AN EMPLOYER'S MANUAL OF WORKFORCE MANAGEMENT AND COMPLIANCE ISSUES

JUNE 8, 2001
NOVI HILTON
NOVI, MICHIGAN

2001 EMPLOYMENT LAW SYMPOSIUM

PRESENTED BY THE LAW OFFICES OF
MADDIN, HAUSER, WARTELL, ROTH, HELLER & PESSES, P.C.

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2001 EMPLOYMENT LAW SYMPOSIUM PROGRAM AGENDA

REGISTRATION AND BREAKFAST	**8:00 a.m. - 8:30 a.m.**	
MICHAEL W. MADDIN - Opening Remarks	**8:30 a.m. - 8:45 a.m.**	
RONALD A. SOLLISH Hiring, Managing & Terminating Employees	**8:45 a.m. - 9:45 a.m.**	**Page 1**
MARTIN S. FRENKEL Pay Attention, Some of This May Be Important - Wage and Hour Issues	**9:45 a.m. - 10:15 a.m.**	**Page 70**
BREAK	**10:15 a.m. – 10:30 a.m.**	
GARY M. REMER COBRA, HIPAA & GUST: Understanding the Alphabet Soup of Benefits	**10:30 a.m. – 11:15 a.m.**	**Page 109**
STUART M. BORDMAN Independent Contractors	**11:15 a.m. – 11:45 a.m.**	**Page 176**
DISCUSSION / QUESTIONS AND ANSWERS	**11:45 a.m. – 12:00 p.m.**	
LUNCH	**12:00 p.m. – 1:00 p.m.**	
STEWART C.W. WEINER Non-Disclosure and Non-Compete Agreements - Help or Hype?	**1:00 p.m. – 1:30 p.m.**	**Page 221**
DAVID E. HART Family and Medical Leave Act	**1:30 p.m. – 2:00 p.m.**	**Page 238**
RONALD A. SOLLISH Disability Law Compliance	**2:00 p.m. – 2:30 p.m.**	**Page 267**
BREAK	**2:30 p.m. – 2:45 p.m.**	
JOSEPH A. LAVIGNE	**2:45 p.m. – 3:15 p.m.**	**Page 291**

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(1902-1984)

June 8, 2001

Dear Symposium Participant:

We wish to welcome you to our Employment Law Symposium, “An Employer’s Manual of Workforce Management and Compliance Issues.” Our goal in preparing the program is to provide you with a broad based overview of various issues which impact the workplace. The Symposium is intended to assist owners, managers and supervisors in identifying and understanding areas of concern which could lead to exposure and liability in the workplace. It is our hope that the Symposium participants will gain an ability to identify such issues and, therefore, gain the ability to better manage their workers and workplace.

We hope that you will retain the manual as a useful reference tool when issues arise in your workplace. It is not necessary to follow the manual during a particular topic presentation. We believe you will obtain a greater benefit from this Symposium if you listen to the oral presentation and utilize the manual as a reference tool thereafter. We encourage you to utilize the Symposium as an opportunity to engage in constructive dialogue regarding workplace problems. Please do not hesitate to ask questions during the program or contact our office directly concerning any questions you may have regarding employment issues or otherwise.

Once again, we would like to thank you for attending our Symposium. Please do not hesitate to introduce yourself to any member of our firm. We will make every effort to introduce ourselves and speak with you throughout the program.

Very truly yours,

MADDIN, HAUSER, WARTELL, ROTH,
HELLER & PESSES, P.C.

HIRING, MANAGING & TERMINATING EMPLOYEES

By: Ronald A. Sollish

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, that must be disclosed. There is a risk that such reports may run afoul of the disparate impact standards for federal civil rights laws.

7. Physical Condition. Under the Americans With Disabilities Act, 42 USC §12101 et seq., inquiries regarding disabilities are prohibited. However, an applicant can be asked whether job related functions can be performed.

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

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

F. Rejecting an Applicant.

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

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

2. Never use symbols on any application.

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

4. Pay particular attention to note taking on application.

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

6. Respond quickly to all applicants.

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

G. Retention of Documents.

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

V. EMPLOYMENT DISCRIMINATION

Various laws prohibit discrimination on the basis of age, sex, race, handicap, and pregnancy.

A. Age Discrimination.

1. Protected Persons.

Persons 40 years of age and older are protected by the Age Discrimination in Employment Act (ADEA) (Federal Law).

2. Employers Subject to the Act.

Employers with 20 or more employees that are engaged in interstate commerce.

3. Prohibited Practices.

Pursuant to the ADEA, it is unlawful for an employer with 20 or more employees that is engaged in interstate commerce to:

a. Not hire, to discharge, or to otherwise discriminate against persons 40 years of age or older with respect to compensation, terms of their employment, conditions of their employment, or privileges of their employment because of their age;

b. Force an employee who is 40 years of age or older to retire; and

c. Give preference because of age to one person over another person who is 40 years of age or older.

4. Exceptions.

Despite the provisions of the ADEA, an employer that is subject to the ADEA may still:

a. Differentiate between employees or prospective employees for legitimate and reasonable reasons other than age. For example, if the job in question entails heavy lifting, the employer may subject prospective employees to a physical examination and may legitimately decide to hire the 20-year-old who does quite well on the examination and not hire the 40-year-old who did not do as well on the examination without violating the ADEA;

b. Enforce good faith occupational qualifications that are reasonably necessary to the normal functioning and operation of the employer's business;

c. Retire an employee at the age of 65 if the employee is an executive employee who is entitled to a pension of at least $44,000.00 per year; and

d. Differentiate between employees pursuant to a bona fide seniority system.

5. Penalties for Violation.

An employer that violates the ADEA may be subject to the following penalties:

a. Backpay (double backpay if the employer willfully violated the ADEA)

b. Reinstatement

c. Fringe benefits

d. Attorney fees

6. Posting Requirements.

An employer that is subject to the ADEA must post, in a conspicuous place on its premises, a notice prepared or approved by the EEOC setting forth information on age discrimination.

B. Sex Discrimination.

1. Protected Persons.

Both men and women are protected by the provisions of Title VII (Federal Law) and the Elliott-Larson Civil Rights Act (State Law)

2. Prohibited Practices.

It is unlawful for an employer to not hire, to discharge, or to otherwise discriminate against any person with respect to compensation, terms of employment, conditions of employment, or privileges of employment because of that person's sex.

C. Sexual Harassment.

1. Protected Class.

Both men and women are protected by the provisions of Title VII and the Elliott-Larson Civil Rights Act.

2. Quid Pro Quo Harassment.

Quid Pro Quo Harassment is defined as: Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, and/or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.

For example, an employer may not deny an employee a pay raise simply because that employee refused to provide the employer with requested sexual favors.

a. Elements of the offense:

i. The employee was subjected to **unwelcome** sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that was unsolicited and either undesirable or offensive to the employee;

ii The harassment was based upon the employee's sex; and

iii. As a result of the employee's reaction to the harassment, some aspect of the employee's employment was affected (compensation, benefits, status, conditions, privileges).

b. Employer's duty upon learning of harassment:

If it comes to an employer's attention that one of his supervisory employees is sexually harassing another employee, the employer is required to take immediate appropriate corrective action.

c. Employer's liability for harassment:

i. Employer harassment.

If the employer is responsible for the harassment, then obviously the employer will be held responsible for any damages that the harassment has caused the harassed employee.

ii. Supervisory, managerial and executive employee harassment.

If a supervisory, managerial or executive employee of the employer is harassing an employee, the employer is strictly liable for that employee's harassing conduct and any damage that harassing conduct may have caused the harassed employee.

iii. Fellow employee harassment.

If a fellow employee is harassing an employee, the employer is liable for that employee's harassing conduct and any damage that harassing conduct may have caused the harassed employee if the employer or its supervisory, managerial and/or executive employees knew or should have known of the harassing conduct (unless, upon learning of the harassing conduct, the employer took immediate appropriate corrective action).

iv. Non-employee harassment.

If a non-employee (e.g. a patient) is sexually harassing an employee, the employer may be held responsible if the employer or its supervisory, managerial or executive employees knew or should have known of the harassment and failed to take immediate corrective action.

3. Hostile Work Environment Harassment.

Hostile work environment harassment occurs when an employee is repeatedly subjected to unwelcome sexual conduct (comments, actions) to the point that the harassment unreasonably interferes with the employee's work performance or creates an intimidating, hostile or offensive working environment.

a. Elements of the offense:

i. The employee was subjected to unwelcome, unsolicited, undesired and unencouraged sexual harassment;

ii. The harassment was based upon the employee's sex (i.e., the activities are not equally offensive to both men and women); and

iii. The harassment was persistent and severe enough to affect the psychological well-being of the employee and a term, condition or privilege of the employee's employment.

b. Employer's duty upon learning of harassment:

If it comes to an employer's attention that one of its supervisory employees is sexually harassing another employee, the employer is required to take immediate appropriate corrective action.

c. Employer's liability for harassment:

i. Employer harassment.

If the employer is responsible for the harassment, then obviously the employer will be held responsible for any damages that the harassment has caused the harassed employee.

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iv. Non-employee harassment.

If a non-employee (e.g. a patient) is sexually harassing an employee, the employer may be held responsible if the employer or its supervisory, managerial or executive employees knew or should have known of the harassment and failed to take immediate corrective action.

4. How to Prevent Sexual Harassment.

The following tips may help prevent sexual harassment claims:

a. Let employees know that sexual harassment of any form is not acceptable and will not be tolerated.

b. Establish a written sexual harassment policy which includes an explanation of how employees can report sexual harassment and distribute the same to all employees.

c. When and if you are notified of any potential harassment, immediately investigate the allegations, document the investigation and take appropriate corrective action; however, maintain confidentiality of the investigation.

D. Race Discrimination.

Pursuant to Title VII (Federal Law) and the Elliott-Larson Civil Rights Act (State Law), it is unlawful for an employer to not hire, to discharge, or to otherwise discriminate against a person with respect to compensation, terms of employment, conditions of employment, or privileges of employment because of that person's race.

E. Disability/Handicap Discrimination.

1. Americans With Disabilities Act (Federal Law).

a. Protected Persons.

Any person suffering from a physical or mental impairment that substantially limits that person's life activities, any person with a record of such an impairment, or any person who is regarded as having such an impairment. (Following are some examples of what may constitute a disability under the law: orthopedic disorders; visual impairments; speech impairments; hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; HIV infection; cancer; heart disease; diabetes; mental retardation; emotional illness; learning disabilities; drug addiction; and alcoholism.)

b. Persons Subject to the Act.

The Americans with Disabilities Act (ADA) applies to employers engaged in an industry that affects commerce with 15 or more employees.

c. Prohibited Practices.

Pursuant to the ADA, it is unlawful for an employer to discriminate against a qualified person because that person is disabled (i.e., a protected person as defined above) with respect to the application process, hiring, advancement, discharge, compensation, job training, and other terms, conditions, or privileges of employment.

Thus, an employer cannot discriminate against a qualified person who, with or without reasonable accommodation, could perform the essential functions of the job in question.

d. Required Accommodations.

Pursuant to the ADA, an employer is required to alter a job, work environment, or the application process to enable a qualified person with a disability to enjoy equal employment opportunities where this can be done without imposing an undue hardship on the employer. These accommodations may include:

i. Making the work area readily accessible to and usable by disabled persons;

ii. Restructuring a job on a marginal scale;

iii. Reassigning a disabled employee to a vacant position;

iv. Establishing part-time or revised work schedules;

v. Acquiring or modifying equipment or devices that are job-related. The employer is not, however, required to provide the employee with devices or equipment that helps the employee both on and off the job. Instead, the employer simply must allow the disabled employee to bring such devices and/or equipment to the job (for example, a leader dog);

vi. Adjusting or changing examinations, training materials, or policies;

vii. Providing qualified readers or interpreters.

e. Posting Requirements.

Every employer subject to the Act must post a notice on its premises that is accessible to applicants and employees and which describes the provisions of the ADA.

2. The Michigan Persons with Disabilities Civil Rights Act (MPDCRA).

a. Protected Persons.

Any person suffering from a physical or mental impairment that substantially limits that person's life activities, any person with a record of such an impairment, or any person that is regarded as having such an impairment. (Following are some examples of what may constitute a disability under the law: orthopedic disorders; visual impairments; speech impairments; hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; HIV infection; cancer; heart disease; diabetes; mental retardation; emotional illness; learning disabilities; drug addiction; and alcoholism.)

b. Persons Subject to the Act.

The MPDCRA applies to employers with one or more employees.

c. Prohibited Practices.

Pursuant to the MPDCRA, it is unlawful for an employer to:

i. Fail or refuse to hire, recruit, or promote a person because of a handicap that is not related to that person's ability to perform the duties of the particular job or position;

ii. Discharge or otherwise discriminate against a person with respect to compensation or the terms, conditions or privileges of employment because of a handicap that is not related to that person's ability to perform the duties of the particular job or position;

iii. Limit, segregate, or classify an employee or applicant in a way that deprives or tends to deprive a person of employment opportunities or otherwise adversely affects the status of an employee because of a handicap that is not related to the person's ability to perform the duties of the particular job or position;

iv. Fail or refuse to hire, recruit, or promote a person on the basis of physical or mental examinations that are not directly related to the requirements of the specific job;

v. Discharge or take other disciplinary action against a person on the basis of physical or mental examinations that are not directly related to the requirements of the specific job;

vi. Fail or refuse to hire, recruit, or promote a person when adaptive devices or aids may be utilized to enable that person to perform the specific requirements of the job;

vii. Discharge or take other discriminatory action against an individual when adaptive devices or aids may be utilized to enable that person to perform the specific requirements of the job;

viii. Discriminate against an individual because of a handicap in admission to, or employment or continuation in, a program established to provide apprenticeship or other training;

ix. Print, publish, or cause to be printed or published, a notice or advertisement relating to employment by the employer indicating a preference, limitation, specification, or discrimination, based on a handicap that is not related to the person's ability to perform the duties of the particular job or position; and

x. Except as permitted by Federal Law:

(a) Make or use a written or oral inquiry or form of application that elicits or attempts to elicit information concerning the handicap of a prospective employee for reasons contrary to the Act;

(b) Make or keep a record of information or disclose information concerning the handicap of a prospective employee for reasons contrary to the Act; and

(c) Make or use a written or oral inquiry or form of application that expresses a preference, limitation, or specification based on the handicap of a prospective employee for reasons contrary to the Act.

d. Required Accommodations.

Pursuant to the MPDCRA, private, for-profit employers must expend a certain amount of money to accommodate each worker with a disability. The amount that such employers must spend to make such accommodations is keyed to the state average weekly wage (SAWW) as determined by the Michigan Unemployment Agency (as of the fiscal year ending June, 1997, the SAWW was $581.39, however, the SAWW is adjusted annually by the UA), and is limited by the nature of the accommodation and the number of employees as set forth below:

i. Equipment or devices:

a) Employers with 1-3 employees are not required to spend more than the current SAWW.

b) Employers with 4-14 employees are not required to spend more than 1.5 times the SAWW.

c) Employers with 15-24 employees are not required to spend more than 2.5 times the SAWW.

d) Employers with 25 or more employees are required to spend 2.5 times the SAWW or less.

ii. Reader or interpreter:

a) Employers with 1-3 employees need not spend more than 7 times the SAWW for the first year the handicapped person is hired, promoted or transferred; need not spend more than 5 times the SAWW for each subsequent year.

b) Employers with 4-14 employees need not spend more than 10 times the SAWW for the first year the handicapped person is hired, promoted or transferred; need not spend more than 7 times the SAWW for each subsequent year.

c) Employers with 15-24 employees need not spend more than 15 times the SAWW for the first year the handicapped person is hired, promoted or transferred; need not spend more than 10 times the SAWW for each subsequent year.

d) Employers with 25 or more employees may be required to spend up to 15 times the SAWW for the first year the handicapped person is hired, promoted or transferred; and up to 10 times the SAWW for each subsequent year.

e) An employer with 15 or more employees will be required to spend up to 15 times the SAWW for the first year the handicapper is hired, promoted, or transferred, and up to 10 times the SAWW for each subsequent year.

iii. Job restructuring or rescheduling:

a) Employers with less than 15 employees are not required to make this accommodation.

b) Employers with 15 or more employees are required to make such accommodations only with respect to minor or infrequent duties relative to a particular job.

F. Pregnancy Discrimination Act (Federal Law).

1. Protected Persons.

Any pregnant female or any female suffering from a pregnancy related condition (e.g., childbirth, abortion).

2. Persons Subject to the Act.

Any employer with 20 or more employees that is engaged in interstate commerce is subject to the Pregnancy Discrimination Act.

3. Prohibited Practices.

It is unlawful for an employer to discriminate against a qualified person because that person is pregnant, or suffering from a pregnancy related condition, with respect to hiring, advancement, discharge, or compensation.

a. Disability Leave.

i. A protected person cannot be forced to go on leave if that person is still able to work.

ii. If other employees who take disability leave are entitled to have their jobs back upon their return to work, so are women who have been unable to work because of pregnancy. (This right is even further enhanced by virtue of the Family and Medical Leave Act.)

b. Fringe Benefits.

A woman unable to work for pregnancy related reasons is entitled to the same disability benefits, sick leave, and health insurance benefits as employees that are unable to work for other medical reasons. (However, an employer is not required to provide health insurance coverage for conditions arising from elective abortion unless the mother's life would have been endangered had the baby been carried to term or where medical complications arise following an abortion.)

G. Relief Available.

The possible relief available to a person who is the victim of employment discrimination includes backpay, front pay, fringe benefits, reinstatement, hiring, emotional distress damages, and attorney fees.

VI. EMPLOYMENT MANUALS AND EMPLOYMENT FILES.

A. Employment manuals can be a terrific tool for use by management in marketing its company to its employees and in providing information to employees.

B. What kind of information can be provided in an employment manual?

Almost anything within the bounds of common sense. Employers have included a company history, biographies regarding officers and upper management, and perhaps the more obvious kind of information such as work rules, basis for termination, disciplinary procedure and available benefits.

C. The manual must be prepared as if an employee who is terminated or who believes he or she is not fairly treated will look closely at the manual for a cause of action to bring against the employer.

D. Not only must the manual be drafted with an eye to defensive practice, but the employer must act consistent with the policies and procedures provided in the manual.

E. The larger a company gets the more likely it is that a management employee will ignore and/or forget policies and procedures contained in the manual.

F. Does your practice need a manual or should the whole concept be forgotten?

On balance, we conclude that an employment manual, properly drafted and tailored to the needs of your office, is preferable to no manual at all. On the other hand, if your office is not attuned to compliance, then perhaps a manual is not a good idea. However, there should be some minimum protection provided for the employer by way of an appropriate employment application combined with certain specific employment policies in writing.

G. The status of the law is such that an employer must make sure that the manual contains only those policies and procedures that it truly will follow.

1. Historically, employment contracts for an indefinite period are presumptively terminable at the will of either party for any reason or no reason, Lynas v Maxwell Farms, 279 Mich 684 (1937). Then, a revolutionary case opened up a Pandora's box for claims against employers. In Toussaint v Blue Cross & Blue Shield of Michigan, 408 Mich 579 (1980), the court held that a provision of an employment contract providing for just cause termination may be formed by either express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statement. With that announcement, lawyers were off and running. After numerous cases, it appeared that the Supreme Court and other Michigan courts were following the lead of the federal courts in limiting claims of a plaintiff based on an employment manual so long as there was a clear statement of at-will employment.

2. In Hale v Comerica Bank, 189 Mich App 382 (1991), plaintiff was terminated. The court carefully examined the policy manual to determine whether the employer followed the procedural steps contained in the manual. Having determined

that the bank complied with the applicable contract provisions, the court granted summary judgment to the bank and dismissed the plaintiff's claim. The significance of the case is the court's examination of whether the bank complied with its own policy statement.

3. In Stopczynski v Ford, 200 Mich App 190 (1993), the court found that an employment agreement existed between the plaintiff and Ford Motor Company reflecting an at-will employment relationship. The court therefore found that there could be no claim of a just cause employment relationship. Plaintiff argued that the at-will language must be read consistent with certain rules, regulations and personnel practices as Ford Motor Company may from time to time adopt. Plaintiff therefore argued that there were other policies which "qualified" the at-will relationship. The court disagreed with the plaintiff and dismissed plaintiff's claim. It noted that there were cases which squarely held that an employer's adaptation of disciplinary guidelines does not transform an at-will employment relationship into one prohibiting discharge absent just cause, Biggs v Hilton Hotel Corp., 194 Mich App 239 (1992).

H. Most recently, the Michigan Supreme Court has issued an opinion which underlines the necessity of making sure that employment manuals are consistently authored and consistently followed.

