UTILIZING BEST PRACTICES TO MANAGE YOUR WORKFORCE

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I. THE EMPLOYER/EMPLOYEE RELATIONSHIP

A. At Will.

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. Oral Agreements.

In 1980, the employer/employee relationship was significantly modified in a manner which detrimentally affected employers. The Michigan Supreme Court narrowed the general rule regarding the at-will employment relationship and recognized that the at-will employment relationship could be modified by oral agreements between the employer and employee. The Court held that employment relationships for indefinite or unspecified terms or durations could be modified by an employer's oral promise not to terminate the employee except for "just cause." *Touissiant* argued that his employer had told him that he would be with the company "as long as I did my job....” The Court essentially held as follows:

1. Even though a contract is for an indefinite term, an oral contract providing that an employee will not be discharged except for cause is legally enforceable.

2. The terms of a just cause relationship may become contractual either through the oral or written express agreements of the parties or even

based on the employee's legitimate expectations grounded in an employer's policy statements.

C. Just Cause and Progressive Discipline.

Many employers have considered the terms "just cause" and "progressive discipline" to be negative in the context of employer/employee relationships. "Just cause" suggests that an employee cannot be terminated as long as the employee is properly performing the designated job duties and the express term of the employment relationship has not expired. Progressive discipline suggests that an employee may not be terminated unless the employee is provided with sufficient prior warning including disciplinary reprimands, suspensions, and other warnings, and an opportunity to cure any alleged performance improprieties prior to termination. The case described above created an atmosphere whereby "just cause" employment and progressive discipline could be inserted into the employment relationship without any written agreement establishing the same. Many critics suggests that "just cause" employment and progressive discipline are not necessarily bad in that to the extent an employer complies with the terms of such employment, employee morale will be higher and employees will be more productive.

D. Employers Are Given a Fighting Chance.

In 1989, the Supreme Court determined that an employer may unilaterally modify its written policy from one of discharge for cause to one of termination "at-will," provided the employer gives the employee reasonable notice of the change.

E. 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. A formal employment contract should contain all of the specific terms of employment including compensation, responsibilities and the term of the employment relationship.

7. Formal employment contracts should specify what benefits the employee will receive and indicate that such benefits are conditional on employment.

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

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

10. 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.

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

12. The agreement should contain appropriate confidentiality and non-competition provisions.

13. 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.

F. 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.

G. 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. Whistleblowing.

4. Service on jury duty.

5. Retaliation for filing workers compensation claims.

II. EMPLOYMENT APPLICATIONS AND EMPLOYER 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.

5. Non-competition agreement.

6. Confidentiality agreement.

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 access 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 an employer's 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. Workers 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 an 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, which 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 Larsens 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 business 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 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. 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. Outrageous production quotas or 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 their 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 a member of the personnel department. The basis for discharge should be reduced to writing and documented. The employee should acknowledge a receipt of the employment action leading to discharge and should be given an opportunity to respond thereto. The 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 termination exit interview on behalf of the employer should prepare

written notes of the event. Attempt to obtain conciliations from the employee regarding the employee's understanding of the basis for termination.

C. Economic Reductions in Force (RIFs).

In many instances an employer desires to reduce its work force for economic or strategic reasons. In many instances the discharge of the employees will not be related to performance or conduct. In order to reduce liability upon the institution of a RIF, you should institute the following plan:

1. Task Force.

You should immediately establish an internal task force consisting of legal counsel, an upper level officer of the business and such other personnel familiar with the internal benefits of the company and knowledgeable as to the financial condition of the business.

2. Review Employment Agreements.

You should review the employment agreements of all employees. Clearly, any employee with a written agreement that provides for a definite period of employment or a specific basis for termination should be handled separately from general "at-will" employees.

3. Documentation.

Immediately commence to evaluate the performance of employees who will potentially be terminated and document performance and inadequacies in writing.

4. Reduction In Force.

Establish and document the economic justification for a reduction in force, as well as alternative expense reduction measures.

5. Possible alternatives to a reduction in force that may be considered:

a. Elimination of unprofitable operations.

b. Restrictions on programs.

c. Consolidation of programs.

