with the U.S. Equal Employment Opportunity Commission.

- $ Who needs to comply: Employers with 25 or more employees must comply.

XI. TERMINATION

A. Resignations and Other No-Fault Terminations

$ Employees may resign to pursue other or better opportunities.

$ Termination may be due to discontinuance of a specific commercial line of activity, the restriction of certain opportunities, or a change in technology.

$ Termination may by due to a change in ownership or relocation of the business.

$ Conditions intolerable to an employee may be caused by an individual supervisor, several supervisory levels, coworkers, or the total business enterprise, resulting in a Aconstructive discharge@ (which may lead to a lawsuit filed against the employer).

B. Unsatisfactory Performance

$ The employer has the right to establish standards for assessing the quality of employee performance.

$ Employers may use standards to identify required employee actions and functions necessary to bring about specific results in the performance of the job.

$ Employers should identify each aspect of performance to be evaluated.

$ Three types of unsatisfactory performance: failure to perform job duties and responsibilities; refusal to perform the job duties and responsibilities; inability to perform the job duties and responsibilities.

$ Termination considerations:

- ❄ Document remedial efforts preceding the termination;
- ❄ Utilize disciplinary procedures;
- ❄ Keep records of nonperformance of job duties;
- ❄ Offer additional training (if necessary due to inability to perform job duties and responsibilities).
- ❄ Carefully measure employee performance against applicable standards of job performance.

C. Misconduct

$ Inappropriate conduct can be disruptive, dangerous, and counterproductive to the business.

$ Employers should be aware of their obligation to protect the health and safety of all employees in the workplace.

$ Intentional deviation from employer standards of conduct, express and implied, constitutes misconduct for which an employee may be discharged.

$ Deliberate acts that recklessly disregard workplace consequences constitute misconduct regardless of the existence of express employer rules prohibiting that conduct.

$ Negligent acts that have the effect of violating the employer=s code of conduct are also acts of misconduct.

$ Employers must ensure that rules prohibiting certain conduct are unambiguous.

D. Termination Suggestions

$ The employer should conduct an exit interview, giving the employee ample opportunity to express in detail, orally or in writing, the employee's feelings about his or her supervisor, the quality and quantity of supervision, the handling of complaints about supervisors, likes and dislikes about the job and the employer, the types of work the employee liked best, the employee's original orientation to the job, feelings about pay and progress on the job, and suggestions for improvement of the job and the workplace.

$ The employer should attempt to ensure that the severance of the relationship is "no-fault" in nature and that there are no improper or illegal employer-initiated causes for the employee's resignation.

$ The employer should develop and maintain precise and clear accounts of the reasons for the severance of employment relationships

$ The employer should prepare a checklist of items to recover from the employee. The list will normally include such items as credit cards, confidential material, access codes or identification, keys, automobiles, and combinations to safes or vaults.

$	Prepare a checklist of the employer=s post-severance obligations, including severance pay, vacation pay, whether references will be provided and by whom, continuity of health-care benefits, removal of the employee's name from appropriate lists, notices of termination, termination of insurance policies, and transfer of personnel files to inactive status.

XII. EMPLOYEE RIGHT TO KNOW ACT ("ERKA"), MCL 423.501, et seq.

A. General Purposes of ERKA

The ERKA requires an employer to provide an employee access to the employee's personnel record upon written request, MCL 423.503, and entitles every employee to a copy of his or her personnel file, MCL 423.504. The purpose of the act is to provide a method for ensuring that erroneous employment information that might hard an employee is corrected by giving employees a chance to review and dispute the information contained in their personnel files. See MCL 423.505; see also House Legislative Analysis, HB 5381, November 11, 1977, pp 1-2. In furtherance of this purpose, the act permits an employee who is denied access to their file to commence an action to force compliance with the act by court order. MCL 423.511. MCL 423.511 further provides that an employer's failure to comply with such an order "may be punished as contempt," and directs the court to "award an employee prevailing in an action pursuant to th[e] act . . . actual damages plus costs" if there was "a violation of the act."

B. Personnel Files

Employers are not required by the ERKA to keep personnel records of employees. If an employer chooses to keep such a record, the employer must follow the requirements set out in the ERKA. A personnel record defined by the ERKA is a record kept by the employer that may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action.