In Rood v General Dynamics Corp., 444 Mich 107 (1993), the Court analyzed the claim of Dr. Rood for wrongful discharge. For Dr. Rood, one of two plaintiffs, the Court found that General Dynamics Corp.'s written policy statements were sufficiently clear and definite to create a jury question regarding the existence of a just cause employment relationship on a theory of "legitimate expectations" as offered in the famous Toussaint case. Toussaint, as noted above, noted that certain policies and procedures may create a "legitimate expectation" of just cause termination procedures. It is sufficient to say that the Michigan Supreme Court continues to state that if an employer creates policies and procedures and those can be reasonably interpreted to create a just cause basis for termination, a jury will be determining whether those policies and procedures created a "legitimate expectation" of just-cause employment:

> ... We noted that '[a] an employer who establishes no personnel policies instills no reasonable expectations of just-cause employment in its employees.' Nevertheless, if an employer elects to create policies and procedures that are reasonably capable of being interpreted as promises to refrain from discharging employees absent just cause, it is for the jury to determine whether such policies and procedures instilled a legitimate expectation of just-cause employment. <u>Rood at 107</u>.

I. Based on Michigan Law, the employment manual must clearly indicate a terminable at-will employment relationship. It should also provide an employer with as much discretion as possible with respect to any disciplinary procedure. It should contain no promise unless the employer reserves the right to itself, in writing, in the manual, to change at its sole discretion.

J. If you have a just-cause manual, can you unilaterally create an at-will relationship with your employer?

Yes, a just-cause employment policy may be modified so long as "reasonable notice of the change is given to affected employees". <u>In re Certified Question, Bankey v Storer Broadcasting</u>, 432 Mich 438 (1989).

VII. <u>STATUTORY COMPLIANCE AND PITFALLS RELATING TO DISCIPLINE AND TERMINATION PRACTICE</u>

A. Bullard-Plawecki Employee Right-T0-Know Act MCLA §423.501, et seq., MSA §17.62(1), et seq.

1. What the Act Generally Provides:

This Michigan law grants employees and former employees the right to review certain "personnel records" and include their own written statements in their file. It also limits the kinds of records an employer may keep and who may see them.

2. Who is Covered.

The Act applies to any employer who has four or more employees. Section 1(b).

3. What are "Personnel Records?

Under the Act, a personnel record is a record kept by the employer that identifies the employee and is or has been used or may affect or be used relative to that employee's qualification for employment, promotion, transfer, additional compensation or disciplinary action. Section 1(c). The Act, however, excludes the following categories of records from the definition of a "personnel record":

a. Employment references supplied to the employer if the identify of the person who gave the reference would be disclosed. Section 1(c)(i).

b. Confidential peer evaluations if they would reveal the identity of the person making the reference. <u>Muskovitz</u> v. <u>Lubbers</u>, 182 Mich App 489, 452 NW2d 854 (1990).

c. Materials relating to staff planning if they involve more than one employee, including staff planning with respect to salary increases, promotions, job assignments and bonuses. Section 1(c)(ii).

d. Medical records made or obtained by the employer if the employee can obtain them from the doctor or medical facility involved. Section 1(c) (iii).

e. 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. Section 1(c)(iv).

f. Information kept separate pursuant to Section 9 of the Act, which information relates to an internal investigation of reasonably suspected criminal activity which may result in loss or damage to the employer. Section 1(c)(v).

g. Separately maintained records of grievance investigations if not used relative to that employee's promotion, transfer, additional compensation or discipline. Section 1(c)(vi).

h. Record made and kept solely by an executive, administrative or professional employee and not accessible to or share with others. Section 1(c) (i-viii).

4. Pertinent Provisions.

a. Use of Information.

If information should have been included in a personnel record but was not, it cannot be used by the employer in a judicial or quasi-judicial (e.g., Unemployment Agency hearing) proceeding. If the omission was unintentional, the judge or hearing officer may permit the employer to use the information if the employee agrees or if the employee has been given a reasonable time to review it. Section 2.

b. Review by Employee.

i. The employer's obligation to permit the employee to review his or her personnel record is triggered by the employee's written request.

ii. The employer need not permit a review any more often than at reasonable intervals, generally not more than two times in a calendar year or as provided by collective bargaining agreement. Section 3.

iii. The review should take place during the employer's normal office hours at a location reasonably near the place of employment. Section 3.

a) The employer is not required to let the employee have time off work to review the records. Section 3.

b) If it would require an employee to take time off from work in order to have the review during normal office hours, the employer must not provide another reasonable time for the review. Section 3.

c) If an employee demonstrates that he or she if unable to review the personnel record at the place of employment, the employer shall, upon the employee's written request, mail a copy of the requested record to the employee. Section 4.

iv. After the review provided for in Section 3, an employee may obtain a copy of the information. The employer may charge a fee limited to the actual incremental cost of duplicating the information. Section 4.

c. Disagreement as to Information Contained in a Personnel Record.

i. The employer and employee can mutually agree to remove or correct a disputed record. Section 5.

ii. If no agreement is reached, the employee may submit a written statement (of no more than five sheets of 8-1/2 by 11 inch paper) explaining his or her position. The employee's statement must be added to the record and included if the file is divulged to a third party. Section 5.

iii. If the employer or employee knowingly place false information in the record, the other can take legal action to have that information expunged. Section 5.

d. Disclosure of Disciplinary Reports:

i. Written notice to the employee is required before an employer may divulge a disciplinary report, letter of reprimand or other disciplinary action to a third party or anyone not a part of a labor organization representing the employee. The notice must be sent by first-class mail to the employee's last known address and mailed on or before the day the information is released. The employer need not give this notice if:

a) The employee has waived written notice;

b) The disclosure is ordered in a legal action or arbitration; or

c) The information is requested by a governmental agency as a result of an employee claim or complaint. Section 6.

ii. Prior to releasing information to a third party, the employer must review the file and remove disciplinary reports, letters of reprimand or other records of disciplinary action that are more than four years old, unless the release is ordered in a legal action or arbitration. Section 7.

e. Non-employment activities: An employer may not gather or keep a record of an employee's associations, political activities, publications or communications of non-employment activities unless the employee authorizes the employer to do so in writing. This restriction does not apply to activities that occur during working hours on the employer's premise and interfere with the employee's duties or those of other employees. Section 8.

f. Criminal activity.

If an employer has reasonable cause to believe that an employee is engaged in criminal activities which may result in loss or damage to the employer's property or disruption of the business, the employer may investigate and may keep a file separate from the employee's other records. After the investigation or two years (whichever comes first), the employer must notify the employee that he or she was or is under investigation for suspected criminal activity. If no disciplinary action is taken, the report must be destroyed. Section 9.

5. How the Act is Enforced.

a. An employee may enforce the Act by filing a lawsuit in circuit court.

b. If the court orders the employer to comply and later finds it has not done so, it may hold the employer in contempt.

c. The Act mandates the court to award a prevailing employee:

i. actual damages plus costs for a violation of the Act;

ii. $200.00 plus costs, reasonable attorney fees and actual damages for a willful and knowing violation of the Act. Section 11.

6. Practical Considerations.

a. Build a file! The most low cost and effective way in which an employer can protect itself from meritless lawsuits is to document misconduct or unsatisfactory performance. The more detailed the documentation, the better. The longer the time span the documentation covers, the better.

The extent of the documentation in a discharged employee's personnel file will be critical to the decision of a plaintiff's lawyer as to whether or not to take the discharged employee's case. A detailed record, reflecting repeated warnings and repeated instances of the conduct in question will save you time, money and aggravation.

b. Never retaliate against an employee for requesting his or her personnel file.

c. Failure to comply with the Act may severely prejudice the employer's case if a lawsuit is brought. The court may bar an employer from using documents that were not included among the employees personnel records. An employee may, in addition to filing a wrongful discharge or discrimination suit, include a "count" for violation of the Bullard-Plawecki Act. While the damages from a violation of the Act may be slight, the fact of a violation may prejudice a jury's consideration for the wrongful discharge or discrimination claim.

d. Keep medical records in a separate file from personnel records. If the medical records may be obtained by the employee from the doctor or medical facility involved, the employer has no disclosure obligation. The commingling of medical records with other personnel records can arguably suggest that prohibited criteria (e.g., disability, weight, etc.) were used in the evaluation of an employee.

B. The Whistleblower's Protection Act. MCLA §15.361, et seq.; MSA §17.425, et seq.

1. What the Act Generally provides:

This Act prohibits an employer from discharging, threatening or otherwise discriminating against an employee regarding compensation or any other privileges of employment because the employee has engaged in "whistleblowing activities."

2. Who the Act Covers.

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

3. The Act's Operative Provisions.

a. Prohibitions.

The Act prohibits an employer from taking action against an employee, or a person acting on an employee's behalf, because he or she has reported, or is about to report, verbally or in writing, a violation or suspected violation of a local, state or federal law, regulation or rule to a <u>"public body"</u> unless the employee knows that the report is false. The Act also prohibits retaliation against an employee who is requested by a court or state organization to participate in an investigation, hearing or inquiry. Section 2.

b. The Act defines "public bodies" as employees and officers of any local or state governmental unit, agency, board, commission, legislative body, judicial body, law enforcement agency, etc. See, Branch v. Azalea/Epps Home, Ltd., Michigan Court of Appeals No. 124903, 5/7/91 (a report to a social worker employed by the Department of Social Services is a report to a public body); Heeter v. Central Piping Co., Michigan Court of Appeals No. 98886, 8/10/88 (the United States Department of Labor is a "public body" under the Act).

4. How the Act is enforced:

a. Civil Action.

An employee may seek injunctive relief, actual damages or both by filing a civil suit in circuit court. Section 3(a).

i. The employee must establish by "clear and convincing evidence" that he or she or a person acting on his or her behalf was about to report a violation or a suspected violation of a law of the state or the United States to a "public body." Section (d)(4)(3).

ii. To establish a prima facie case, the employee must prove:

a) The employee was engaged in protected conduct as defined by the Act;

b) The employee subsequently suffered an adverse action regarding his or her employment;

c) The employee's participation in the protected conduct was a motivating factor in the adverse action. See, <u>Eckstein v Kuhn</u>, 160 Mich App 240; 408 NW2d 131 (1987); <u>Melchi v Burns International Security Systems Inc.-</u>, 597 F Supp 575 (ED Mich 1984).

iii. If the employee succeeds in proving a <u>prima facie</u> case, the burden shifts to the employer to show a legitimate reason for the adverse employment action. (Id.)

iv. If the employer carries its burden, the employee must have an opportunity to prove that the legitimate reason offered by the employer was not the true reason but was only a pretext for discrimination. (Id.)

b. Statute of limitations.

Employees must file suit within 90 days of the alleged violation, or else the claim is barred.

c. Arbitration.

In the absence of a clear agreement to arbitrate whistleblower claims, the employee's failure to submit the issue to arbitration will not preclude a civil action. <u>Hopkins</u> v <u>City of Midland</u>, 158 Mich App 361, 404 NW2d 744 (1987); <u>Tuttle</u> v <u>Bloomfield Hills School District</u>, 156 Mich App 527; 402 NW2d 54 (1986).

d. Remedies.

The Act allows recovery of back wages, full reinstatement of fringe benefits and seniority rights, and actual damages, as well as civil fines of up to $500. The court in its discretion, may include reasonable attorney fees in any award. Sections 4 and 5.

e. Posting Notice.

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

4. Practical Considerations.

a. Treat employee complaints about health, safety and other company practices seriously. Have an internal process. Conduct an appropriate investigation. Find out what the complaining employee knows about the alleged problem. Take corrective action if the complaint is meritorious.

b. Do not terminate the employee or retaliate against the employee for complaining to a "public body." This will only compound your problem.

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

C. Employee Polygraph Protection Act of 1988 - 29 USC §2001, ET SEQ.

1. What the Act Generally Provides.

This federal law effectively bars employers from using lie detector tests for pre-employment screening and for disciplining employees, except where an employee is reasonably suspected of workplace theft or industrial espionage. Tests administered under this law's exception in the case of workplace theft must meet the Act's stringent safeguards and <u>must also</u> meet the requirements of the Michigan Polygraph Protection Act. MCLA §37.201 <u>et seq.</u>, MSA §17.65(1) <u>et seq</u>.

2. Who is Covered?

Department of Labor regulations provide that virtually all private sector employers are covered by the Act. 29 CFR §801.3.

3. Provisions.

a. Prohibitions.

Subject to certain exemptions set forth herein, the Act prohibits an employer from:

i. Directly or indirectly requiring, requesting, suggesting or causing any employee or prospective employee to take a lie detector test;

ii. Using, accepting, referring to or inquiring concerning the results of the lie detector test of an employee or prospective employee;

iii. Discharging, disciplining, discriminating or threatening such action against any employee or prospective employee who refuses to take a lie detector test or on the basis of the results of a lie detector test;

iv. Retaliating against any employee because the employee filed a complaint under the Act or exercised a right under the Act on behalf of a fellow employee.

b. Notice Posting.

All employers are required to post, in conspicuous places, notices prepared by the Secretary of Labor summarizing the pertinent provisions of the Act.

c. Exemptions:

i. Subject to the "safeguards" provided for in the Act, (and also subject to the "safeguards" of the Michigan Polygraph Protection Act), an employer may request an employee to submit to a lie detector test if:

a) The test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation or an act of unlawful industrial espionage or sabotage;

b) The employee had access to the property that is the subject of the investigation;

c) The employer had a reasonable suspicion that the employee was involved in the incident or activity under investigation; and

d) The employer executes a statement provided to the examinee before the test specifying with particularity the incident or activity being investigated and the basis for testing particular employees, which statement identifies a specific economic loss, indicates that the employee had access to the property in question and describes the basis of the employer's reasonable suspicion of the employee. The statement must be retained by the employer for at least three years.

ii. There are also exemptions providing for the use of lie detector tests for screening prospective employees for employers involved in providing security services, producing, transmitting or distributing electric or nuclear power, shipping toxic waste, public transportation, etc. There is a broader exemption for employees of employers authorized to manufacture, distribute or dispense certain drugs.

iii. The Act provides an employee taking a polygraph exam pursuant to an exemption with certain rights, including the right:

a) To terminate the test at any time;

b) To not be asked questions in a manner designed to degrade or needlessly intrude on the examinee;

c) To not be asked any questions concerning the examinee's religious belief or affiliations, beliefs or opinions regarding racial matters, political beliefs or affiliations, matters relating to sexual behavior, and beliefs and affiliations regarding labor unions;

d) To refuse to submit to a test upon presentation of sufficient evidence by a physician of a medical or psychological condition which might cause an abnormal response;

e) To be provided with reasonable written notice of the date, time and place of the test and to obtain legal counsel;

f) To be informed in writing of the nature of the test, the instruments involved, whether two-way mirrors, cameras or other recording devices are to be used;

g) To make a recording of the test;

h) To receive a written notice informing the examinee that he or she cannot be required to take the test as a condition of employment, that any statement made during the test may be used for purposes of an adverse employment action, of the safeguards provided for under the Act, and of the remedies available to an examinee if a test is not conducted in accordance with the Act;

i) To be provided with an opportunity to review all questions to be asked during the test in advance and to terminate the test at any time; and

j) To be interviewed further on the results of the test and receive a written copy of any opinions and a copy of the questions asked, prior to any adverse employment action being taken.

4. Nondisclosure.

An employer may not disclose information obtained during a polygraph test except to the examinee and other persons designated by the examinee, in writing, or to any court, governmental agency, arbitrator or mediator in accordance with due process of law, pursuant to an order from a court or a governmental agency, but only insofar as the disclosed information *is* an admission of criminal conduct.

5. How the Act is Enforced.

An employer who violates the Act is subject to a civil penalty of $10,000, an injunctive action brought by the Department of Labor and a civil action brought by the involved employee. The employee may sue in federal or state court and may, if the employee prevails, recover his or her attorney fees.

6. Practical Considerations.

   a. Use of lie detector tests are fraught with legal pitfalls. Do not attempt to use one without consulting with an attorney with experience in labor and employment law first.

   b. Remember, you may always report misconduct involving theft and intentional property damage to the police.

D. Michigan Workers Disability Compensation Act Provisions Against Retaliation - MCLA 418.301(11); MSA 17.237(301)(11)

1. Generally.

   In 1980, the Michigan legislature amended the Michigan Workers Compensation Disability Act to prohibit retaliation against an employee for filing a workers' compensation claim or otherwise exercising a right provided by the Act.

2. Who is covered?

   The Act covers every employee, with special provisions relating to agricultural employees and employees of domestic servants.

3. Relevant Provisions.

   The Act expressly provides that, "a person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under (the) Act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by (the) Act." Section 301.

4. Case law.

While courts have uniformly held that discharging or disciplining an employee for filing a workers compensation claim clearly violates the Act, see, e.g., Sventko v. Kroger Company, 69 Mich App 644 (1976), discharging an employee in anticipation of the filing of such a claim has been held not to be a violation. Griffey v. Prestige Stamping, 189 Mich 665 (1991). Note: Such a discharge may, however, implicate the Americans With Disabilities Act, 42 USC §12101, et seq., and/or the Michigan Handicapper's Civil Rights Act, MCLA §37.1101, et seq.; MSA §3.550(101), et sea.

5. Enforcement.

An employee may enforce his or her right under §301 against retaliation of the Act by filing a lawsuit in circuit court, if the alleged damages exceed $10,000, or in district court, if the alleged damages are below $10,000. The employee may demand a jury trial.

6. Remedies.

In addition to lost wages and benefits, an employee may recover damages for emotional distress, Dunbar v. Michigan Dept. of Mental Health, 197 Mich App 1 (1992), and seek reinstatement.

7. Practical Considerations.

a. Obviously, do not discharge or discipline an employee because he or she has filed a worker's compensation claim. If an employee does have a worker's compensation claim pending and has engaged in conduct which warrants discharge, proceed warily. Carefully analyze whether there is more than sufficient evidence to establish that the discharge had nothing to do with the filing of the compensation claim.

b. Do not forget to call your carrier when a compensation claim is filed, and consider the applicability of the Americans with Disabilities Act and the Family and Medical Leave Act.

E. Michigan Employment Security Act - MCLA §421.1, ET SEQ. MSA §17.501, ET SEQ.

1. General.

The purpose of the Act is to ease the burden caused by unemployment where the employee is laid off through no fault of his or her own.

2. Who is Covered?

a. Employing Unit - Any individual or type of organization which has in its employ one or more individuals performing services for it in Michigan.

b. Liable Employer - An employing unit is a liable employer if it has or had:

i. A total payroll of $1,000 or more for covered services <u>or</u>

ii. One or more employees performing covered services in 20 different calendar weeks in a calendar year <u>or</u>

iii. Acquired 75% or more of the assets of an organization, trade, or business which at the time of the acquisition was subject to this Act.

c. Independent contractors are not employees and hence not entitled to benefits. Michigan applies the "economic reality" test, which considers:

i. Who controls the employees duties;

ii. The right to hire discipline and discharge the employee;

iii. Whether the employee performs duties as an integral part of the business; and

iv. the payment of wages

v. Carpet v MESC, 143 Mich App 287, 372 NW 2d 332 (1985).

2. Disqualification for Benefits.

An individual who is otherwise eligible for benefits may be disqualified for benefits under the following circumstances:

a. If the individual leaves work voluntarily and without good cause attributable to the employer. In general, courts have held that there is "good cause" where the employer's conduct would cause an average, reasonable and otherwise qualified employee to leave his or her employment. McArthur v Bormans, Inc., 200 Mich App 686, 505 NW 2d 32 (1993). A mere personal reason, albeit a good one, does not constitute "good cause." id. An employee's loss of a prerequisite of continued employment, (e.g., a driver's license or nurse’s license) lost through the employees own fault, may constitute a voluntary leaving without good cause. Echols v MESC, 380 Mich 87, 155 NW 2d 824 (1968). An employee's leaving because of discontent with his or her lack of work may also constitute a voluntary leaving without good cause. Cooper v U of M. 100 Mich App 99, 298 NW 2d 677 (1980).

b. If the individual is discharged for misconduct connected with work, or for intoxication while at work, unless the discharge was subsequently reduced to a disciplinary lay off or suspension. The definition of "misconduct" adopted by the Michigan Courts is as follows:

> the term "misconduct" is limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in the deliberate violations or disregard of standards of behavior which the employer has a right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies

> or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute. Carter v MESC, 364 Mich 538, 541, 111 NW 2d 817 (1961) Broyles v Aerocruilp Corp., 176 Mich App 175; 438 NW 2d 888 (1989).

Misconduct that may justify discharge may not necessarily constitute misconduct sufficient to disqualify the employee for unemployment benefits. Reed v MESC, 364 Mich 395, 110 NW 2d 907 (1961). Hence, for example, excessive absenteeism and tardiness, for reasons beyond the control of an employee, may not constitute "misconduct" under the statute. Washington v Amwav Grand Plaza, 135 Mich App 652, 354 NW 2d 299 (1984).

Further, a finding of "misconduct" within the meaning of the statute may be based on a series of infractions, any one of which, alone, would not amount to disqualifying misconduct. Christophersen v City of Menominee, 137 Mich App 776, 359 NW 2d 563 (1984).