6. Personnel alternatives that may be considered:

   a. Hiring freeze.

   b. Promotion freeze.

   c. Pay cuts.

   d. Reduced work weeks.

   e. Attrition.

7. Detail the anticipated savings of each cost cutting alternative.

8. Evaluate the financial and non-financial positive and negative impact of each alternative.

9. State the rational for selection of practical alternatives selected or rejected as they relate to the financial considerations.

10. Retain outside experts, i.e., accounting firms, to lend support to your rational for termination.

11. Release Plan.

    Your task force should immediately establish an incentive plan whereby the discharged employees will execute a release in return for compensation and benefits in excess of those typically offered to discharged employees. This process should commence early so that you will have ample time to finalize any such releases.

12. Internal Audit.

    Conduct an internal audit to determine the race, sex, ethnic and age distribution of the work force which will be compared to the projected work force statistics at each step of the process before any action is implemented.

13. Employment Monitoring.

Monitor hiring, promotions and salary increases for at least one year following the reduction in force.

14. Employment Hiring.

Monitor hiring before the reduction in force and after the reduction in force by having all hiring decisions approved by your task force.

15. New Hires.

Place no new hires into positions or job functions previously performed by the discharged employees. Accordingly, it is imperative that any new hires have job descriptions which are broader in nature than the discharged employees.

16. Freeze Promotions Where Feasible.

Audit promotions so that young employees are not promoted into jobs previously held by the discharged employees.

17. Freeze Salaries Where Practical.

18. Evaluate Job Functions.

a. Develop uniform guidelines for identifying unnecessary job functions.

b. Determine what the most essential job functions will be after the reduction in force and identify the skills and qualifications needed to perform those functions. The emphasis must be placed on identifying job functions, not individuals.

19. Exit Interview.

You should conduct an exit interview with the employees to be terminated.

a. You should have a guideline for the interview.

b. You should practice how you will conduct the interview.

c. The conversation should be limited in the exit interview to the essentials.

d. Inform the employee briefly as to how and why the job function was eliminated, how individual employee evaluations were made and in what ways job performance was deemed inadequate.

e. At least two people should be present during the interview and both should take notes.

f. Request any comments the employee has on the determination decision and if the employee believes they were unfairly terminated.

20. You Should Not Do The Following:

a. Do not advertise for any job openings while the termination procedures are going on.

b. Do not hire unless you consult with your task force approving the hire.

c. Do not place the new hires in identical positions of those that were terminated.

d. Do not permit promotions into the identical jobs that were terminated.

e. If job functions are not eliminated, divide them among a number of employees and do not divide them based upon age, color, religion, race, sex or national origin.

D. Releases.

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

1. Voluntary.

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

2. Consideration.

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

3. Time To Review.

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

4. Express Release.

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

5. Execution.

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

6. Additional Provisions For Inclusion In A Release.

a. Reaffirmation of "At-Will" Relationship.

The release should reaffirm that the employee was retained on an "At-Will" basis.

b. Attorney Review.

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

c. Confidentiality.

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

d. Conduct.

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

e. Return Of Property.

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

f. Default Provisions.

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

g. Waiver Of Right To Tender Back.

Various common law cases exist whereby an employee can tender back the consideration received in support of the release

and thereafter, proceed against the employer. The release should contain a provision which provides for a waiver of the right to tender back consideration.

h. Waiver Of Right Of Reinstatement.

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

7. Releases Applying To Older Workers.

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

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

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

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

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

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

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

8. WARN.

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

a. Coverage.

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

b. When Is Notice Required?

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

c. Plant Closing.

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

d. Notice.

In the event of a mass layoff or plant closing, notice must be given to the employees or their union, the state dislocated worker unit and the chief elected official of local government. Notice must be given 60 calendar days prior to the final day of work. Shorter periods of time are allowed in the event the

employer is seeking capital or business which would avoid the plant closing, there is a dramatic, sudden, unforeseen circumstance forcing the plant closing or layoff, there is a natural disaster, or if a layoff extends beyond the six month period but was not originally intended to do so. The notice must contain comprehensive information regarding the site of employment, the temporary or permanent nature of the layoff, the date the layoff or plant closing is to occur, individuals affected and such other additional information as may assist in the employee following the layoff or plant closing.

e. Penalties.

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