C. Information In A Personnel File

The following information may, at the employer's option, be kept in an employee's personnel record:

$	employment applications

$	work performance evaluations

$	notes of disciplinary conferences

$	disciplinary actions taken

- $ tax forms

- $ educational background (although not actual school records), including supplementary training courses taken by the employee

- $ fringe benefit information

- $ wage, commission, and earnings information, general work history

D. Information Prohibited From Being Kept

The ERKA specifically states that certain information may not be included in a personnel record:

- $ Employee references supplied to an employer.

- $ Materials relating to staff planning with respect to more than one employee, including salary increases, management bonus plans, promotions, and job assignments.

- $ Medical reports and records made or obtained by the employer if the records or reports are available to the employee from the doctor or medical facility involved.

- $ Information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.

- $ Information relating to an investigation by the employer of an employee's alleged criminal activity that is kept separately from other records.

- $ Records of grievance investigations which are kept separately and are not used for the purposes of determining an employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action.

- $ If the employer is an educational institution, educational records as defined by law.

- $ Records kept solely by an executive, administrative, or professional employee which are not accessible or shared with other persons. However, such a record may be entered into a personnel record if entered not more than six months after the date of the occurrence or the date fact becomes known. MCL 423.508.

- Information regarding an employee's associations, political activities, publications, or communications of non-employment activities may not be kept in the personnel record, nor gathered by an employer. MCL 423.508. The employer may keep this information if the information is submitted in writing by or authorized to be kept or gathered, in writing, by the employee to the employer. Also, if the employee engages in these activities on the employer's premises or during the employee's working hours and these activities interfere with the employee's performance or that of other employees, an employer may keep and gather such information. If such information is kept, it must be included in the personnel record.

E. Employee Disagreements With Information Contained In His/Her Personnel File

An employee who disagrees with the information contained in their record may mutually agree with the employer to have the information deleted. If an agreement cannot be reached, the employee has the right to include a written statement, not exceeding five sheets of 8" x 11" paper, explaining the employee's position. Whenever the information the employee disagrees with is given to a third party, the employee's statement must be included. MCL 423.505.

F. Disclosure of Information Contained in A Personnel File

Employers are prohibited from disclosing any disciplinary report or letter of reprimand to anyone outside the employer's organization, or the labor organization representing the employee, without written notice to the employee. MCL 423.506. The written notice must be mailed first class to the employee on or before the day the information is divulged. Written notice need not be given if the employee has waived notice as part of a written signed employment application with another employer, the disclosure is ordered in a legal action or arbitration, or the information is requested by a government agency as a result of a claim or complaint by an employee. Before releasing personnel information to a third party, an employer must review the record and delete disciplinary reports, letters of reprimand, or other disciplinary records which are more than four years old. MCL 423.507. The employer needs to delete disciplinary information when the information is "ordered" in a legal action or arbitration. According to the Michigan Court Rules, a validly issued subpoena signed by the attorney of record or the court clerk has the force and effect of an order signed by the judge. MCR 2.506(B).

G. Separate, Secret Personnel Records

If anything which may be kept in a personnel record under ERKA is not included in the personnel record, it may not be used by the employer in a

judicial or quasi-judicial proceeding. MCL 423.502. This section of the statute contains a proviso that if the exclusion of the information was unintentional, the information may be used in a proceeding if the employee agrees or is given a reasonable time to review the information. The employee may use the excluded information upon request.

H. Employee Reviews of Personnel Files

ERKA provides that employees may, upon written request, periodically review their personnel record, generally not more than two times per year. MCL 423.503. The review must take place at a location reasonably near the employee's place of employment, curing normal business hours. If a review during normal business hours would require the employee to take time off work, the employer must provide another reasonable time for review.

I. Copies of Personnel Files

An employer is required to give to an employee a copy of the record, or sections of it, upon the employee's request. The employer may charge a nominal fee for duplication of the record. An employee who demonstrates he or she is unable to review their record at the employing unit can request in writing that the employer mail a copy of the record to the employee. MCL 423.504.

J. Lawsuits Over ERKA

If an employer or employee knowingly puts false information into a personnel record, suit may be brought pursuant to ERKA to have the false information expunged from the record. MCL 423.505. An employee may bring suit for an employer's violation of ERKA and may recover his actual damages. If the court finds the employer willfully and knowingly violated ERKA, the employee may recover $200.00 plus costs and reasonable attorney's fees, in addition to his actual damages.

The opinions expressed in these materials are intended for general guidance only. They are not intended as recommendations for specific situations. As always, please consult a qualified attorney for specific legal guidance.

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