Additionally, use of vulgarity or abusive language may constitute disqualifying misconduct, although the determination will turn on the "totality of the circumstances." Broyles v Aeroquip Corp., 176 Mich App 175, 438 NW 2d 888 (1989).

c. If the individual fails without good cause to apply for available "suitable" work of which the individual is notified by the UA. In determining whether or not work is "suitable" the Unemployment Agency considers the degree of risk involved to the individuals health, safety and morals, the individuals physical fitness and prior training, the individuals experience and prior earnings, the individuals length of unemployment and prospects for securing local work in the individuals customary occupation, and the distance of the available work from the individuals residence.

d. If the individual fails, without good cause, to report to his or her former employer within a reasonable time after notice from that employer of an interview concerning available "suitable" work with the former employer.

e. If the employee fails without good cause to accept "suitable" work when offered to the individual, or fails without good cause to return to the individuals customary self-employment, if any, when directed by the UA.

f. If the individual lost his or her job because they were absent from work as a result of a violation of law for which the individual was convicted, and sentenced to jail or prison. However, an individual is not disqualified when the conviction was for a traffic violation that resulted in an absence of less than 10 consecutive work days.

g. If the individual is discharged for striking in violation of a collective bargaining agreement, participating in a wildcat strike or other concerted activity not authorized by the employee's union.

h. If the individual is discharged for an act of assault and battery connected with the individual's work.

i. If the individual is discharged for theft connected with the individual’s work.

j. If the individual is discharged for willful destruction of property connected with the individuals work resulting in loss or damage of more than $25.00.

4. Practical Considerations.

a. Build a file! Document misconduct in detail. Explain how the particular misconduct in question effected productivity, negatively impacted customer relations, or otherwise harmed the business. Unless the conduct for which an employee is fired is particularly outrageous, the Unemployment Agency referee will be looking for a detailed record reflecting repeated instances of misconduct and repeated warnings.

b. Think carefully about your response to the Unemployment Agency's request for information. In most cases, you will want to start your response with the words, "Among other reasons, the claimant was discharged for . . .”

PAY ATTENTION – SOME OF THIS MAY BE IMPORTANT: WAGE AND HOUR ISSUES

By: Martin S. Frenkel

I. COMMON QUESTIONS

A. Do I have to pay my salaried employees overtime?

B. Is every minute an employee spends at work compensable time?

C. When do I have to pay an employee overtime?

D. Could I be violating child labor laws and not even know it?

E. What happens if I violate wage and hour laws?

II. A BRIEF HISTORY OF WAGE AND HOUR LAWS

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

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

2. Michigan Law: Minimum Wage Act of 1964 ("MMWA")

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

B. Background

1. Fair Labor Standards Act

a. The FLSA was enacted in 1938 and has subsequently been modified through amendments or enactments of related acts approximately two dozen times since the Act was initially passed. The first minimum wage provided by the FLSA was $0.25 an hour in 1938 and was most recently increased in 1997 to $5.15 per hour. The FLSA initially only applied to employees engaged interstate commerce. The Act now applies to nearly all employees and has been extended to cover employees engaged in large retail and service enterprises, local transit, construction, gas stations, hospitals, nursing homes, schools, laundries, dry cleaners, hotels, motels, restaurants, and farms.

b. The FLSA was enacted to govern payment of overtime wages, create record-keeping requirements for hours worked by employees, and to prevent exploitation of child labor.

c. The FLSA does <u>not</u> regulate the following:

i. Vacation, holiday, severance, or sick pay;

ii. Meal or rest periods, holidays off, or vacations;

iii. Premium pay for weekend or holiday work;

iv. Pay raises or fringe benefits; and

v. Discharge notices, reason for discharge, or immediate pay of final wages to terminated employees.

2. Michigan Minimum Wage Act of 1964: The Act was passed in 1964 in order to regulate overtime, record-keeping, and use of child labor by any employers which fall outside of the scope of the FLSA.

3. Michigan Wages and Fringe Benefits Act:

a. The Act (in its modern form) was enacted in 1978.

b. The Act does not regulate the amount of wages paid, but provides procedures for the time when wages are to be paid and governs the payment of fringe benefits to employees.

III. APPLICATION OF THE FLSA AND THE MICHIGAN MINIMUM WAGE ACT ("MMWA")

A. Who is an "employer" under the FLSA?

1. An "employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization."

B. What industries are covered?

1. Generally: All employees of enterprises having workers engaged in interstate commerce, producing goods in interstate commerce, or handling, selling, or otherwise working on goods or materials that have been moved in or produced for such commerce (referred to as "covered enterprises"). These "covered enterprises" have been extended to include not only businesses engaged in production of goods for interstate commerce, but also employed by a business engaged in any closely related process or occupation which is directly essential to such production, including employees who work in communications or transportation, regularly use the mails or telephones for interstate communication, keep records of interstate transactions, regularly cross state lines in the course of employment, or work for employers who contract to do

clerical, custodial, maintenance, or other work for firms engaged in interstate commerce or in the production of goods for interstate commerce.

2. In 1990, additional requirements for determining whether an employer is a "covered enterprise", and therefore subject to the FLSA, were added. These requirements provide that:

   a. A covered enterprise is defined as the related activities performed through unified operation or common control by any person or persons for a common business purpose and

      i. whose annual gross volume of sales made or business done is not less than $500,000.00; or

      ii. is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill who reside on the premises; a school for mentally or physically disabled or gifted children; a preschool, an elementary school or secondary school, or an institution of higher education (whether operated for profit or not for profit); or

      iii. is an activity of a public agency.

3. Grandfather Clause: Any enterprise that was covered by the FLSA on March 31, 1990, and that fell outside of the act because of the new $500,000.00 test, remains subject to the overtime pay, child labor, and recordkeeping provisions of the FLSA.

C. Where does the MMWA fit in?

1. It is the rare local exception which falls outside of the FLSA. In such cases, the MMWA (the provisions of which mirror the FLSA, including exemptions from coverage) applies.

2. The MMWA covers all employers not covered by the FLSA and defines employers as "a person, firm, or corporation, including the state and its political subdivisions, agencies, and instrumentalities, and a person acting in the interest of the employer, who employs 2 or more employees at any 1 time within a calendar year. An employer shall be subject to this act during the remainder of that calendar year.

IV. MINIMUM WAGE REGULATIONS

A. All employees must be paid the minimum wage set by federal law unless your business is one of those that falls outside the scope of the Fair Labor Standards Act. The current minimum wage is $5.15 per hour. However, there is a youth minimum wage of $4.25 per hour which may be paid to employees under the age of 20 years old during the first 90 consecutive calendar days of employment with the employer. Employers may not displace employees in order to hire other employees at the youth minimum wage.

The most common minimum wage issues which arise are listed below.

B. Average Wages Over a Work Week. The earnings of employees paid by the hour or by the piece cannot be averaged over any time period longer than a work week. Amounts earned in excess of the minimum wage during one work week cannot be used to offset amounts earned below the average in another work week.

C. Employees Paid in Whole or in Part on Commission.

1. Commission as sole compensation. Payments to the employee for each work week must satisfy the minimum wage requirement for that work week.

2. Commission and hourly wages. If an employee is paid part of the work week on a hourly basis and part of the work week on a commission basis, the employer may not average the wages earned while being paid hourly to make up for a deficiency in earnings while the employee is being paid on commission.

3. Payment of commissions on a monthly basis. An employer may pay commissions on a monthly as opposed to a weekly basis. However, the computation of hours worked and the employee's earnings must be done on a work week basis, and the employee must be paid at least the minimum wage for all hours worked during a work week on the pay day for that work week.

4. Effect of a draw against commissions. An employer may allow employees to draw against their future commissions. However, the employer cannot use that draw to offset the required payment of the minimum wage for that work week.

D. Employees Paid in Whole or in Part Based on Production Quantity. For employees paid by the piece, or a combined hourly wage plus a piece rate, the calculation to determine if the minimum wage requirements are satisfied is based upon a regular 40-hour work week. If the average hourly earnings of the employee for non-overtime hours in each work week satisfy, equal or exceed the minimum wage then the requirements are satisfied for that work week.

For employees who split time between jobs paid at an hourly wage and jobs paid by the piece, the hourly rate must equal or exceed the minimum wage, and the average hourly rate for the time spent working at the piece work must equal or exceed the minimum wage.

E. Employees Paid in Part by Tips. Tipped employees are those employees who regularly receive more than $30.00 per month in tips. An employer may consider tips received by an employee as part of the employee’s wages, but the employer must pay the employee at least $2.13 per hour in actual wages. (The MMWA increases this amount to $2.65 per hour.) If an employer elects to credit tips towards the minimum wage, the employer must inform the employee prior to crediting tips. In the event an employee’s direct wages of $2.13 and credited tips do not equal at least the minimum wage, then the employer must make up the difference. Other tipping issues include:

1. Proof of amount of tips received. The burden is on the employer to determine the amount of tips actually received. The employer may not rely exclusively upon the amount of the business generated at a particular table or tables, because, barring other evidence, there is no absolute correlation between the revenue generated and the tips received.

2. Tip pooling. Tip pooling arrangements are permissible and the employer may take the minimum wage percentage exemption for tipped employees if all members of the pool are employees

who regularly receive tips. The pool cannot include employees who do not receive tips unless the employees voluntarily pool their tips.

3. Time spent on other work. If an employee spends time on work for which tips are not customarily given, in most cases, the employee must be paid the full minimum wage for such time.

4. Deductions for walkouts, cash shortages, etc. An employer may not make a deduction from an employee's wages which would result in the employee earning less than the required minimum wage. Thus, if an employer sought to pass along the amount of a cash shortage to an employee, the employer may only make such a deduction to the extent that the employee's wages exceed the minimum wage. For this purpose the employer cannot argue that the employee receives tips which make the employee's wages greater than the required minimum wage.

F. Permissible Deductions from Wages. An employee must be paid the required minimum wage "free and clear." This means that deductions from wages which the employer may wish to impose cannot be taken if the effect is to lower the employee's wage below the required minimum wage.

1. Permissible deductions. An employer may deduct the fair value of board, lodging or "other facilities."

a. "Other facilities" are items that are "like board or lodging" including meals furnished at company cafeterias, housing, merchandise from a company store or commissary, utilities for company supplied housing, and transportation provided to and from work. "Other facilities" do not include such items as trade tools, laundering of uniforms, sleeping facilities for employees required to be on duty, meal expenses for employees on the job, and transportation during the course of employment.

b. The amount of the deduction cannot include any profit to the employer or an affiliate. The cost can include adequate allowances for depreciation and interest (not more than 5.5%) on the invested capital, but in no event may the cost exceed the fair market value for the item.

2. Other permissible deductions. An employer may deduct the cost of certain other items/benefits from an employee's wages provided that the deduction does not work to reduce the employee's wages below the required minimum wage. Thus, an employer may deduct the cost of providing uniform cleaning, cash register shortages, mathematical errors or non-paying customers.

3. Uniforms. If an employer requires employees to pay for a uniform from the employee's wages, THE DEDUCTION IS PERMITTED, IF THE DEDUCTION does not reduce the employee's wages below the applicable minimum wage or reduce the required payment of overtime wages. An employer may require a prospective employee to purchase a uniform in advance, but the employee must be reimbursed that portion of the cost of the uniform which would result in the employee earning less than the required minimum wage or overtime compensation. The employer may deduct the cost over several pay periods to avoid this problem. The cost of cleaning the uniforms (unless the uniforms can be

washed in the same manner as the employee's personal clothing) must be paid by the employer unless the employer is paying the employees an amount sufficiently in excess of the minimum wage so that the cleaning cost would not have the effect of reducing the employee's wages below the required minimum wage.

V. OVERTIME COMPENSATION

A. Overtime Rate. Federal law requires employers to pay non-exempt employees overtime wages at a rate not less than 1 1/2 times their regular rate of pay for each hour or fraction of an hour worked by the employee in excess of 40 for any given work week. No overtime is required for hours worked in excess of normal time for a particular day, or for work on Saturdays, Sundays or holidays.

B. Requirements Cannot be Waived. The overtime requirements cannot be waived by an employee, and cannot be overridden by an employment contract which prohibits the employee from working overtime where both the overtime worked and the employee's duties are known to the employer.

C. Overtime Calculated on a Work Week Basis. The calculation as to whether an employee worked any overtime is determined by the work week basis. An employer is not required to pay overtime wages on a weekly basis. The employer must pay the overtime wages in the pay period applicable to the period worked. If it is not possible to determine the overtime worked before the regular pay day the employer may pay the overtime wages as soon as possible thereafter.

D. Calculation of Hours Worked. The determination as to whether an employee is "working" is not always easy. In the absence of a contract, custom or practice to pay for such items, time spent by employees in reaching their work stations, and time spent by employees in preparing to work or leave from work need not be considered work time.

E. Waiting Time. Employees which are engaged to work such as the receptionist who reads a magazine waiting for the phone to ring must be paid for such time. However, employees who are waiting to work such as the workers who arrive at the factory before it is open are not compensated for such time.

F. On Call Time. An employee who must remain on call while on the employer's premises must be compensated for such time. An employee who is on call at home, or is allowed to call in for messages, is not entitled to be compensated for such time.

G. Travel Time. An employee's ordinary travel from home to work and work to home is not compensable time. When an employee works at a fixed location and is required to travel to another city on a temporary basis, then the travel time is work and must be compensated. Finally, where an employee travels as part of the employee's principal work activity, then such travel time must be compensated.

H. Unauthorized Overtime. If an employer knows and permits an employee to work beyond his or her normal work hours, the employer must pay wages at the applicable rate to the employee even if the employer has a written policy prohibiting overtime or unauthorized work.

I. Lunch/Dinner Breaks. Generally, time provided for meals is not work time requiring compensation. Barring special exceptions, a meal period must be at least 30 minutes long and the employee must be completely relieved from duty. The employee should be able to leave his or her work station. If meal periods are frequently interrupted for work requirements, then the entire period is compensable time.

J. Rest/Coffee Breaks. Employers are not required to grant rest or coffee breaks. If such breaks are granted, they count as compensable work time if 20 minutes or less and cannot be offset against other types of work time. The general idea is that such breaks promote employee efficiency and thus benefit the employer.

K. Time Spent in Meetings/Training. Time spent attending training programs, meetings or lectures need not be counted as hours worked if the following criteria are met:

1. The meetings take place outside normal working hours;

2. Attendance is truly voluntary;

3. The meeting, lecture, etc., is not directly related to the employee's job; and

4. The employee does not do productive work during the meeting.

L. Use of "Comp" Time in Lieu of Paying Overtime. An employer may not trade "comp" time for overtime under the FLSA (unless the employer is a public agency). Employers who are not subject to the FLSA may provide for “comp” time pursuant to the MMWA if the time off is given at the rate of 1 ½ hours off per hour of overtime, there is a written comp time agreement between employer and employee before the overtime work is performed, and comp time does not exceed 240 hours per year.

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

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

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

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

3. Bonuses that depend on hours worked;

4. Commission payments;

5. Payments for meals, lodging and other facilities;

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

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

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

1. Discretionary bonuses;

2. Gifts and certain employee benefit plan contributions;

3. Employee referral bonuses;

4. Paid leave from work;

5. Severance pay;

6. Subsistence pay;

7. Talent fees; and

8. On-call or call-back pay.

C. For employees which are paid on a piece rate, commission, salary or other non-hourly basis, the compensation must be converted to an hourly rate which is usually done by dividing the work week compensation by the number of hours worked.

VII. EXEMPTIONS FROM MINIMUM WAGE AND OVERTIME REGULATIONS

A. Some employees who would otherwise be covered by the FLSA or MMWA have been exempted from application of wage and hour laws.

B. Exemptions for Executives.

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

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

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

c. The employee must have authority to hire and fire employees or to make recommendations as to hiring, firing, promotions, pay or other aspects of the employment status of other employees;

d. The employee must have discretionary powers and regularly exercise them;

e. The employee must be paid on a salary basis and earn not less than $155.00 per week (less if employed in Puerto Rico, Virgin Islands or American Samoa);

f. Subject to the below listed exceptions, the employee must spend less than 20% of his or her time each week on activities which are not directly and closely related to exempt executive/management activities.

2. Exceptions:

a. Executives in a retail business can devote up to 40% of their time to non-executive activities (most often direct sales activities);

b. Employees who own 20% or more of the enterprise may devote an unlimited percentage of their time to non-exempt activities. (This is primarily directed at small businesses to allow for the situation where the owners do nearly everything.); and

c. The employee is solely in charge of an independent establishment or a physically separated branch of an enterprise.

C. Special Short Form Test for "Highly Paid" Executives. If an employee qualifies as a "highly paid" executive, then several of the above test requirements do not apply. A "highly paid" executive is someone who makes at least $250.00 per week (less if employed in Puerto Rico, the Virgin Islands or American Samoa). If the employee satisfies this salary requirement, then the only additional requirements are:

1. His or her primary duty must be the management of the enterprise or a recognized department or subdivision; and

2. He or she must customarily and regularly direct the work of two or more other employees in the enterprise, department or subdivision.

D. Exemptions for Administrators. An employer is not required to pay overtime wages to administrative employees. The test for determining whether an employee is an "administrative" employee is slightly different than that for "executive" employees. An "administrative" employee is someone who satisfies the following criteria:

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

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

   3. The work performed by the employee:

      a. Requires the employee to regularly and directly assist an owner of the business or another employee who is an executive or administrator; or

      b. Is done under only general supervision and involves specialized or technical issues which require special training, experience or knowledge; or

c. Involves special assignments or tasks done with only general supervision;

4. The employee does not devote more than 20% of his or her hours worked (in an average work week) to activities which are not directly or closely related to the performance of administrative functions, except that a person employed by a retail establishment can devote up to 40% of their time to non-administrative functions; and

5. The employee is paid on a salary or fee basis at a rate of not less than $155.00 per week (less if employed in Puerto Rico, the Virgin Islands or American Samoa). If the employee is employed on a fee basis for less than a normal 40 hour work week, then he or she must be paid at an hourly rate of not less than $3.875 (i.e., $155.00 divided by 40 hours).

E. Special Short Form Test for "Highly Paid" Administrators. As with the test for "highly paid" executive employees, if an employee qualifies as a "highly paid" administrator, then several of the above test requirements do not apply. A "highly paid" administrator is someone who makes at least $250.00 per week (less if employed in Puerto Rico, the Virgin Islands or American Samoa). If the person satisfies this salary qualification, then the only additional requirements are:

1. His or her primary duty must be the performance of office or non-manual work directly related to management policies or general operations of the employer or the employer's customers; and

2. The work must require the employee to exercise his or her discretion and independent judgment.

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

1. The employee's primary duty is either:

   a. Performing work requiring knowledge of an advanced type in a field of science or learning; or

   b. Performing original or creative work in an artistic field;

2. The employee's work requires the consistent exercise of discretion and judgment;

3. The work performed must be predominantly intellectual and varied in character as opposed to routine, manual, mechanical or physical; and of such a nature that the output or result cannot be standardized in relation to a given time period;

4. The employee does not spend more than 20% of his or her time (determined on a weekly basis) on work which is not an essential part of and necessarily incident to his or her professional duties; and

5. The employee receives a salary or fees at a rate of not less than $170.00 per week (less if employed in Puerto Rico, the Virgin Islands or American Samoa). The salary requirement does not apply if the employee holds a valid license to practice law or medicine and is actually engaged in such practice, or if the employee has the required academic degree for the practice of medicine and is engaged in an internship or resident program. Professional employees paid on a fee basis for less

than a 40 hour work week must be paid at least $4.25 per hour (less if in Puerto Rico, the Virgin Islands or American Samoa).

G. Special Short Form Test for "Highly Paid" Professionals. As with executives and administrators there is a special short form test for employees who qualify as "highly paid" professionals. A "highly paid" professional is an employee who is paid at least $250.00 per week (less if employed in Puerto Rico, the Virgin Islands or American Samoa) and satisfies one of the following criteria:

1. The employee's primary duty must be the performance of work requiring knowledge of an advanced type in a field of science or learning, or teaching, and such work must require the consistent exercise of discretion and judgment; or

2. The employee's work is in a recognized artistic field and includes work that requires invention, imagination or talent.

H. Employees Working in Certain Computer Related Jobs Qualifying as Professionals.

1. The Wage and Hour Division has issued regulations regarding the application of the "professional" exemption to certain computer related jobs and fields. In general, employees working in areas requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, or who are engaged in the design, testing, creation, or modification of computer programs qualify as exempt professionals if they perform this work as a computer systems analyst, programmer, software engineer or other similarly skilled worker. To be exempt, however, the employee must earn a salary of at least $155.00 per week, or if paid on an

hourly basis, then the rate of pay must be at least $27.63 per hour.

2. This exemption does not include employees working in the operation of computers, or in their manufacture, maintenance or repair. The exemption also does not include employees whose work is dependent upon computers such as engineers, drafters or users of CAD/CAM software unless they otherwise qualify.

I. Exemptions for Outside Salespersons. An exemption from the overtime wage laws also exists for employees who are "outside salespersons." The criteria for determining if an employee qualifies as an "outside salesperson" is as follows:

1. The employee customarily and regularly is away from the employer's place of business in order to make sales, or to obtain orders or contracts for services or the use of facilities, for which payments will be made by the client or customer; and

2. The time spent by the employee performing work other than described above must not exceed 20% of the hours worked (on a work week basis) of the employers by other non-exempt employees of the employer. Work performed by the employee which is incidental to the employee's sales, including deliveries and collections, is still considered exempt work.

J. Reduction in Pay for Absences of Less than a Full Work Day: Effect on Exempt Status. In order to qualify for the exemptions referenced above, the employee must be paid on a salary. A salary is a predetermined amount of compensation which is paid on a regular basis without regard to the quality or quantity of work performed by the employee. Employers who make deductions from the salary of an otherwise exempt employee for absences of less than a full day risk negating the employee's exempt status.

VIII. CHILD LABOR REGULATIONS

A. The FLSA places certain restrictions on the employment of persons under the age of 18. Children aged 16 and 17 are prohibited from working in hazardous occupations, and children aged 14 and 15 are limited in the hours they may work. Children under the age of 14 generally cannot be employed at all except for entertainment/performing arts, newspaper delivery and by their parents if they are sole proprietors of a business.

B. Hazardous Occupations for 16 and 17-Year Olds include:

1. Jobs in plants where explosives, or goods containing explosives, are handled or stored;

2. Driving motor vehicles except when the driving is only occasional and incidental to the job; and only if the vehicle is less than 6,000 pounds;

3. Mining;

4. Any equipment operation in a sawmill;

5. Any job requiring the operation of any woodworking machine;

6. Any job involving exposure to radioactive materials (watch for x-ray equipment);

7. Any job requiring the operation of power lifting equipment including elevators;

8. Any job requiring the operation of power metal forming tools;

9. Any job requiring the operation of power meat cutting tools including slicers used at deli counters;

10. Any job requiring the operation of power baking machines;

11. Any job requiring the use of power paper making/recycling machines;

12. Any job involved in the manufacture of brick, tiles or similar products;

13. Any job requiring the use of a circular or band saw or guillotine shears;

14. Any job involving the wrecking/demolition of buildings;

15. Any job involving the building of ships;

16. Any job involving the application of materials to roofs; and

17. Any job involving excavation work.

C. Hazardous Occupations for 14 and 15-Year Olds include:

1. Any occupation/job listed in B above;

2. Any job involving duties in work rooms where goods are manufactured, mined or processed (i.e., factory or shop floor jobs);

3. Public messenger services;

4. Helpers on motor vehicles; and

5. Jobs other than office or sales work pertaining to the transportation of persons or goods, warehousing or storage, communications, public utilities, and construction. (NOTE: Any

office/sales work pertaining to construction must be conducted off-site.)

D. Permissible Occupations for 14 and 15-Year Olds include:

1. Office/clerical work;

2. Cashier, sales, modeling, art work, work in advertising, window trimming/display, comparative shopping, price marking, assembling orders, packing and shelving;

3. Bagging and carrying out customers' orders;

4. Errands/delivery work if done on foot, bike or by public transportation;

5. Clean-up work (may operate a vacuum or floor waxer);

6. Outdoor maintenance, but may not use a power mower or cutter;

7. Kitchen/food prep work (including use of small machines such as milk shake makers, pop corn poppers, toasters, dumbwaiters, dishwashers, and coffee makers and grinders);

8. Dispensing gas/oil for cars and trucks, car cleaning/waxing, general courtesy service (washing windows, etc.); and

9. Cleaning fruits and vegetables, wrapping, labeling, and/or pricing food if in an area away from where meat is prepared for sale, and away from freezers.

E. Specifically Prohibited Jobs for 14 and 15-Year Olds include:

1. Any job in a boiler room;

2. Any job repairing or maintaining equipment;

3. Any job washing exterior windows requiring work from window sills or on a ladder/scaffold;

4. Any cooking or baking job except at soda fountains, lunch counters, snack bars or cafeteria serving counters;

5. Any job relating to the use or operation of food slicers, grinders, choppers and bakery mixers;

6. Any job requiring work in a freezer or meat cooler;

7. Any job involving the loading or unloading of goods from trucks, railroad cars or conveyers; and

8. Any job in a warehouse except for office work.

F. Restrictions on Hours Worked by 14 and 15-Year Olds include:

1. Must be outside school hours;

2. No more than 3 hours a day on a school day, and no more than 8 hours on a non-school day;

3. No more than 18 hours a week during any school week, and no more than 40 hours during a non-school week; and

4. No work before 7:00 a.m. and no work after 7:00 p.m., except from June 1 through Labor Day the child may work until 9:00 p.m. unless those are school days.

IX. RECORDKEEPING REQUIREMENTS

A. Employers are required to maintain records to establish their compliance with minimum wage, overtime, equal pay and child labor laws. These records for non-exempt employees must include the following:

1. Name used for social security purposes;

2. Home address;

3. Date of birth if under age 19. The burden is on the employer to prove the employee is not a minor if there is a question;

4. Sex and occupation;

5. The time and day on which each work week begins;

6. The employee's regular rate of pay for every week in which overtime pay is owed. This should be detailed enough so that it can be determined how the overtime wage is calculated;

7. The amount and nature of any regular rate exclusions;

8. The employee's wage, salary or earnings for each pay period;

9. The hours worked for each workday and work week including starting and ending times each day;

10. All "straight time earning" including all wages for regular hourly work, piece rates, commissions and/or salary;

11. All overtime pay;

12. Any deduction/addition to wages;

13. Pay dates and pay periods covered; and

14. The total wages paid each employee for each pay period.

B. Records for exempt employees do not have to be as detailed. These records must include the following:

1. The basis on which wages are paid;

2. Total pay including fringe benefits; and

3. Records sufficient to establish requirements of the exemption.

C. Preservation of Records.

1. Generally, employers should keep payroll and other required records for at least three years. Employers should also preserve any collective bargaining agreements and any documents pertaining to any deduction from wages for the same three-year period.

2. Records from which the above are taken, such as timecards, production cards, wage rate tables, work schedules, and order/shipping/billing records, must be kept two years from the last effective date.

3. Records should be kept at the place of business or a central records office. Records must be available within 72 hours after receipt of a notice from a Wage Hour administrator.

D. Posting Requirements.

1. Employers who employ anyone subject to the minimum wage requirements must post a notice published by the Wage Hour Division.

E. Telecommuting Employees.

1. Although no new amendments have been enacted to address telecommuting employees (those employees who work off the job site via computer), the FLSA has always provided for regulation of off-site workers as "Industrial Homeworkers." An industrial homeworker is a person who produces industrial homework which is defined as "the production by any person in

or about a home, apartment, tenement, or room in a residential establishment of goods for an employee who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production. 29 CFR §516.31(a).

2. "Goods" which are produced by industrial homeworkers include wears, products, commodities, merchandise, or articles or subjects or commerce of any character, or any ingredient thereof . . ." This definition extends to intangibles, such as ideas, telegraphic messages, newspapers, magazines, reports, or insurance policies. 29 CFR §776.20.

3. All minimum wage, overtime, and record keeping requirements under the FLSA apply to homeworkers. However, additional recordkeeping requirements also apply. The following additional records must be maintained for homeworkers:

    a. Date on which work is given out to worker, or begun by a worker, and amount of such work given out or begun.

    b. Date on which work is turned in by worker, and amount of such work.

    c. Kind of articles worked on and operations performed.

    d. Piece rates paid, if applicable.

    e. Hours worked on each lot of work turned in.

    f. Wages paid for each lot of work turned in.

4. Industrial homeworkers must also maintain a homeworker handbook. The handbook must be obtained by the employer from the U.S. Department of Labor and supplied to each

homeworker. It is the employer's responsibility to insure that the hours worked and other information required is entered by the homeworker in the handbook. The handbook must remain in the possession of the homeworker except at the end of each pay period when it is returned to the employer. The handbook (when full) must contain a written verification by the employer attesting that the homeworker was instructed to accurately record information in the handbook. All handbooks must be maintained by the employer for at least two years after completion.

X. PENALTIES FOR VIOLATION OF WAGE AND HOUR LAWS

A. Civil Actions by the U.S. Department of Labor. Generally, the Department of Labor may take action to enforce the provisions of the Fair Labor Standards Act. This is commonly done by bringing a civil action to recover back wages and an equal amount as liquidated damages on behalf of harmed employees. Additionally, suit may be brought for injunctive relief to restrain further violations or to prevent the sale or transportation of "hot goods" (those produced in violation of the Fair Labor Standards Act). The injunction obtained, if any, remains in effect indefinitely and exposes the employer to contempt penalties if violated.

1. A civil penalty of up to $1,000.00 per violation may be imposed if the employer repeatedly or willfully violates the minimum or overtime wage requirements.

2. A civil penalty of up to $10,000.00 per employee may be imposed.

B. Criminal Actions by the Department of Justice. The Department of Justice may bring criminal charges against employers who willfully violate the Fair Labor Standards Act.

1. The penalty for a first offense is a fine of up to $10,000.00. A second conviction can include prison time for up to six months.

2. A criminal conviction may result from violation of the "hot goods" provisions if the defendant knows that it is doing business with companies that are violating the act.

3. The number of violations does not necessarily depend on the number of employees affected or the time periods covered. Thus, the failure to pay the required minimum wage is only one violation of the act. However, the failure to pay the required overtime wage can be a second violation, and the failure to keep the required records can be a third violation.

4. Criminal liability for willful violations rests with the employer and its officers.

C. Lawsuits by Employees. Employees may individually or collectively bring an action to require compliance with the Fair Labor Standards Act.

1. Suits can recover any unpaid wages plus liquidated damages in an equal amount.

2. Attorney fees are also recoverable.

3. An employer may enter into an out-of-court settlement with an employee. However, unless the settlement is supervised and approved by the Department of Labor, the employee can later reject the settlement.

4. Good faith defenses exist if the employer is acting in compliance with a written ruling from the Wage Hour administrator even if the ruling is later determined to be improper. The employer may avoid the liquidated damage aspect if it establishes that the failure to comply with the act was in good faith and that a reasonable grounds existed for believing that no violation took place.

XI. HOT BUTTON ISSUES: HOT GOODS AND TELECOMMUTING

A. Prohibition Against the Sale/Shipment of "Hot Goods." The FLSA prohibits the shipment of goods in interstate commerce which were produced in violation of the overtime, minimum wage, or child labor provisions of the act. Such goods are deemed “hot goods”

1. Goods Produced with Oppressive (Illegal) Child Labor. No producer, manufacturer or dealer may ship any goods produced within the United States if within 30 days of the shipment the producer of the goods employed oppressive child labor. However, any purchaser who acquires the goods in good faith, for value, and without notice of the producer's use of oppressive child labor, may ship the goods if the purchaser has written assurance from the producer, manufacturer or dealer that the goods were produced in compliance with the requirements of the Fair Labor Standards Act.

2. Goods Produced by an Employer Who Fails to Comply with Minimum Wage and Overtime Laws. The same prohibition applies to the shipment or sale of goods where the employer producing the goods fails to comply with the minimum wage and overtime requirements of the Fair Labor Standards Act. However, a good faith purchaser who acquires the goods for value and without notice of the violation may transport/sell the

goods if the purchaser has written assurance from the producer that the goods were produced in compliance with the Fair Labor Standards Act.

3. Janitorial Services. One way employers may unwittingly violate the FLSA results from janitorial service contracts. Janitorial service contractors, which often employ workers who perform their jobs at night without close scrutiny, are forced to work without overtime pay, or without lunch breaks, in violation of the FLSA. In addition, the workers are frequently assigned so high a volume of work that they are forced to enlist the aid of family members (and often minors) to complete their assignment. These additional helpers become workers subject to the FLSA, and thereby implicate the minimum wage and child labor provisions. If the building owner or tenant directs the janitorial service when and how to clean, the owner or tenant company may become a joint employer of the janitors as determined by the Department of Labor. Accordingly, the owner or tenant company may be imputed with a violation of the FLSA and (in extreme cases) may be held to violate the hot good prohibitions of the FLSA and subject the employer to an injunction prohibiting the transportation of such goods.

B. Overtime Liability for Telecommuters. Because telecommuters perform their work off of the employer's job site, and are unsupervised, there is potential liability to the employer for unapproved overtime. The FLSA requires compensation for overtime regardless of whether the employer approved the overtime work. Therefore, it is necessary that the employer and telecommuting employee define their relationship up front through an agreement providing for expected hours of work, methods of communication, and pre-approval for overtime work. Monster.Com quoting Workforce Online, February 1999.

C. Use of Independent Contractors. Employers are increasingly using independent contractors, rather than hiring employees, because of the financial benefits resulting from the fact that employers do not have to provide benefits to independent contractors. However, in the rush to hire independent contractors to perform more and more functions for the employer, employers must beware not to blur the lines between an employee and an independent contractor. It is important to determine whether a worker is an employee or an independent contractor because the minimum wage and overtime provisions of the FLSA apply only to employees. The following questions are asked by the U.S. Department of Labor in determining whether an individual is an independent contractor and not subject to the Act:

1. How much control does the employer exert over the worker? The employer should not control when or for what period of time the independent contractor works, nor should the employer control the manner in which the contractor completes the work assigned.

2. What is the worker's opportunity for gain or loss? The independent contractor should bear the risk of loss or gain depending on the success of the project.

3. Does the worker have any special talents or skills that set the worker apart from the employer organization? Independent contractors should be hired to provide services which the employer's workers cannot typically perform.

4. Does the worker bring his or her own tools to the job site?

5. What is the permanence of the working relationship between the independent contractor and the employer? Is the relationship limited for a short period of time and for one project, or is the relationship continuing both in projects and time?

6. Are the services rendered by the worker an integral part of the employer's business operations? Generally speaking, an independent contractor will not perform primary functions for the hiring organization i.e. management of the company.

C. Stock Options.

1. The value of stock options for non-exempt employees were formerly included in calculating the regular rate of pay of a non-exempt employee for the purposes of determining overtime pay. Recent amendments to the FLSA were passed excluding income from stock options, stock appreciation rights, or employee stock purchase plans from calculation of the overtime rate in certain circumstances. In order for a stock option compensation to be excluded from an overtime calculation, the following requirements must be met:

   a. The employer's stock option plan must require the employee to hold the stock for at least six months before cashing in the stock;

   b. The plan must require the option price to be at least 85 percent of the market price for the stock when the option is granted;

   c. The employee's participation in the plan must be voluntary; and

d. The terms of the plan must be disclosed to the employee.

2. Plans which existed prior to August 16, 2000, are protected from FLSA overtime liability if the stock options meet the following requirements:

   a. The stock options were obtained prior to August 16, 2000.

   b. The stock options were issued to employees within one year of August 16, 2000; or

   c. The stock options are part of a collective bargaining agreement which existed on August 16, 2000.

E. Living Wage Ordinances. Fifty-six local governments currently have local wage ordinances while eighty-four other cities are considering such measures. Living wage ordinances typically require contractors who receive government contracts to pay employees minimum wage rates which are higher than the federal minimum wage. Municipalities are permitted to pass living wage ordinances because the FLSA does not prevent state and local laws from setting more stringent minimum wage requirements than federal law. The living wage movement is continuing to grow and may seek to expand the requirements to all workers working within municipal boundaries, rather than simply workers receiving government funds. In Michigan, Detroit has passed a living wage ordinance which requires a minimum wage of $9.02 per hour with benefits and $10.25 per hour without benefits for workers on government contracts. Similar ordinances have been passed in Warren and Ypsilanti. Ordinances are under consideration in Ann Arbor, Grand Rapids, and Kalamazoo.

XII. MICHIGAN WAGES AND FRINGE BENEFITS ACT

A. The MWFBA regulates the timing of payment of wages to employees and the payment of compensation other than wages. The MWFBA applies to all "employers," which term is broadly defined as "an individual, sole proprietorship, partnership, association, or corporation, public or private; this state or an agency of this state; a city, county, village, township, school district, or intermediate school district; an institution of higher education; or an individual acting directly or indirectly in the interest of an employer who employs 1 or more individuals."

B. The term "fringe benefits" is defined as "compensation due an employee pursuant to a written contract or written policy for holidays, time off for sickness or injury, time off for personal reasons or vacation, bonuses, authorized expenses incurred during the course of employment, and contributions made on behalf of an employee."

C. Time for Payment of Wages. An employer must pay employees based on a regular schedule. Permissible schedules are as follows:

1. On or before the 1^{st} and 15^{th} of each month provided that the payments encompass wages earned during the 15 days of the preceding calendar month for the payment on the 1^{st} of the month, and during the preceding calendar month from the 16^{th} through the last day of the month for the payment on the 15^{th}.

2. Weekly or bi-weekly so long as the wages are paid on a regularly recurring payday and the payday occurs on or before the 14^{th} day following the end of the work period in which wages were earned.

3. Monthly provided that the employer pays the employee on or before the first day of each calendar month for all wages earned in the preceding month.

D. Voluntarily Terminated or Discharged Employees. An employer may not withhold fringe benefits which are to be paid at the employee's termination date unless there is a written contract or statement providing for such withholding. Upon termination of the employment relationship, the employer is required to pay the employee all wages earned and due as soon as the amount can be determined through the exercise of due diligence.

E. Form of Payment. Payment of wages must be made in U.S. dollars or by a negotiable instrument which may be converted to U.S. dollars.

F. Deductions from Wages. An employer may not deduct any amount from an employee's wages without the employee's full, free, and written consent.

G. Payment to Employer as Consideration for Employment. An employer may not "demand or receive, directly or indirectly from an employee, a fee, gift, tip, gratuity, or other remuneration or consideration, as a condition of employment or continuation of employment." This prohibition applies to all employers except state licensed employment agencies.

H. Reimbursement of Training Expenses. Employers increasingly seek to recover training costs for employees. In a job market where employees frequently move from job to job acquiring training along the way, employers have become more sensitive to the costs which are incurred in training employees who, once trained, may leave for other employment. Employers seeking to recover training and educational expenses must be careful not to run afoul of the MWFBA. The

MWFBA provides that an employer shall not condition an employee's employment upon payment of any consideration or remuneration. In the recent case of *Sands Appliance Services, Inc. v. Wilson,* 463 Mich 231 (2000), the Michigan Supreme Court addressed the situation where an employer required an employee (prior to beginning employment) to execute a contract in which the employee agreed to remain employed with the employer for six years in return for formal and informal training provided by the employer. In the event the employee did not remain with the employer for six years, the employee would be responsible to reimburse the employer $50.00 a week for a total of 156 weeks. The Supreme Court struck down this agreement as void for violating the MWFBA because the contract was an express condition upon the employee's employment. The Supreme Court distinguished the situation in *Sands Appliance* from workplace rules which require employees to reimburse employers for personal phone calls or for employer provided tools kept after employment. The Supreme Court indicated that the latter policies were workplace rules and were not conditions of employment, i.e., it is optional whether employees make personal phone calls at work or take tools after leaving employment. The contract in *Sands Appliance* was not optional. In addition, the Supreme Court distinguished the *Sands Appliance* contract from cases where employers offer to fund an employee's education in return for the employee's agreement to repay the educational costs if the employee does not remain with the employer for a specific period. The distinguishing factor in these cases is that such agreements are not required at the start of employment and are not a condition of being hired, but simply provide the employee with the choice to receive educational benefits in exchange for the obligation to repay costs for such benefits.

I. Pay Statements. Employers must provide employees, at the time wages are paid, with statements containing the hours worked by an employee (unless the employee satisfies the requirements for an executive, administrative, or professional employee, or is a teacher), the gross wages paid, identification of the pay period covered, and an itemization of deductions authorized by the employee or required by law.

J. Payments to Deceased Employee. An employer shall pay fringe benefits on behalf of a deceased employee as provided by the terms of a written contract, written policy, or submission of a designation form to the employer before the employee's death. In the event no such written statements exist, payments of wages and fringe benefits shall be made according to the following priority:

1. The employee's surviving spouse.

2. The employee's surviving children.

3. The employee's surviving mother or father.

4. The employee's surviving sister or brother.

K. Prohibitions, Penalties, and Remedies.

1. An employee may file a complaint with the Michigan Department of Labor ("MDOL") concerning violations of the MWFBA within 12 months of the violation. However, if an employee asserts that he/she has been discharged or discriminated against due to the employee's proposed filing of a complaint for violations of the act, then the employee must file the complaint within 30 days of the alleged violation. In the event an employee's complaint for discrimination is substantiated, MDOL will order the reinstatement of the employee with back pay.

2. An employer may not direct or require an employee not to disclose his/her wages and may not discipline, discharge, or discriminate against the employee for such disclosure.

3. An employer which violates the MWFBA with intent to defraud is guilty of a misdemeanor punishable by $1,000.00, 1 year in jail, or both. The MDOL may also assess civil penalties against the employer up to $1,000.00.

COBRA, HIPAA, & GUST: UNDERSTANDING THE ALPHABET SOUP OF BENEFITS

By: Gary M. Remer

COBRA

I. EMPLOYERS AND EMPLOYEES COVERED BY COBRA

A. What is an Employer? Treasury Regulation §54.4980B-2 Q&A-2 defines the "employer" as:

1. A person for whom services are performed;

2. Any other member of a controlled group or an affiliated service group with such person, pursuant to IRC §§414(b), (c), (m), or (o) of the Code; and

3. Any successor to any of the above. Treas. Reg. §54.4980B-2 Q&A-2(b) generally defines a "successor employer" as an employer that "results from a consolidation, merger, or similar restructuring of the employer or if it is a mere continuation of the employer."

B. Small Employer Exception. COBRA applies to all plan sponsors EXCEPT employers who normally employ fewer than 20 employees during a typical business day during the preceding calendar (not plan) year. IRC §4980B(d)(1) and ERISA §601(b). All members of a controlled group or an affiliated service group are treated as a single employer. IRC §414(b), (c), (m), (o) and (t) and ERISA §607(4). Also, leased employees providing services to an employer will be treated as employees of that employer. IRC §414(n) and ERISA §607(4).

1. 20-Employee Threshold.

a. Days Counted.

i. Under the final Regulations, an employer "is considered to have normally employed fewer than 20 employees during a particular calendar year if, and only if, it had fewer than 20 employees on at least 50% of its typical business days during that year." Treas. Reg. §54.4980B-2 Q&A-5(b).

ii. The count can be determined on each typical business day or each pay period. In the latter case, the count determined for the pay period is attributable to each business day in the pay period. Whichever method is used must be used consistently for an entire calendar year. Prop. Treas. Reg. §54.4980B-2 Q&A-5(e).

b. Employee Counted.

i. Under the final Regulations, all common law employees are counted, regardless of whether they are covered by the plan (specifically including non-resident aliens who are common law employees). However, individuals with other business relationships, such as directors of a corporation, law firm partners, and independent contractors, are not counted toward the small-plan exemption, even though those individuals are fully entitled to COBRA rights if the plan is subject to COBRA. Treas. Reg. §54.4980B-2 Q&A 5(c).

ii. Each full time employee is counted as one employee for purposes of this test. Each part time employee is counted as a fraction of an employee, with the denominator being the lowest number of hours (not more than 40 hours per week) that a person could work and still be considered a full time employee, and the numerator being the actual number of hours worked by the employee. Treas. Reg. §54.4980B-2 Q&A-5(d) and (e).

c. Plans Covering More Than One Employer (Other than Multi-Employer Plans).

i. Under the statutory provisions, it would appear that a multiple-employer group covered by one plan is always treated as a single plan (which would make the entire plan subject to COBRA, even if certain employers employed fewer than 20 persons), or whether it is treated as a collection of plans (which would make COBRA applicable to the plans of employers employing 20 or more employees).

ii. Prop. Treas. Reg. §1.162-26 Q&A-10 provided that a MEWA was to be treated as a collection of single-employer plans for this purpose, so that employees of a sponsoring employer were not entitled to COBRA coverage unless that employer had at least 20 employees. A multi-employer plan, on the other hand is subject to COBRA if any of the contributing employers has at least 20 employees.

d. Multi-Employer Plans.

i. Under the new final Regulations, a multi-employer plan is subject to COBRA if any contributing employer is subject to COBRA under the above rules on account of having 20 or more employees. A provision in the 1987 proposed Regulations gave an exempt multi-employer plan until February 1st of a calendar year to remove any employer that had crossed the 20-employee threshold during the prior calendar year, and if it did so that plan continued to be exempt from COBRA with no interruption. However, this grace period for removal of an employer was deemed unworkable, and under the new proposed Regulations the entire plan will be subject to COBRA if any employer has crossed the 20-employee threshold during the prior calendar year unless that employer is excluded from the plan by January 1st. Treas. Reg. §54.5980B-2 Q&A-5(f).

ii. A multi-employer plan is defined in the new final Regulations as a plan maintained pursuant to one or more collective bargaining agreements, to which more than one employer is required to contribute by virtue of such collective bargaining agreement(s), "and that satisfies such other requirements as the Secretary of Labor may prescribe by regulation." Treas. Reg. §54.5980B-2 Q&A-3.

2. Impact of Dropping Below 20-Employee Threshold. If an employer ceases to become subject to COBRA because it no longer employees at least 20 employees, it must continue to provide COBRA benefits to qualified beneficiaries whose qualifying events occurred during a year in which the employer was subject to COBRA. IRC §4980B(d)(1) and ERISA §601(b). The final Regulations elaborate and provide examples for this provision. Treas. Reg. §54.4980B-2 Q&A-5(g).

C. Individuals Protected by COBRA.

1. The individuals protected by COBRA include employees, former employees and certain of their dependents.

a. Qualified dependents are (and always have been) defined by the regulations to include the covered employee's spouse or dependent child. Treas. Reg. §54.4980B-3 Q&A-1(a) and Prop. Treas. Reg. §1.162-26 Q&A-15(a).

b. In addition, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") amendments to COBRA provide that a child born to or placed for adoption with the covered former employee while that former employee is a COBRA beneficiary will be a qualified beneficiary in his or her own right. Treas. Reg. §54.4980B-3 Q&A-1(a)(1)(I).

c. If the plan permits the employee to cover domestic partners to whom they are not married, those individuals do not appear to have COBRA rights.

2. Under the final Regulations, it is clear that "individuals who have an employment-related connection to the employer or employee organization and their families" are also intended to have COBRA rights. Treas. Reg. §54.4980B-2 Q&A-1(a). Under the new Regulations, self-employed individuals (within the meaning of Section 401(c)(1) of the Code), independent contractors (and their employees and independent contractors), and directors (in the case of a corporation), are all protected by COBRA if they participate in a plan subject to COBRA. Treas. Reg. §54.4980B-3 Q&A-2(a).

II. <u>PLANS SUBJECT TO COBRA</u>

A. Group Health Plan. COBRA applies to any group health plan (within the meaning of IRC §5000(b)(1); and ERISA §607(1)) of an employer that provides medical care to its employees, former employees, or the families of such employees or former employees, directly or through insurance, reimbursement or otherwise. IRC §4980B(g)(2) and ERISA §607(1). HMOs and Dental Maintenance Organizations (DMOs) are subject to COBRA.

1. Retiree Plans. From this definition, and the definition of "covered employee," COBRA clearly applies (and has always applied) to post-retirement or retiree plans. Treas. Reg. §54.4980B-2 Q&A-2(b) and Prop. Treas. Reg. §1.162-26 Q&A-16.

2. Non-Medical Plans. COBRA does not apply to traditional disability income plans or to wellness programs that do not provide medical care. However, if such programs are designed to include medical care, they will be subject to COBRA.

a. COBRA does not apply to plans for the general well being of the employee, such as vacations, and a fitness facility available to employees without regard to illness or injury. Treas. Reg. §54.4980B-2 Q&A-1(b).

b. COBRA does not apply to employee discount programs that happen to include health related products unless the employer is a health clinic. This is true whether or not the benefit is excludable from income under Section 132 of the Code. Treas. Reg. §54.4980B-2 Q&A-1(c).

c. If substantially all of a plan's coverage consists of qualified long term care services (as defined in Section 7702B(c) of the Code), the plan is not subject to COBRA. For this purpose, a plan may use "any reasonable method in determining whether substantially all of the coverage provided under the plan is for qualified long term care services." Treas. Reg. §54.4980B-2 Q&A-1(e).

d. A medical savings account program is not subject to COBRA. However, the catastrophic health insurance policy that goes with it will be subject to COBRA if it otherwise meets the requirements. Treas. Reg. §54.4980B-2 Q&A-1(f). (Note that this exclusion applies only to medical savings accounts, and not to health flexible spending accounts.)

B. Cafeteria Plans. If a cafeteria plan (or other program offering a choice among benefits) offers health care as one of its options, then COBRA continuation coverage is applicable to the cafeteria plan only with respect to individuals who actually receive health care coverage under the plan. Treas. Reg. §54.4980B-2 Q&A-8(a)(1).

1. Health Plan and Non-Health Plan Options. For example, if a cafeteria plan offers a health care option and employee A elects health care coverage for himself but employee B does not elect the health care option, COBRA continuation coverage is potentially available only to employee A. Treas. Reg. §54.4980B-2 Q&A 8 and Prop. Treas. Reg. §1.162-26 Q&A-14.

2. Health Flexible Spending Accounts.

   a. The IRS has long insisted that a flexible spending account maintained under a cafeteria plan to reimburse participants for medical expenses is covered by COBRA Prop. Treas. Reg. §1.162-26 Q&A-14, Example 3.

   b. Under the final Regulations, the IRS has continued to take the general position that health flexible spending accounts are subject to COBRA. Treas. Reg. §54.4980B-2 Q&A-8.

   c. A health flexible spending account that qualifies for exemption from HIPAA can also be exempt from COBRA:

      i. For an entire plan year if the maximum benefit that could be received for a full year through a COBRA election is no greater than the maximum premium that could be charged for a full year's COBRA coverage. Most health flexible spending accounts will be generally exempt on this basis, since they are funded solely through salary reduction. However, even if there is an employer contribution (assuming that contribution is low enough to keep the plan within the limits for its being exempt from HIPAA), most health flexible spending accounts will still qualify for this exemption since the COBRA beneficiary must pay for both the employee's share and the employer's share.

ii. For the remainder of the plan year in which the qualifying event occurs if the maximum benefit that could be received for the remainder of the year through a COBRA election is no greater than the maximum premium that could be charged for COBRA coverage for the remainder of the year. However, if the maximum benefit for the remainder of the plan year would exceed the COBRA premium for that period (in other words, if failure to offer COBRA would leave the participant with unspent amounts in his account), then COBRA must be offered for the remainder of the plan year in which the qualifying event occurs, even if the plan will be exempt from COBRA thereafter.

III. QUALIFYING EVENTS AND DURATION AND TERMINATION OF CONTINUATION COVERAGE

A. Qualifying Events (IRC §4980B(f)(3) and ERISA §603).

1. 18-Month Qualifying Events. If health plan coverage is lost due to the occurrence of one of the following events, qualified beneficiaries will be entitled to elect up to 18 months of continuation coverage.

a. Termination of Employment or Reduction in Hours. If hours of employment are reduced below the amount required to retain benefits under the plan, or employment is terminated, up to 18 months of continuation coverage will ordinarily be available.

b. Gross Misconduct. However, if a participant's employment is terminated for "gross misconduct," a phrase not defined by the proposed Treasury Regulations, no COBRA rights are available.

c. Interaction With Family and Medical Leave Act.

   i. Taking of Family and Medical Leave Act ("FMLA") Leave. The taking of leave under the FMLA does not constitute a qualifying event under COBRA. Treas. Reg. §54.4980B-10 Q&A-1.

   ii. Failure to Return from FMLA Leave. For a person who was covered under the plan at the beginning of the leave or becomes covered during the leave, coverage loss on or before the end of the leave will be a qualifying event unless coverage for all employees in the employment classification of the person on leave is eliminated during the leave (other than in connection with a termination of all persons in such class). Treas. Reg. §54.4980B-10 Q&A-1.

      (a) The qualifying event resulting from failure to return from a FMLA leave does not occur until the earlier of the end of the FMLA leave, or the employee's announcement that he or she will not return to work following the leave. Treas. Reg. §54.4980B-10 Q&A-2.

(b) This is true even if the employee elected not to maintain health coverage during the leave, and even if the employee lost coverage for a portion of the leave due to failure to pay premiums. Treas. Reg. §54.4980B-10 Q&A-3.

(c) An employer may not condition COBRA coverage on reimbursement for amounts the employee owes the employer, for either the employer or the employee portion of the premium. Treas. Reg. §54.4980B-10 Q&A-5.

(d) If an employer is required by state law to provide family or medical leave health coverage for a longer period than required by FMLA, that extra period of coverage is ignored in determining the timing of the qualifying event.

2. Disability Extension. If the covered employee or any covered dependent is later determined by the Social Security Administration ("SSA") to have been disabled within 60 days following the qualifying event, the disabled individual may elect to extend the continuation coverage for an additional 11 months (but at a higher premium). IRC §4980B(f)(2)(B)(I) and (C) and ERISA §602(2)(A) and (3).

a. Time When Disability Must Exist.

i. A disability occurring within 60 days following the qualifying event will now qualify for the 11-month extension. Any disability determined to exist before the qualifying event will qualify the family for the disability extension so long as it has not been determined, by the time of the qualifying event, that the disability no longer exists. Treas. Reg. §54.4980B-7 Q&A 5(c).

ii. Prior to HIPAA, however, it was clear that the disability had to exist at the time of the qualifying event, even if the SSA determination of that disability occurred later.

3. Other Qualifying Events. If health plan coverage is lost due to the occurrence of one of the following events, the spouse and certain dependents of a covered employee will be entitled to elect up to 36 months of continuation coverage.

a. Death. A covered employee dies.

b. Medicare Entitlement of Employee. A covered employee becomes entitled to Medicare benefits.

c. Divorce. A covered employee and spouse divorce or become legally separated.

d. Maximum Coverage Age. A dependent child of a covered employee loses dependent status under the plan, as a result of reaching the maximum age for coverage, and/or ceasing to have a certain status (such as being a student or being unmarried).

i. Note that the definition of “dependent” under the terms of a plan, or the exact point at which a dependent ceases to be such, can often be a difficult matter of interpretation. For example, suppose a student fully intends to return to college in the fall, and thus does not give any notice at the end of the spring term of any cessation of his full time student status. Suppose that the student fails to return in the fall, either through circumstances totally beyond the control of the student (such as a serious illness or injury) or as a result of a last minute change of mind. Has the regular coverage terminated with the end of the spring term, and, if so, is it too late by the end of the summer break (which often exceeds 60 days) for the student or the parent to notify the plan administrator that the child has ceased to be a full-time student?

4. Strike or Layoff is Qualifying Event. Under the final Regulations, a strike is a qualifying event resulting from a reduction in hours worked if it causes the striking employees to lose regular coverage. A layoff is a qualifying event if it causes the laid off employee to lose regular coverage. Treas. Reg. §54.4980B-4 Q&A-2.

5. COBRA Period Following Period of Subsidized Coverage After Qualifying Event. Normally, the coverage period runs form the date of the qualifying event even if the employer continues to pay for the beneficiary’s coverage for a portion of that period. Treas. Reg. §54.4980B-4 Q&A-1(c).

6. Other Loss of Coverage. A loss of coverage for any other reason does not result in COBRA entitlement.

7. Loss of Coverage Required for Qualifying Event. It is clear that an event is not a qualifying event unless it results in the loss of regular health plan coverage. Treas. Reg. §54.4980B-4 Q&A-1(c).

8. Election to Have COBRA Period Begin After Qualifying Event. If an individual has the right to elect continuation coverage for any of the reasons noted above, he or she will have at least 60 days from the date of the "qualifying event" (or, if later, the termination of regular coverage) to elect coverage. IRC §§4980B(f)(2)(B) and (5)(A)(ii); ERISA §§602(2) and 605(1)(B); and Treas. Reg. §54.4980B-6 Q&A-1(a).

   a. Beginning Date of COBRA Coverage Period. In general, the maximum required period for continuation coverage begins on the date of the qualifying event, and not the date basic coverage would otherwise terminate, if later. IRC §4980B9f)(2)(B); ERISA §602(2); and Treas. Reg. §54.4980B-6 Q&A-1(a). Failure to give timely notice will extend the election period, but not necessarily the COBRA period itself. Treas. Reg. §54.4980B-6 Q&A-3(a).

   b. Election to Have Period Begin at Loss of Coverage. However, for plan years beginning on or after January 1, 1990, private sector plans may provide that the COBRA period (and the notice period) begin on the date coverage is lost. IRC §4980B(f)(8); ERISA §607(5); Treas. Reg. §54.4980B-7 Q&A-1(a)(1); and Treas. Reg. §54.4980B-7 Q&A-4(b). The new final Regulations make it clear that affirmative action is required on the part of the plan sponsor to elect to defer the starting date for the COBRA period and the notice period. In order to avail itself of this election, the plan must provide both:

i. "That the 30-day notice period (during which the employer is required to notify the plan administrator of the occurrence of certain qualifying events such as the death of the covered employee or the termination of employment or reduction of hours of employment of the covered employee) begins on the date of the loss of coverage rather than on the date of the qualifying event; and"

ii. "That the end of the maximum coverage period is measured from the date of the loss of coverage rather than from the date of the qualifying event."

If the plan so provides, all required measurements will be made as though the end of employer-provided coverage were the qualifying event date.

c. Notice Required for Election Period to Begin. Regardless of the date of the qualifying event or the loss of coverage, the 60-day election period does not begin until the notice of qualifying event is given. Treas. Reg. §54.4980B-6Q&A-1(a)(2) and Q&A-3(a).

B. Multiple Qualifying Events.

1. Extension of Coverage Period to 36 Months. IRC §4980B(f)(2)(B)(I)(II) and ERISA §602(2)(A)(ii) provide that if a second or additional qualifying event occurs during the initial 18

month continuation coverage period or during the extended 29 month period for a disabled qualified beneficiary, the period will be extended to 36 months from the date of the earlier qualifying event.

a. For example, if employee A is terminated on June 1, 1999, elects continuation coverage, and is then divorced on October 1, 2000, A's spouse will be entitled to continuation coverage until May 31, 2002 (i.e., 36 months after June 1, 1999). Treas. Reg. §54.4980B-7 Q&A-6(b).

b. Similarly, if employee A is not divorced, but his child graduates from college on June 1, 2000, and thus ceases to qualify for regular coverage as A's dependent, the child will be entitled to continuation coverage until May 31, 2002 (also 36 months after June 1, 1999).

c. Disability Extension. If the covered employee or any covered family member is determined by SSA to be disabled as of a date no later 60 days after the date of a qualifying event that is a termination of employment or reduction of hours (in other words, an 18-month qualifying event), all covered family members will be entitled to an 11-month disability extension. Treas. Reg. §54.4980B-7 Q&A-5(a).

   i. Measurement of 60-Day Period.

      (a) Normally, the 60-day period runs from the date of the qualifying event. However, if the plan has elected to have the date the employer-subsidized coverage ends be treated as the qualifying event date, then the 60-day period runs from the deemed qualifying event date. Treas. Reg. §54.4980B-7 Q&A-5(c).

(b) In the case of a qualified beneficiary who is a child born to or placed for adoption with the covered employee during the employee's period of COBRA coverage, the 60-day period during the existence of a disability will qualify the family members for the 60-day extension beginning on the date of the child's birth, adoption or placement for adoption. Treas. Reg. §54.4980B-7 Q&A-5(c).

(c) If the disability is determined by SSA to have existed before (even long before) the qualifying event, the family members will all be entitled to the disability extension so long as the SSA has not thereafter determined that the disability no longer exists. Treas. Reg. §54.4980B-7 Q&A-5(c).

ii. Second Qualifying Events.

(a) If a second qualifying event occurs while the family members are entitled to the disability extension, but occurs during the first 18 months of COBRA coverage, all covered family members affected by the second qualifying event are entitled to the extension to 36 months on the same terms (and subject to the same premium) as if there had been no entitlement to the disability extension. Treas. Reg. §54.4980B-7 Q&A-5(b) and Treas. Reg. §54.4980B-8 Q&A-1(b).

(b) If a second qualifying event occurs during the 11-month disability extension, the family members who continue to be covered qualified beneficiaries are all entitled to have their COBRA periods further extended to a maximum of 36 months, on the same terms (and subject to the same premium) as would otherwise apply during the disability extension. Treas. Reg. §54.4980B-7 Q&A-5(b) and Treas. Reg. §54.4980B-8 Q&A-1(b).

d. A termination of employment following a reduction of hours is NOT a second qualifying event, and does not entitle anybody to an extension of the 18-month COBRA period to 36 months. Treas. Reg. §54.4980B-7 Q&A-6(b).

e. The bankruptcy of the employer will never be a second qualifying event that extends an 18-month COBRA coverage period to 36 months. Treas. Reg. §54.4980B-7 Q&A-6(b). However, the employer’s bankruptcy does not alter the operation of any of the other COBRA provisions for qualifying events other than the bankruptcy of the employer. In other words, if the bankrupt employer continues to employ the employees and to provide them with health coverage, termination of employment will continue to trigger COBRA rights.

f. The covered employee is never entitled to an extension of either the 18-month or 29-month COBRA coverage period to 36 months. Only dependents may obtain a 36-month COBRA period as a result of a second qualifying event.

g. No qualifying event (other than the bankruptcy of the employer) can ever give rise to more than 36 months of COBRA coverage. Treas. Reg. §54.4980B-7 Q&A-6(b). Therefore, no second qualifying event will provide any extension to a date that is later than 36 months after the qualifying event.

C. Termination of Continuation Coverage.

1. Loss of COBRA Coverage. A qualified beneficiary will lose the right to continuation coverage in any of the following circumstances:

a. Failure to Pay Premiums. The qualified beneficiary fails to make timely payments under the plan. Treas. Reg. §54.4980B-8.

i. IRC §4980B (f)(2)(B)(iii) and ERISA §602(2)(C) require a minimum grace period of 30 days, regardless of any shorter period contained in the plan for active employees. However, payment by a later date is also considered timely payment if, under the terms of the plan, covered employees or qualified beneficiaries are allowed until that later date to pay for their coverage during the period, of if the employer is allowed until a later date to transmit payments to the insurer. Treas. Reg. §54.4980B-8 Q&A-5 and Prop. Treas. Reg. §1.162-26 Q&A-48.

ii. If timely payment is made in an amount slightly wrong (not significantly less than the amount the plan requires to be paid), then the plan must either accept the payment and provide the coverage or notify the qualified beneficiary of the amount of the deficiency and give him or her a reasonable period of time for payment of the deficiency to be made.

(a) For this purpose, as a safe harbor, 30 days after the date the notice is provided is deemed to be a reasonable period time. Treas. Reg. §54.4980B-8 Q&A-5(d).

(b) The final Regulations issued in February of 1999 left the determination of what was a "significant" underpayment to the good faith determination of the employer. However, many commenters requested a bright line test. Therefore, the new final Regulations define a "significant" underpayment as the lesser of:

(i) $50 (or such other amount as the Secretary of the Treasury may provide from time to time), or

(ii) 10% of the required premium amount.

Treas. Reg. §54.4980B-8 Q&A-5(d)

iii. Payment is considered made on the date on which it is sent to the plan. Treas. Reg. §54.4980B-8 Q&A-5(e).

b. Coverage by Another Employer's Plan. The qualified beneficiary becomes covered as an employee or otherwise, under another group health plan that "does not contain any exclusion or limitation with respect to any pre-existing condition of such beneficiary." IRC §4980B(f)(2)(B)(iv)(I) and ERISA §602(2)(D)(I).

i. The qualified beneficiary must be actually covered, rather than merely eligible to be covered, to lose COBRA rights as a result of the other coverage. Treas. Reg. §54.4980B-7 Q&A-2(b).

ii. COBRA may be terminated "even if the other coverage is lass valuable to the qualified beneficiary." Treas. Reg. §54.4980B-7 Q&A-2(a)

iii. The statutory provisions state that the qualified beneficiary loses COBRA coverage if he or she "first becomes, after the date of the election covered under" such other plan. The final COBRA regulations make one thing perfectly clear, and that is that any new coverage must begin after the date of the COBRA election in order to form a basis for terminating COBRA coverage. Whatever coverage a qualified beneficiary already has at the time of his qualifying event (or whatever coverage he can obtain between his qualifying event and the time of his COBRA election) is his to keep over and above his COBRA coverage. Treas. Reg. §54.4980B-7 Q&A-2(a).

c. Termination of all of Employer's Health Plans. The employer no longer maintains any group health plan. IRC §4980B(f)(2)(B)(ii) and ERISA §602(2)(B).

i. Aggregation of Related Employers. For this purpose, note that all members of a controlled group or an affiliated service group will be treated as a single employer. For example, if an "employer" consisting of several corporate entities, each with its own health plan, sells its assets and terminates its health plan, the terminated employees and dependents will be entitled to continuation coverage if any other corporation (or other business entity) within the "employer" group continues to maintain a health plan.

ii. Successor Employer. Also, the regulations define the "employer" to include a "successor" employer. Treas. Reg. §54.4980B-2 Q&A-1(c) and Prop. Treas. Reg. §1.162-26 Q&A-5.

iii. Corporate Reorganizations. In the new final Regulations, which involve only minor changes from the 1999 proposed Regulations, Treasury addresses this issue in much more detail in the context of corporation reorganizations. Treas. Reg. §54.4980B-9. Under those provisions:

(a) The sale of the stock of a subsidiary is not a qualifying event for those who continue employment with the seller following the sale. However, loss of employment by the seller in connection with a sale of assets is a qualifying event, even if the buyer immediately covers the employees under its own plan.

(b) Stock sales and assets would be treated alike. In both cases, the selling controlled group generally remains responsible for existing qualified beneficiaries, and for those who never obtain coverage with the new controlled group. This is true even if the buyer assumes the plan of the entity or unit whose stock or assets it has purchased (unless the parties contract for the buyer to assume the COBRA responsibilities).

(c) However, if the selling controlled group terminates all its plans incident to the sale, then the buying controlled group becomes a successor employer, and liable as such for the COBRA rights for all those qualified beneficiaries whose last employment by the selling controlled group had to do with either the subsidiary or the assets being purchased.

(d) The party responsible for COBRA under the Regulations may contract with the other party to provide it instead. As long as that party does so, then that party is the only party responsible for COBRA for those qualified beneficiaries. However, if the contractual party fails to provide COBRA – either because it ceases to maintain any health plan and thus is no longer required to provide COBRA, or because it simply fails to comply with its obligations – the COBRA obligation then reverts back to the party responsible under the Regulations.

iv. Terminating only one of several plans that are subject to COBRA will not absolve the employer of the continuation coverage requirements.

v. Termination of one or more of an employer's plans does not trigger a qualifying event for those who continue in employment following the plan termination.

2. Dropping Below 20-Employee Threshold. Note that ceasing to be covered by COBRA (for example, the employer dropping below the 20-employee threshold for COBRA coverage) is not an event permitting termination of the COBRA rights of a COBRA beneficiary. IRC §4980B(d)(1); ERISA §601(b); and Treas. Reg. §54.4980B-2 A&A-5(g).

IV. QUALIFIED BENEFICIARIES

A. Qualified beneficiaries are employees or former employees covered under a group health plan (these individuals are called "covered employees') other than nonresident aliens who received no U.S. source earned income from their employer (IRC §§4980B(f)(7) and (g)(1)(C) and ERISA §607(2). Independent contractors, directors, and other individuals covered based on services provided to an "employer" are also considered "covered employees," and thus may also be qualified beneficiaries, effective for plan years beginning after December 31, 1989. IRC §4980B(f)(7) and ERISA §607(2).

1. Spouses of covered employees (other than spouses of nonresident aliens excluded above) who were covered by the plan when the qualifying event occurred are also qualified beneficiaries. IRC §4980B(g)(1)(A)(I) and ERISA §607(A)(I).

2. Dependent children of covered employees (other than nonresident aliens excluded above) who were covered by the plan when the qualifying event occurred are also qualified beneficiaries. IRC §4980B(g)(1)(A)(ii) and ERISA §607(A)(ii).

3. Retired employees and their spouses and dependent children who were covered under a private sector group health plan when the employer commenced certain bankruptcy proceedings, or when the coverage was substantially eliminated within the one-year period immediately preceding the bankruptcy, are qualified beneficiaries even if their loss of coverage for any other reason would not give rise to COBRA rights. IRC §§4980B(f)(3) and (g)(1)(D) and ERISA §§603(6) and 607(3)(C).

4. A child born to or placed for adoption with the covered employee during the time that covered employee is covered under COBRA will be a qualified beneficiary. IRC §4980B(g)(1) and Treas. Reg. §54.5980B-3 Q&A-1(a)(1)(ii).

B. COBRA Generally Only Allowed if Covered at Qualifying Event. In general, only these employees and dependents will be entitled to elect continuation coverage after a qualifying event.

1. For example, if an employee's spouse or child was not covered by the plan when a qualifying event occurred, even though the employee was covered at that time, the spouse and child generally would not be entitled to continuation coverage.

2. However, any elimination or reduction of coverage in anticipation of a qualifying event is disregarded. Treas. Reg. §54.4980B-4 Q&A-1(c) and Prop. Treas. Reg. §1.162-26 Q&A-22.

3. Family members of COBRA beneficiaries can be added as dependents to the same extent and under the same terms as family members of active employees. However, such family members will not thereby become qualified beneficiaries. Treas. Reg. §54.4980B-3 Q&A-1(b) and (c); Treas. Reg. §54.4980B-5 Q&A-5(a) and Prop. Treas. Reg. §1.162-26 Q&A-17, 30 and 31.

4. Individuals who would have been covered but for their exclusion in violation of the medical non-discrimination provisions of HIPAA will be qualified beneficiaries even if they are not covered at the time of a qualifying event. Treas. Reg. §54.4980B-3 Q&A-1(a)(3).

5. In general, once an individual ceases his or her own COBRA coverage, the employer has no further COBRA obligations to him even if he becomes covered in another capacity, such as being added as a dependent by another family member who did make and maintain a COBRA election.

V. <u>SCOPE OF REQUIRED CONTINUATION COVERAGE</u>

A. Continuation coverage is required for all medical and dental plans, including cafeteria plans that provide medical or dental benefits, as well as for HMOs and MDOs.

B. COBRA continuation coverage cannot be conditioned upon evidence of insurability. IRC §4980B(f)(2)(D); ERISA §602(4); and Prop. Treas. Reg. §1.162-26 Q&A-22.

C. If a qualifying event occurs, the qualified beneficiary must be able to elect to continue the same health care coverage that the qualified beneficiary received immediately before the qualifying event. However, a reduction or elimination of coverage in anticipation of the qualifying event is disregarded in determining the rights of the qualified beneficiary. Treas. Reg. §54.4980B-5 Q&A-1(a) and 4(a) and Prop. Treas. Reg. §1.162-26 Q&A-22.

D. Changes in Plan Provisions.

1. If coverage provided to similarly situated active employees is eliminated but the employer continues to maintain one or more group health plans, the employer must permit the qualified beneficiary receiving COBRA continuation coverage to elect to be covered under any of the remaining group health plans maintained by the employer for similarly situated active employees. Prop. Treas. Reg. §1.162-26 Q&A-23.

2. If the plan sponsor modifies the benefits for active participants, COBRA beneficiaries are subject to the same modifications. IRC §4980B(f)(2)(A) and ERISA §602(1). In the case of a multi-employer plan, the joint board of the trustees is the sponsor. Therefore, if a withdrawing employer creates its own health plan for its active employees, that modification will not apply to previous COBRA beneficiaries who remain in the multi-employer plan.

VI. ELECTION OF CONTINUATION COVERAGE

A. Within 60 days of the date of termination of coverage or, if later, the date of notice of termination of coverage from the plan administrator, all qualified beneficiaries who would otherwise lose their health coverage may elect to continue the identical coverage being received under the plan prior to the qualifying event. IRC §4980B(f)(5)(A) and ERISA §605(1).

1. 60-Day Election Period

a. The statute requires not only that the qualified beneficiary must elect within 60 days, but also that the period of time for making the election must be open for 60 days. Treas. Reg. §54.4980B-6 Q&A-3(a).

b. The 60-day period is a minimum requirement.

i. It may be longer if the plan so provides or if the qualified beneficiaries are misled as to the length of the period.

ii. It may be tolled during any period when the qualified beneficiary is incapable of acting and has no legal representative to act on his or her behalf. Branch v. G. Bernd Company, 955 F.2d 1574 (11th Cir. 1992).

2. Impact of Waiver. A qualified beneficiary who, during the election period, voluntarily waives COBRA continuation coverage, can revoke the waiver at any time before the end of the election period.

However, if a waiver of COBRA continuation coverage is revoked, coverage need not be provided retroactively. Treas. Reg. §54.4980B-5 Q&A-4 and Prop. Treas. Reg. §1.162-26 Q&A-35.

VII. COST OF BENEFITS, "SIMILARLY SITUATED" BENEFICIARY, AND PAYMENT OF BENEFITS

The employer may require the employee to pay for the continuation coverage. Treas. Reg. §54.4980B-8 Q&A-1(a).

A. Insured Plan. If the plan is insured, the cost to the "qualified beneficiary" generally may not exceed 102% of the "applicable premium." IRC §4980B(f)(2)(C)(i) and ERISA §602(3)(A).

The term "applicable premium" is defined as the cost to the plan for the period of coverage for a "similarly situated" beneficiary with respect to whom a qualifying event has not occurred (without regard to whether such cost is paid by the employer or the employee). IRC §4980B(f)(4)(A) and ERISA §604(1). Note that the cost of the premium is not defined with regard to the cost of the employer but rather with regard to the cost to the plan. Accordingly, the employer can only charge the net cost of providing the coverage (the premium less experience rebates and dividends).

B. Self-Insured Plan. If the plan is self-insured, the cost to the beneficiary generally may not exceed 102% of a reasonable estimate of the cost of providing coverage for such period for a similarly situated beneficiary (determined actuarially based on factors to be set forth in the Regulations).

Alternatively, if the benefits provided or the number or composition of employees covered under the plan have not changed significantly since the previous "determination period," and if the employer so elects, the employer can use last year's cost to the plan for similarly situated participants, increased or decreased for inflation or deflation based on the GNP Deflator. IRC §4980B(f)(4)(B); and ERISA §604(2).

C. Cost of 11-Month Extension. A disabled qualified beneficiary who is entitled to an 11-month extension of the COBRA period may be required to pay 150% of the "applicable premium" during the 11 month extension period. IRC §4980B(f)(2)(C); ERISA §602(3); and Treas. Reg. §54-4980B-8 Q&A-1(b).

1. Proposed HIPAA guidance issued in 1997 announced that Congress had intended for the disabled beneficiary to pay the higher premium due to the expected increased costs to the plan arising from the qualified beneficiary's disability, and that charging the higher premium during the extension would not be deemed a violation of HIPAA's anti-discrimination rules. A similar provision is included in the final Regulations. Treas. Reg. §54.4980B-8 Q&A-1(c).

2. Now that the HIPAA amendments to COBRA make it clear that all family members of the disabled qualified beneficiary are also entitled to the extension, the COBRA statutory provisions appear fairly clear that the non-disabled family members would

also have to pay the 150% premium during the 11-month extension period. However, the recent HIPAA guidance reserved (and requested public comment on) the question of whether it would be a violation of HIPAA's anti-discrimination rules to charge the 150% premium to the non-disabled family members of the disabled qualified beneficiary. The final COBRA regulations provide that the 150% premium may be charged to all family members as long as the disabled person is one of the qualified beneficiaries electing COBRA coverage during the extension period. However, if only other family members are electing such coverage, only the 102% premium may be charged. Treas. Reg. §54.4980B-8 Q&A-1(b).

3. Recent Treasury guidance was also provided as to the computation of the premium when a qualified beneficiary entitled to the 11-month disability extension also becomes entitled to an extension to 36 months on account of a second qualifying event.

   a. If the second qualifying event occurs during the first 18 months of coverage, when the premium is at the 102% level, the premium will remain at that level throughout the entire 36 months of the beneficiary's COBRA coverage, without regard to the beneficiary's disability and even if the employer had already been notified of the SSA's determination of that disability.

   b. However, if the second qualifying event occurs during the 11-month extension, at a time when the 150% premium is in force, the 150% premium will remain in force during the remainder of the 36-month coverage period, including the last 7 months that occur after the end of the 11-month disability extension.

D. Similarly Situated. Each plan must make its own determination as to what constitutes "similarly situated" beneficiaries.

1. The proposed Regulations do not define similarly situated beneficiaries or even provide examples illustrating certain groups of employees that are similarly situated. The legislative history, however, provides that any Regulations may not define similarly situated as "medically identical," e.g., all employees with high blood pressure, and the Regulations must take into account the type of plan, the type of coverage and, if applicable, the regional differences in health costs. Conf. Rep. to §§10001, 10002 and 10003 of Public Law No. 99-272.

2. Furthermore, employees may not be grouped in any manner which would violate "Title VII of the Equal Pay Act" or so as to inappropriately increase the cost of coverage to the rank-and-file employees. Ibid. It is not clear what is meant by the reference to "Title VII of the Equal Pay Act." It may have been meant to read "Title VII of the Civil Rights Act or the Equal Pay Act." Note that age discrimination is not prohibited by either the Civil Rights Act or the Equal Pay Act.

E. Determination Period. Regardless of whether the plan is insured or self-insured, the amount of "applicable premium" must be fixed by the plan before the "determination period" begins. A determination period is any twelve-month period selected by the plan, but it must be applied consistently from year to year. IRC §4980B(f)(4)(C) and ERISA §604(3). Accordingly, each qualified beneficiary does not have a separate determination period beginning on the date that COBRA continuation coverage begins for that qualified beneficiary. Treas.

Reg. §54.4980B-8 Q&A-2(b) and Prop. Treas. Reg. §1.162-26 Q&A-45.

F. Timing of Payments. Regardless of whether the plan is insured or self-insured:

1. The qualified beneficiary must be allowed to make payments on a monthly basis. Other intervals may also be allowed (for example, weekly, quarterly, or semiannually). Treas. Reg. §54.4980B-8 Q&A-3.

2. At the employer's discretion, these payments must be made either to the employer or to the insurance company (if the insurance company is willing).

3. The qualified beneficiary must be given a grace period in which to make premium payment of:

    a. With respect to each monthly premium, at least 30 days, or such longer period as may be permitted under the terms of

        i. The plan for active employees or qualified beneficiaries, or

        ii. An arrangement between the employer and an insurer, HMO or similar entity providing plan benefits; or

    b. With respect to any premium payment then due, 45 days following the date of the COBRA election.

VIII. PENALTIES FOR NONCOMPLIANCE

A. Excise Taxes. For taxable years beginning on or after January 1, 1989, the primary COBRA sanction is a non-deductible excise tax.

1. The excise tax imposed for failure to satisfy the health care continuation rules with respect to any qualified beneficiary is $100 per day during the noncompliance period, with a maximum tax per family of $200 per day. IRC §§4980B(b)(1) and (c)(3).

2. The non-compliance period with respect to any failure begins on the date of the failure and ends on the date the failure is corrected. IRC §4980B(b)(2).

   Correction requires that the rules be retroactively satisfied to the extent possible, and that the qualified beneficiary (or his estate) be placed in a financial position that is as good as if the failure had not occurred. IRC §4980B(g)(4). But if the delay in giving notice of a qualifying event results in a large back premium being due within 45 days of the election, the correction may not be sufficient unless the beneficiary is given several months over which to amortize the back premium.

3. If the failure is not corrected, the period ends 6 months after the last date on which the beneficiary would have been entitled to receive continuation coverage assuming all premiums had been paid. IRC §4980B(b)(2)(B)(ii).

4. However, if none of the persons who could be liable for the tax knew, or exercising reasonable diligence could have known, that the failure existed, the noncompliance period will not begin until one or more of such persons knows or should know of such failure. IRC §4980B(c)(1).

a. Also, a 30-day grace period will be allowed if a failure to comply with COBRA is due to reasonable cause and not due to willful neglect and if such failure is corrected within the 30 days. IRC §4980B(c)(2).

b. However, the inadvertent failure and grace period exceptions will not apply if the error is discovered after the employer is notified that its tax return for the period including the error is under audit. In that event, the minimum penalty for the period under audit, if greater than the regular penalty, will be $2,500 per beneficiary or, if the errors are more than de minimis, $15,000. IRC §4980B(b)(3).

5. For a plan that is not a multi-employer plan, the employer is always liable for the excise tax with respect to all plans that it maintains. IRC §4980B(e)(1)(A)(I). The maximum penalty for any employer for failures not due to willful neglect is the lesser of:

   a. 10% of the employer's costs for group health plans for the prior taxable year, or

   b. $500,000.

   IRC §§4980B(c)(4)(A) and (B).

6. For a multi-employer plan, the plan is always liable.

7. In addition, an administrator or insurance company, or the employer in a multi-employer plan, will be liable under IRC §§4980B(e)(1)(B) and (e)(2):

   a. If its act or failure to act caused or contributed to the violation, but only if it assumed responsibility for the performance of such act under a legally binding written agreement; or

b. If the employer (or the qualified beneficiary in the case of a divorce, legal separation, or a child ceasing to qualify as a dependent) requests in writing that the administrator or insurer make available to qualified beneficiaries coverage equivalent to that being provided by the administrator or insurer to active employees, unless the employer's act or failure to act made it impossible for the administrator or insurer to comply with its responsibilities.

The maximum penalty for an administrator or insurer with respect to failure occurring during a taxable year is $2,000,000. IRC §4980B(c)(4)(C).

8. The IRS may waive a penalty to the extent that it is excessive compared to the seriousness of the violation. IRC §4980B(c)(5).

9. Related entities.

a. The penalties for taxable years beginning before January 1, 1989 are imposed with respect to all health plans maintained by an "employer." It is, therefore, important to know whether related entities are to be considered separately or treated as a single employer.

b. A failure to comply with COBRA by one member of a group presumably will make all members of the group potentially liable for the sanctions. Prop. Treas. Reg. §1.162-26 Q&A-5.

10. The proposed regulations contain some relief in the case of a group that acquires a company whose plan is not in compliance. Generally, an innocent group member will not suffer sanctions if the failure to comply is corrected by the end of the innocent member's first taxable year that begins after the noncomplying company joins the group. Prop. Treas. Reg. §1.162-26 Q&A-3.

B. Effective Dates of Final Regulations.

1. The 1999 final COBRA Regulations are effective for qualifying events occurring in plan years beginning in 2000 and thereafter. Treas. Reg. §54.4980B-1 Q&A-2.

2. The 2001 final Regulations are generally effective for qualifying events occurring on or after January 1, 2002. However:

   a. The new final rules relating to the counting of employees for purposes of the small employer plan exception are applicable beginning January 1, 2002 for determinations made with reference to the number of employees in calendar year 2001 or later.

   b. The new final rules regarding the maximum coverage period are applicable to any individual who is a qualified beneficiary on or after January 1, 2002.

   c. The new final rules relating to business reorganizations are applicable with respect to business reorganizations that take effect on or after January 1, 2002.

   d. New final rules regarding employers who withdraw from a multi-employer plan are applicable to any cessation of contributions that occurs on or after January 1, 2002. (A cessation occurs on or after that date if the employer's last contribution to the plan occurs on or after that date.)

e. New final rules relating to the interaction between COBRA and FMLA are applicable to FMLA leaves that begin on or after January 1, 2002.

THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996

I. PLANS AFFECTED

A. The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) is applicable to the following:

1. HIPPA applies generally to “group health plans” the definition of which is found in Section 5000(b)(1) of the Code. The term includes employer-sponsored health care plans, regardless of whether such plans are insured or self-insured, funded or unfunded.

2. Health maintenance organizations and union sponsored medical plans are also subject to HIPAA.

3. Section 5000(b)(1) of the Code indicates that HIPAA applies to plans also maintained by partnership and sole proprietorships, even plans that only cover partners in a partnership.

B. HIPAA applies to group health plans except:

1. Small plans and relief from the regulation of HIPAA in two ways:

a. Section 9831(a)(2) of the Code exempts any group health plan for any plan year if, on the first day of such plan year, such plan has fewer than two participants or current employees.

b. Small employers are protected from excise tax penalties resulting from the terms of the group medical insurance contracts. The term “small employer” is defined as one that employed an average of at least two but not more than fifty employees on business days during the preceding calendar year, and at least two employees on the first day of the plan year.

2. Section 9831(a) of the Code exempts government plans from the requirement of HIPAA.

3. Church plans, which are generally exempt from ERISA, are not automatically exempt from HIPAA.

4. HIPAA does not apply to specified types of benefits enumerated in Section 9832(c)(1) of the Code. This includes accident or disability income insurance only, liability insurance, including general liability insurance and automobile liability insurance and supplements thereto, workers compensation or similar insurance, automobile medical payment insurance, credit only insurance, on-sight medical clinics, and other similar insurance, specified in regulations, under which medical benefits are secondary or incidental to other insurance benefits.

C. What are the Effective Dates for HIPAA?

1. Portions of the 2001 interim final rules under HIPAA, prohibiting discrimination based on a health factor, that repeat provisions in previous interim final rules remain currently ineffective.

2. Portions of the 2001 interim final rules that include new guidance generally are effective on the first day of the first plan year beginning on or after July 1, 2001.

3. The departments that issue the 2001 interim rules, the IRS, the DOL, and the HHS, stated that they will not take enforcement action against a plan or issuer for efforts to comply in good faith

with the statutory non-discrimination provisions before the first plan year beginning on or after July 1, 2001.

4. The interim rules already in place generally are applied for plan years beginning after July 1, 1997.

II. PRE-EXISTING CONDITION EXCLUSION LIMITATIONS

A. General Information.

1. Group health plans typically attempt to avoid covering illness or injuries that occur before enrollment. To counter act this, Section 9801 of the Code limits the ability of a group health plan to impose such pre-existing condition exclusions.

2. A pre-existing condition exclusion is permissible, with some exceptions, only if it satisfies three conditions:

   a. The exclusion applies to a condition, whether physical or mental, regardless of the cause of the condition, for which medical advice, diagnosis, care, or treatment was recommended or received within the six month period ending on the enrollment date.

   b. The exclusion extends for a period of not more than twelve months (or 18 months in the case of a late enrollee) after the enrollment, and

   c. The period is reduced by the "aggregate creditable coverage" applicable to the participant or beneficiary as of the enrollment date.

3. The term "enrollment date," is defined as the date of the enrollment or coverage of the individual in the plan or, if earlier, the first day of the waiting period for enrollment. Any waiting

period runs simultaneously with the pre-existing condition exclusion.

4. Under Regulations issued in 2001, a pre-existing condition exclusion must apply uniformly to all similarly situated individuals and not be directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries, such as a disability.

5. A plan amendment adding a pre-existing condition exclusion is not considered under the non-discrimination regulations under §9802 of the Code to be directed at any individual participants or beneficiaries if it is applicable to all individuals in one or more groups of similarly situated individuals under the plan and is effective no earlier than the first day of the first plan year after the amendment is adopted. Treas. Regs. §54.9802-1T(b)(3)(C).

B. Creditable Coverage.

1. Creditable Coverage as defined under §9801(c)(1) of the Code encompasses coverage of the individual under:

   a. A group health plan;

   b. Health insurance coverage;

   c. Part A or Part B of Medicare for Medicaid other than coverage consisting solely of pediatric vaccine distribution benefits;

   d. CHAMPUS;

   e. A medical care program of the Indian Health Service or of a tribal organization;

f. A state health benefits risk pool;

g. A federal civil service health plan;

h. A public health plan; and

i. A health benefit plan under the Peace Corp. Act.

2. Section 9801(c)(3) of the Code provides for two methods of crediting prior coverage. The first is the "standard" method. Under this approach, the new group health plan would not take into consideration any specific benefits for which coverage is offered during the period. The amount of creditable coverage would simply be determined by reference to the length of time the individual is covered under the prior plan. The second, or "alternate" method, permits a group health plan to determine the amount of creditable coverage based on coverage of any benefit, at any level, within each of the five categories of benefits. The categories are:

   a. Mental health coverage

   b. Substance abuse treatment

   c. Prescription drugs

   d. Dental care

   e. Vision care

   An election to utilize the alternate method must be made on a uniform basis for all participants and beneficiaries.

3. In order to provide participants with evidence of creditable coverage, HIPAA requires that each group health plan provide written certification. It should be noted that the certification may

be provided by telephone or other means in some circumstances if the parties agree to do so. Treas. Reg. §54.980-5.

a. Section 9801(a) of the Code provides the certification must include:

i. The period of creditable coverage of the individual under the plan and that plan's COBRA continuation coverage provisions; and

ii. The waiting period, if any, and affiliation. If applicable, impose with respect to the individual for any coverage under such plan.

b, The required certification must be furnished by a group health plan:

i. At the time an individual ceases to be covered under the plan or otherwise becomes covered under COBRA continuation coverage.

ii. At the time an individual ceases to be covered under COBRA continuation coverage.

iii. On request of an individual made not later than 24 months after cessation of regular or COBRA continuation coverage.

C. Prohibition of certain pre-existing condition exclusions.

1. The general limits on the pre-existing condition exclusions do not apply to certain situations involving birth or adoption. A group health plan may not impose any pre-existing condition exclusion relating to pregnancy.

2. A pre-existing condition exclusion cannot be applied to any newborn child who, as of the 30th day after the date of birth, has any creditable coverage.

3. In addition, a pre-existing condition exclusion cannot be applied to an adopted child placed for adoption before attaining 18 years of age who, as of the 30th day after the date of adoption or placement for adoption, has creditable coverage. Does not apply to coverage before the date of such adoption or placement for adoption.

4. The exception for newborns and adopted children do not apply after the child has a break in coverage of 63 or more consecutive days.

III. <u>SPECIAL ENROLLMENT PERIODS</u>

A. Individuals losing other coverage.

1. Section 9801(f)(1) of the Code requires group health plans to provide special enrollment periods to certain employees and their dependants who are otherwise eligible for coverage but not yet enrolled.

2. An individual who is covered under another group health plan, or who had insurance coverage at the time coverage was previously offered to him or her, qualifies for this special enrollment period if certain conditions are met. Such prior coverage must be either:

a. COBRA continuation coverage that has been exhausted; or

b. Other coverage that was terminated as a result of loss of eligibility or cessation of employer contributions towards such coverage.

3. A plan can require that when the employee declines enrollment for the employee or the dependent, the employee state in writing the coverage under another group health plan or health insurance coverage was the reason for declining enrollment. However, this requirement applies only if the plan sponsor or health insurance provides notice of the requirement to provide the statement at the time the employee declines enrollment.

4. The employee must request the special enrollment not later than 30 days after the loss of other coverage.

5. Enrollment must become effective not later than the first day of the first calendar month beginning after the date the completed enrollment request is received.

B. Dependent Beneficiaries.

1. Section 9801(f)(2) of the Code requires that any group health plan that makes coverage available to dependent beneficiaries provide for a special enrollment period for an individual who becomes a dependent of a participant through marriage, birth, or adoption or placement for adoption. Upon the birth or adoption of a child, the spouse of the participant may also enroll, if otherwise eligible for coverage.

2. The dependent special enrollment period must be at least 30 days and must begin on the later of the date the dependent coverage is made available or the date of marriage, birth, adoption or placement for adoption.

3. Such coverage is retroactive, if elected by the participant within the first 30 days of the dependent special enrollment period, to the date of birth, adoption or placement for adoption. Coverage becomes effective, in the case of marriage, not later than the first day of the first month beginning after the completed request for enrollment is received by the plan.

GUST

I. QUALIFIED RETIREMENT PLAN ("QRPs") DOCUMENTS

A. Alternatives.

1. Master or Prototype.

a. Plan documents reviewed and preapproved by IRS.

b. Generally sponsored by banks, insurance companies, mutual funds, stock brokerage firm and trade associations.

c. Plan document consists of two or three parts.

i. Adoption Agreement.

ii. Plan.

iii. Trust.

d. Plan language cannot be varied.

e. Operational choices usually limited to: vesting, contributions, allocations, deferral percentages, matching percentages, waiting periods, minimum age requirements, loan options, withdrawal options and distribution options.

f. Master vs Prototype.

i. Master plan must use a corporate trustee.

ii. Prototype plan may use individual trustee.

g. Standardized vs Non-Standardized.

i. Standardized plans offer fewer options than non-standardized (or individually designed plans).

ii. Adopting employers of standardized plans need not obtain an individual IRS determination letter, while adopting employers of non-standardized plans should obtain an individual IRS determination letter. Reduced user fees apply for non-standardized plans.

2. Volume Submitter.

a. Format of plan reviewed and pre-approved by the IRS.

b. Generally sponsored by law firms (law firm must certify that at least 30 employers will adopt).

c. In most instances a single plan document is used.

d. May contain all of the variables described in Paragraph I.A.1. e. above and more.

e. Mind plan language variations are permitted to accommodate the needs of individual plan sponsors.

f. Adopting employers should obtain an individual determination letter. Reduced user fees are applicable.

3. Individually Designed Plans.

a. These plans offer the greatest flexibility in design.

b. Adopting employers should obtain an individual IRS determination letter. No reduced user fees are available.

C. Design Considerations in Choosing a Plan.

1. Standardized plans are most restrictive.

a. Contribution must be made for any participant who is employed on the 1st day of year, regardless of the number of hours employed during the year.

b. Contribution must be made for any participant who terminates employment during the year if they completed at least 500 hours of service.

c. Plan may not limit eligibility by classification (except members of collective bargaining unit).

d. Only “safe harbor” definition of compensation may be used.

2. Cross-tested allocation formulas only available in individually designed plans and volume submitter plans.

3. Prototype plan may limit investment alternatives or funding vehicles.

C. Amending QRPs for New Legislation.

1. Effective Dates of Legislation.

a. Small Business Job Protection Act of 1996 (“SBJPA”).

i. ADP/ACP tests based upon prior year’s deferrals and contributions – plan years beginning after December 31, 1996.

ii. Nondiscrimination safe harbors established for 401(k) plans – plan years beginning after December 31, 1996.

iii. Simplified definition of "highly compensated employee" – plan years beginning after December 31, 1996.

iv. Repeal of family aggregation rules – plan years beginning after December 31, 1996.

v. Repeal of combined defined contribution/defined benefit limit (§415(e)) – limitation years beginning after December 31, 1999.

vi. Elective deferrals of employees considered compensation for purposes of maximum plan benefits/contribution under §415 – limitation years beginning after December 31, 1997.

vii. Required distributions may be deferred until retirement – plan years beginning after December 31, 1996.

viii. Waiver of 30 day waiting period for distributions – plan years beginning after December 31, 1996.

b. Taxpayer Relief Act of 1997 ("TRA 97").

i. Increase in cash out limit to $5,000 – plan years beginning after August 5, 1997.

ii. Modification of prohibition of assignment or alienation of plan benefits for participants committing fiduciary breaches - judgments or settlements after August 5, 1997.

c. Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”).

i. Continued vesting and service for veterans or reservists – reemployment on or after December 12, 1994.

ii. Employer contributions required and matching contributions required if employee makes up permitted contributions – December 12, 1994.

d. General Agreement on Tariffs and Trade (“GATT”).

i. Modification to §415(c) defined contribution maximum limit.

ii. Effective for limitation years after December 31, 1994.

2. Various Legislative Changes Are Optional.

a. Repeal of family aggregation.

b. Delaying required minimum distributions.

c. Increased cashouts up to $5,000.

d. Use of prior plan year data for ADP/ACP testing.

e. ADP/ACP testing safe harbors.

3. Deadlines for Plan Amendments.

a. Generally:

i. SBJPA specified amendments would not be required <u>before</u> plan years beginning in 1998.

ii. TRA 97 specified amendments would not be required <u>before</u> plan years beginning in 1999.

b. IRS recognized the necessity of coordinating the amendments.

i. A single amendment date.

ii. The consolidated amendment for the requirements of GATT, USERRA, SBJPA and TRA 97 is now referred as the GUST amendment.

c. §401(b) – the remedial amendment period.

i. Purpose of §401(b) rules.

(a) Generally, §401(b) permits retroactive remedial changes to a plan, which, if timely made, will result in the plan avoiding disqualification.

(b) The §401(b) rules were intended to apply to so-called "disqualifying defects" that arise with respect to the form of a new plan or as a result of an amendment made to an existing plan, that would otherwise result in disqualification.

(c) Under §401(b), if the plan is retroactively amended to cure the "disqualifying defect" within certain time frames, the plan will be considered to have at all times satisfied the qualification requirements, notwithstanding the existence of the defect during the interim.

ii. Application of §401(b) to GUST amendments.

(a) Rev. Proc. 2000-27 permitted plan sponsors to delay the adoption of GUST amendments until the last day of the 2001 plan year.

(b) The procedure also confirms that plan provisions which are "integrally related" to a GUST change may also be covered by the delayed amendment deadline. The types of amendments considered "integrally related" include such optional provisions as the repeal of family aggregation rules, deferred minimum distribution rules, and increased cash out rules.

4. Drafting Plan Amendments to Incorporate Retroactive Deadlines.

a. Although it may appear at first blush that the delayed amendment deadline for GUST amendments is a blessing, it could also prove to be a curse.

b. Employers are provided with a number of options in how their plans may comply with the new law. Nevertheless, if the plan document is not amended until 2001, the amendment must be retroactively effective and correctly reflect the manner in which the plan was operated during the interim.

c. Because of the numerous design options available, it is absolutely imperative that detailed records be maintained regarding the elections the employer made in regard to GUST compliance in operation. That information must be communicated to whomever will be responsible for drafting the updated plan so that the plan's language will conform to its operation.

d. Examples of some design options available to employers that must be reflected in the plan document.

i. Top paid group election.

(a) Employers may restrict the definition of highly compensated employees ("HCE") to those employees who earned greater than $85,000 (for 2000 and $80,000 for prior years) during the year of determination and were in the top 20% of all employees based on compensation.

(b) IRS Notice 97-95 indicates that no notification or IRS filing is required in order to apply the top paid group election in determining the HCE status. Once made, the election applies to all subsequent years unless changed by the employer. There does not appear to be any special limitations on the ability to change this election. However, a plan amendment may be necessary.

(c) Most plans do not need to be updated for the new HCE definition until the end of the 2001 plan year. However, when adopted, the amendment must be retroactively effective and reflect how the plan was operated in the interim. Hence, it is imperative that employers and accountants/administrators keep good records with respect to the manner in which HCEs are determined during 1997, 1998, 1999, 2000 and 2001 so that the plan amendment can reflect what, if any, elections were made.

ii. Calendar year election.

(a) Employers may elect to use as the determination year for HCE status purposes, the calendar year beginning within the prior plan year in lieu of the prior plan year itself.

(b) IRS Notice 97-45 again requires this election to be made in the plan document.

iii. 401(k) or 401(m) testing on a current or prior plan year basis.

(a) Beginning with the 1997 plan years, 401(k)/(m) plans could utilize prior year testing, instead of current year testing.

(b) The plan document must again specify which testing year will be utilized – IRS Notice 98-1.

(c) For 401(k)/(m) plans that were first adopted in 1997 or years thereafter, if the prior year testing method is utilized, a further election is required for the first year of the plans operation: either utilize the current year's testing information or assume an ADP/ACP for NHCEs of three percent.

iv. Implementation of new minimum distribution rules for non-five percent owners who continue to work past 70-1/2.

(a) Prior law generally required minimum distributions to begin as of the April 1st following attainment of age 70-1/2 for non-five percent owners.

(b) Commencing with years beginning after 1996, that rule has been modified to now require the plan to begin distributions no later than the April 1st following the later of attainment of age 70-1/2 or his actual retirement date.

(c) Various options are available to plans in implementing this rule including: leave the plan intact and still mandate benefits to commence as of the April 1st following the attainment of age 70-1/2; postpone distributions until the later of retirement or attainment of age 70-1/2; or allow each participant the choice.

5. Implementation of GUST.

a. New Plans.

i. The normal remedial amendment deadline under §401(b) for a new plan is the due date of the plan sponsor's tax return for the tax year ending with or within the first plan year. This deadline can be extended by submitting a determination letter request to the IRS.

ii. The IRS extended the normal remedial amendment deadline for new plans (and amendments to existing plans) which are adopted or effective after December 7, 1994, to coincide with GUST §401(b) period. This means that a new plan does not need to be submitted to the IRS for review by the normal tax return due date deadline. Instead, the initial submission can be delayed until the end of the remedial amendment period.

b. Prototype plans/volume submitter plans.

i. Prototype plans/volume submitter plans are not required to have GUST language at this time. However, employers will have to update their plans at a later date after the basic plan document and adoption agreement have been updated and approved.

ii. Rev. Proc. 2000-20 indicates that in general a GUST restatement may be adopted by an employer at any time up through the later of the end of the remedial amendment period or within 12 months after the sponsor of the prototype/volume submitter receives IRS approval of their specimen plan.

iii. Rev. Proc. 2000-20 also indicates that to qualify for this extended relief, the adopter must have either previously adopted such prototype/volume submitter plan or executed a "Certification of Intent" to adopt such plan prior to the end of the remedial amendment period. This will eliminate "prototype shopping" for late amenders.

c. Terminating plans.

i. The IRS has indicated that if a plan terminated before the end of the remedial amendment period, it would need to be updated as of its date of termination, notwithstanding that the amendment could have been delayed. However, the plan need only comply with those changes in the laws that have taken effect as of the date the plan was terminated.

ii. There is no IRS "model" language, which can be used to update terminating plans. However, the Cincinnati Key District has been providing "sample language" in most cases where a determination letter concerning the plan's termination is requested.

iii. Sponsors of terminating plans are not required to request a determination letter when a plan is terminated. Nevertheless, it is a good practice to do so and almost mandatory during this interim period of uncertainty.

iv. This must be communicated to employers that are terminating plans. The IRS will disqualify a terminating plan that is not amended and thereby destroy the tax-favored treatment available to QRP participants (including tax-free rollovers).

d. Opening the determination letter program.

i. Rev. Proc. 200-27 opened the IRS's determination program officially as of June 26, 2000 for individually designed plans and compliance with GUST.

ii. In light of the extensive nature of the required amendments, the IRS will require a complete restatement at this time.

e. Takeover Plans.

i. When an accounting firm responsible for plan administration is changed, there is always a potential for miscommunication to occur and a mistake to be made. This mistake potential is significantly heightened for "takeovers" that occur during the GUST amendment period.

ii. For accounting firms, which assume responsibility for the administration of a plan during the interim, it is critical that their engagement letters reflect what the firm's responsibility may be to reconfirm the information provided by the prior accountants/administrators. Make it clear as to whether you will rely on the takeover data as is, or instead recrunch the numbers to make sure they conform to the manner in which the plan will be updated.

II. <u>OTHER LEGAL DOCUMENTS</u>

A. Summary Plan Description ("SPD").

1. ERISA requires SPDs to include:

a. The type of plan;

b. The identification number of the plan;

c. The responsible fiduciaries;

d. A description of the eligibility, vesting and benefit accrual features;

e. A description of the break-in-service rules;

f. The plan's normal retirement age;

g. The plan's provisions describing any conditions that must be met before a participant is eligible to receive benefits;

h. If the plan provides joint and survivor benefits, any requirements necessary to reject these benefits;

i. Any circumstances under which benefits may be denied, lost, or forfeited;

j. The sources of contributions to the plan and the method by which the contribution is calculated;

k. The funding media used for the accumulation of assets;

l. The procedures to be used in making a claim for benefits; and

m. A statement of ERISA rights.

2. SPDs must be written "in a manner calculated to be understood by the average plan participant."

3. SPDs must be distributed to participants by the later of:

a. 90 days after the employee becomes a participant; or

b. 120 days after the later of the plan's effective date or adoption date.

4. Updated SPDs are required:

a. If the plan is not amended - at least every 10 years.

b. If the plan is amended in a non-substantial manner – at least every 5 years.

c. If the plan is amended in a significant manner – a new SPD or a summary of material modifications ("SMM") must be distributed no later than the last day of the month following the end of the plan year, in which the amendment becomes effective.

5. TRA '97 has mercifully eliminated the requirement that SPDs or SMMs be filed with the DOL.

B. Participant's Election Not To Participate.

1. Plan may allow participants to elect not to participate with the administrator's consent.

2. This election must be an irrevocable one-time election made at the outset of the employee's participation in the plan.

C. Plan Loans.

1. DOL regulations requires each plan that provides for loans to adopt a written loan procedure.

2. A typical loan package will incorporate the following:

a. An application.

b. A promissory note.

c. A security/pledge devise.

d. A spousal consent (when necessary).

D. Annual Report to Participants – Summary Annual Report ("SAR").

1. The SAR is a plain English explanation of the information that is contained in Form 5500.

2. Generally the SAR must include:

   a. The value of the trust's assets as of the beginning and end of the plan year.

   b. Plan expenses incurred during the plan year.

   c. Insurance information, if any.

   d. A statement that participants may examine/receive copies of the plans full annual report.

3. Due to the change in 5500 series and elimination of the 5500-C/R for "small" plans, a full SAR is required for each plan.

4. SARs must be furnished to participant on or before the last day of the 9th month following the end of the plan year (this deadline may be extended if 5500 is extended).

E. Designation of Death Benefit Beneficiary.

1. Plans providing for death benefits in the form of pre-retirement survivor annuities ("PRSA").

   a. All pension plans and some profit sharing/401(k) plans.

   b. Death benefits must be paid in the form of a PRSA to a surviving spouse, unless there is on file an election to waive the PRSA and a spousal consent form.

      i. For example, if a participant wishes to have children from a first marriage designated as beneficiary.

ii. For example, if a participant wants the death benefit to be paid in the form of a lump sum.

c. Special rules for participants who make elections to waive prior to age 35.

i. Generally elections to waive and spousal consents become invalid at the earlier of the participants employment termination date or age 35.

ii. If forms are not re-executed, upon death a pre-retirement survivor annuity must be paid to the spouse.

2. Plans not providing for death benefits in the form of pre-retirement survivor annuities.

a. Most profit sharing/401(k) plans.

b. Spousal consent still needed if death benefit is paid to anyone else.

F. Distribution of Benefits – Lifetime.

1. Plans providing for lifetime benefits in the form of a joint and survivor annuity ("JSA").

a. All pension plans and some profit sharing/401(k) plans.

b. Married participants must receive a JSA notice before a lifetime distribution of benefits will occur.

i. The notice will explain:

(a) The benefits will be paid in the form of a JSA, unless an election is made to waive and his/her spouse consents.

(b) What a JSA is and its effect in comparison to other benefit forms offered.

ii. Election and consent form provides:

(a) Election of various alternative forms of benefits offered under the plan.

(b) A spousal consent to the waiver of a JSA.

c. Unmarried participants must receive a notice concerning the distribution of a straight life benefit. Once again this form of benefit can be waived.

e. Generally, notices may be distributed and election/consent forms completed no more than 90 days prior to the annuity starting date, nor less than 30 days prior to the annuity starting date.

f. If permitted by the plan, a participant may waive the 30 day election period and benefits may commence/be paid after 7 days.

2. All plans must distribute an explanation concerning the tax consequences of distribution, if the distribution would qualify as an “eligible rollover distribution.”

a. Notice must be distributed within a reasonable period before the distribution, but within the 30/90 day period.

b. This requirement is mandated by §402(f).

c. Recent IRS Notice 2000-11 specifies an updated version of the safe harbor 402(f) Notice.

i. It may be customized by deleting certain sections that are not pertinent.

ii. Additional information may be included.

3. All plans must provide participants with an opportunity to cause an “eligible rollover distributions” to be transferred into an IRA or another QRP.

a. Participants must be given at least 30 days following receipt of the explanation referred to in subparagraph F.2. above to consider the decision concerning a direct rollover. This 30 day period may be waived.

b. “Eligible rollover distributions” which are not directly transferred are subject to 20 percent withholding.

INDEPENDENT CONTRACTORS

By: Stuart M. Bordman

I. JARGON

Company	A business which retains a worker
Worker	A person who renders services to a company
Other than an Employee	Independent contractor, subcontractor, broker, middleman, agent
Employee	A person who renders services to an employer
Leased Employee	A worker who renders services to one company while an employee of another company or an independent contractor compensated by another company
Employer	Anyone who pays wages to an employee
Wages	All remuneration for services performed by an employee for his/her employer
Statutory Non-Employee	Qualified real estate agent or direct seller (IRC §3508)
Statutory Employee	Officer of a corporation, agent or commission drivers, insurance salesmen, home workers, certain traveling salesmen. (See VIII.C.2. of outline for a more complete definition.) (IRC §3121(d))

II. TAX RESPONSIBILITY FOR EMPLOYEES

A. WT (Collection of income tax at source) – Federal and State

B. FICA (Social Security) - employee and employer share

C. FUTA (federal unemployment) - employer only

D. State unemployment - employer only

E. Compliance with the Michigan Workers' Compensation Act

F. Compliance with the Fair Labor Standards Act (FLSA)

G. ERISA provides that benefit plans are **exclusively** for employees.

III. COST OF MISCLASSIFICATION

A. Federal Tax Exposure

1. Section 3509 - Liability for failing to deduct and withhold.

a. 1.5% of wages paid to employees

b. 20% of employee's share of FICA

c. 100% of employer's share of FICA

d. 100% of FUTA

a. and b. are doubled for failure to file Form 1099-MISC and other reports.

Section 3509 does not apply when the employer has intentionally disregarded the reporting rules - Section 3509(c). This is referred to as a **full rate adjustment**. The IRS will attempt to collect 20% of wages as withholding and 100% of the FICA due -- both the employer's and the employee's share.

2. Section 3402(d) - If the employee has paid the taxes due, the employer is not liable for such amounts. However, the employer is not relieved of its liability for any penalties or additions.

3. Section 6672 - Personal liability for amounts owed. The IRS may collect any amounts due from any person who effectively controls the finances of the corporation. A responsible person has the duty to direct the act of collecting, accounting for, and paying over taxes. A 1995 Federal District Court case, Crowd Management Services, Inc. v U.S. (95-1 USTC ¶50,260) seems to state that a 100% penalty under §6672 may be imposed where the employer had no reasonable basis for believing that withholding was not required.

4. Section 7202 - Willful failure to collect or truthfully account for, or pay over taxes is a felony and subject to a fine up to $10,000 and/or five years in prison.

B. State Tax Exposure

1. Michigan Compiled Laws ("MCL") 206.351(5) imposes personal liability on any responsible officer for failure to file or pay taxes.

2. MCL 205.23 imposes interest and penalty:

   a. If due to negligence and without intent to defraud, the greater of $10.00 or 10% of the unpaid tax.

   b. If due to intentional disregard of the law without intent to defraud, the greater of $25.00 or 25% of the unpaid tax.

   c. If due to fraudulent intent to evade tax, 100% of the unpaid tax.

C. FLSA Exposure - For a willful violation of the overtime provisions, the assessment is doubled.

D. ERISA - In Kenney v Commissioner, T.C. Memo, 1995-431, after determining under common law that two individuals who worked for a law firm were employees and not independent contractors, the Tax Court disqualified the firm's retirement plan for failing to meet coverage.

A court decision that a worker is an independent contractor could result in a violation of the exclusive benefit rule if the worker had been a participant in a qualified retirement plan. Such a holding could result in the plan's disqualification and adverse tax consequences to the worker as well as other participants. Additionally, the employer might have to wait years during the pendency of the litigation to find out about the status of the worker and the plan.

IV. IRS

A. View – For almost every worker, there is an employer somewhere.

B. Preference - Every worker is employed by General Motors or a similar company which withholds, pays FICA and FUTA, etc.

C. Objection to workers who are other than employees.

1. Right to deduct expenses which employees cannot deduct – revenue loss.

2. Difficulty of administration and collection.

V. REAL WORLD

There are thousands of "self-employed" workers for whom there is no "employer."

VI. HOW DO CASES ARISE?

A. Industry review by IRS - messenger services in Chicago.

B. Routine audit - W-2's/1099's.

C. A worker who receives a 1099 does not pay income tax.

D. A worker applies for unemployment or Social Security benefits.

E. Worker treated as other than employee contacts IRS or other agency.

VII. CONDITIONS UNDER WHICH THE ISSUE MIGHT ARISE

A. Two Party Relationship - A business hires an individual to perform a job or task. The individual is either an employee of the business or renders services as "other than an employee". The status of workers who retire and are hired by their former employers as part-time consultants is often an issue.

B. Three Party Relationship - Involves a worker, a client and a broker or agency. A business contacts the broker/agency which sends a worker to the client business. The worker may be an independent contractor, an employee of the broker/agency or treated by the broker/agency as other than an employee. **The IRS believes that there is almost always an employer.**

VIII. DETERMINATION OF STATUS

A. Different Tests

1. IRS

2. Michigan Department of Treasury

3. Unemployment Agency (Formerly Michigan Employment Security Commission)

4. Fair Labor Standards Act

5. Workers' Compensation

6. Michigan Occupational Safety and Health Act

B. Initial Question - The Party's Treatment of the Relationship

C. Statutory Non-Employees and Statutory Employees Under the Internal Revenue Code

1. Statutory Non-Employees. Section 3508(a) classifies qualified real estate agents and direct sellers as **other than employees.**

   a. Qualified real estate agents - licensed, remuneration based on sales and not hours worked and a written contract providing for independent contractor treatment for federal tax purposes.

   b. Direct sellers - Sell consumer products, at home, remuneration based on sales and not number of hours worked and a written contract providing for independent contractor treatment for federal tax purposes.

   NOTE: For purposes of qualified pension, profit sharing and stock bonus plans, the workers may be considered employees.

2. Statutory Employees (not common law employees but are nevertheless treated as employees for FICA and FUTA).

   a. For FICA purposes, Section 3121(d) defines employees to include:

      i. any officer of a corporation;

      ii. an individual who is an employee under the common law rules;

      iii. an agent driver or commission driver engaged in the distribution of meat products, vegetable products, bakery products, beverages, or laundry or dry cleaning services for his principals;

iv. a full-time life insurance salesperson;

v. home workers who must follow specifications and are furnished materials or goods;

vi. traveling salespeople engaged full time to solicit orders for merchandise for resale or use in business operations.

b. For FUTA purposes, Section 3306(i) defines employee as above, but excludes:

i. full-time life insurance salespeople; and

ii. home workers.

c. To be considered an employee for FICA or FUTA purposes (Section 3121(d)), three requirements exist:

i. The "contract of service," whether formal or informal, must contemplate that the individual will perform substantially all of the services;

ii. The individual must have no substantial investment in the facilities used in performing the services (other than facilities used for transportation); and

iii. The services must be performed in a continuing relationship with the person for whom they are performed and not as a single transaction.

d. For purposes of income tax withholding on wages, Section 3401(a) defines wages to include all remuneration for services performed by an employee for his employer. Accordingly, an employee may be subject to income tax withholding but may not be subject to FICA and/or FUTA.

e. Certain individuals may be considered as employees for purposes of income tax withholding, FICA and FUTA but may not be deemed employees for classification of expenses. These individuals may claim their business expenses on Schedule C of Form 1040. Additionally, their trade or business expenses are not subject to the 2% floor on miscellaneous deductions. See Revenue Ruling 90-93, 1990-45 I.R.B. 4.

D. Safe Haven Under Section 530 of the Revenue Act of 1978

1. Permits treatment as independent contractors for federal employment tax purposes, regardless of worker status under the common law. There are three requirements:

   a. all required returns (Form 1099) are filed;

   b. similarly situated workers are not treated differently; and

   c. there is a reasonable basis for treating workers as independent contractors:

      i. case or ruling;

      ii. prior IRS audit; or

      iii. long-standing recognized practice of a significant segment of the subject industry.

2. Section 530(d) does not apply in a three party relationship involving engineers, designers, drafters, computer programmers, system analysts or similar workers.

3. Based on the common law factors and Rev. Rul. 87-41, the IRS determined that the worker was an employee. The company was "…allowed Section 530 under the prior audit safe haven." There is

no FICA paid by the company. The worker does not pay self-employment tax -- he only pays his portion of the FICA. Mechanics:

a. Use Form 4137 attached to outline and cross out tips.

b. Attach a copy of letter from IRS.

4. Section 530 only provides employment tax relief for employers. Accordingly, it may not help in a reclassification of workers for ERISA purposes.

5. Section 530 precludes Treasury and IRS from issuing rules or regulations that would define the distinctions between employees and independent contractors.

E. Common Law Factors – Internal Revenue Code and State of Michigan Statutes

A business has the burden to prove the status of an independent contractor.

1. Revenue Ruling 87-41 sets forth 20 factors used to indicate whether sufficient control is present to establish an employer-employee relationship. No one factor controls.

a. Right to require worker to comply with instructions.

b. Training the worker.

c. Integration of worker's services into business operations.

d. Requirement that the services be performed personally.

e. Hire, supervise and pay assistants.

f. Continuing relationship between business and worker.

g. Worker subject to set hours of work.

h. Worker must devote most time to the business.

i. Performance of work at the business premises.

j. Compliance with a set order or sequence.

k. Worker must submit reports.

l. Payment by hour, week or month.

m. Payment of business and/or travel expenses.

n. Worker is furnished tools and materials.

o. Lack of investment in work facilities.

p. Lack of ability to realize a profit or loss on the job.

q. Inability to work for more than one business.

r. Services not available to general public.

s. Right of business to discharge worker.

t. Right of worker to terminate relationship.

2. Other Factors.

a. The independent contractor has a distinct business:

i. incorporated or use of assumed name;

ii. use of stationery and business cards;

iii. separate place of business.

b. Lack of guaranteed minimum compensation.

c. No entitlement to bonuses.

F. Fair Labor Standards Act

1. The Act only applies where an employer/employee relationship exists.

2. In certain instances an employer/employee relationship exists for FLSA purposes where it would not exist under the common law tests.

3. Just as for income tax purposes, there is no one test to determine if a worker is an employee for FLSA purposes.

G. Workers' Compensation

1. Definition in MCLA 418.161 provides little guidance.

2. Insurance Bureau Bulletin 89-03 uses many of the 20 common law factors used by the IRS in evaluating whether an individual is an employee of a contractor.

3. Company bears liability even if subcontractors are truly subcontractors if the subcontractor fails to carry workers' compensation insurance.

H. Michigan Employment Security Act

1. "Services performed by an individual for remuneration shall not be deemed to be employment subject to the Act, unless the individual is under the employer's control or direction as to the performance of the services both under a contract for hire and in fact …"

2. The courts and UA have used the economic realty test in applying the statute.

"The test employed is one of economic realty. It looks at the task performed, whether or not it is a part of a larger common task, 'a contribution to the accomplishment of a common objective'. [Citations omitted] … The test is far from the common-law test of control, since 'the act concerns itself with the correction of economic evils through remedies which were unknown at the common law.' [Citation omitted] … The test, rather, looks at the workmen, to see whether or not their work can be characterized ' as a part of the integrated unit of production' [Citation omitted] … and whether 'the work done, in its essence, follows the usual path of an employee' [Citation omitted] … In applying such test, control is only one of many factors to be considered. The ultimate question is whether or not the relationship is of the type to be protected. …"

Powell v Employment Security Commission, 345 Mich 455 (1956) (page 478).

McKissic v Bodine, 42 Mich App 203 (1972), sets forth eight criteria by which to apply the economic realty test. Those criteria are:

"First, what liability, if any, does the employer incur in the event of the termination of the relationship at will?

Second, is the work being performed an integral part of the employer's business which contributes to the accomplishment of a common objective?

Third, is the position or job of such a nature that the employee primarily depends on the emolument for payment of his living expenses?

Fourth, does the employee furnish his equipment and materials?

Fifth, does the individual seeking employment hold himself out to the public as one ready and able to perform tasks of a given nature?

Sixth, is the work or the undertaking in question customarily performed by an individual as an independent contractor?

Seventh, control, although abandoned as an exclusive criterion upon which the relationship can be determined, is a factor to be considered along with payment of wages, maintenance of discipline and the right to engage or discharge employees.

Eighth, weight should be given to those factors which most favorably effectuate the objectives of the statute."

IX. PROCEDURE

A. For Employees

1. Responsible for collecting and paying all taxes listed in II. above.

2. Responsible for obtaining Form W-4, Employee Withholding Allowance Certificate, from all employees.

3. Responsible for issuing Form W-2, Wage and Tax Statement, to all employees.

4. Responsible for obtaining Form I-9, U.S. Department of Justice, Immigration and Naturalization Service, Employment Eligibility Verification.

B. For Independent Contractors

1. Not responsible for collecting or paying employment taxes.

2. Responsible for filing Form 1099-MISC for all payments of $600 or more for fees, commissions or other forms of compensation to persons not treated as employees for services rendered.

3. Responsible for obtaining Form W-9, Request for Taxpayer Identification Number and Certification.

CAUTION: Without having the independent contractor's proper taxpayer identification number, the business will be subject to 20% backup withholding. The business is responsible for filing the 1099-MISC, even if it does not know the proper taxpayer identification number.

C. Relief Under Section 3402(d)

1. If the employer is subject to a full rate adjustment, there may be relief under Section 3402(d). The employer must obtain Form 4669, Employee Wage Statement signed by all employees.

2. Submit a Form 4670, Request for Relief from Payment of Income Tax Withholding, with the signed Form 4669 to the IRS.

NOTE: Relief is not available under §3402(d) if the employer is merely subject to the penalty provision of Section 3509.

D. IRS Determination of Status

The IRS will determine if a worker is an employee if a Form SS-8, Information for Use in Determining Whether a Worker is an Employee for Purposes of Federal Employment Taxes and Income Tax Withholding, is filed.

WARNING: Filing of this form is **NOT** recommended! The IRS almost always classifies the workers as employees. The District Office is notified of the determination and the chance of audit is increased.

X. RECENT DEVELOPMENTS

A. Possible Repeal of Section 530. A Congressional Committee has recommended that the Section 530 safe harbor for misclassification of workers as independent contractors be eliminated. It also recommended that the 20-point common law test set forth in Revenue Ruling 87-41 be revised and clarified and that a set of objective rules and regulations be established.

B. In January of 1995 a bill entitled the "Independent Contractor Tax Fairness Act of 1995" was introduced and was referred to the House Ways and Means Committee. It proposes new standards for independent contractor classification. The bill provides a new definition of "independent contractor" for the Internal Revenue Code. Workers would meet the definition if they satisfied one of several criteria.

C. Increased Attention During IRS Audits. The IRS has announced that every audit or examination will include a review of the employer's classification of its workers. This is in response to the Section 530 safe harbor which allows an employer to continue its classification of independent contractors after an IRS audit, even if the audit never examined the classification of workers. The health care industry has become an area of primary focus by the IRS for audit.

D. Critical Care Registered Nursing, Inc. v U.S. Critical Care filed a suit against the U.S. to recover federal employment taxes assessed by the IRS and paid by Critical Care. The U.S. filed a counterclaim for additional taxes it claimed were owed by Critical Care. This case was tried before a jury which found in favor of Critical Care. The U.S. filed a motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial. The court denied both motions of the U.S. The sole issue is whether the nurses provided to hospitals by Critical Care for temporary staffing were independent contractors or employees. This case was governed by

Section 530. The court stated that the safe havens were not the exclusive ways of meeting the reasonable basis requirement. Specifically, the court held that if a taxpayer could demonstrate a reasonable basis for the treatment of an individual in some other manner the taxpayer should not be required to treat the worker as an employee. The court concluded that under Section 530 a taxpayer may establish that it had a reasonable basis for not treating its workers as employees by using the traditional common law rules for determining whether workers were employees or independent contractors. Further, the taxpayer need only show that "under the common law rules, its treatment of its workers was reasonable."

E. In TAM 9502008 issued October 17, 1994 the IRS held that, in facts which appear identical to those of Critical Care, the workers were employees even though their contracts referred to them as independent contractors. The employer had orientation and performance review procedures, required the nurses to work a set schedule and paid them an hourly rate.

F. Hospital Resource Personnel, Inc. v U.S. Hospital Resource Personnel, Inc. ("HRP") was in the same business as Critical Care and treated its nurses as independent contractors. HRP was audited for the years 1988 through 1990 and assessed employment taxes, penalty and interest in excess of $1,140,000.00. The IRS asserted that HRP should have classified its nurses as employees. HRP paid a portion of the assessment and filed a claim for refund which the IRS denied. HRP then filed an action in Federal District Court and the Court concluded that HRP established a reasonable basis for treating its nurses as independent contractors under Section 530. The Federal Appeals Court refused to disturb the lower Court's conclusion that the nurses were independent contractors and noted that HRP demonstrated it fell under the safe harbor of Section 530, published Revenue Rulings and common law.

G. Queensgate Dental Family Practice v U.S. The sole issue in this case is whether dentists who conducted their practices at plaintiff's facilities were employees or independent contractors. The plaintiff in this case was **not** a professional corporation. The president of plaintiff contacted the counsel for the Pennsylvania Dental Board who stated: "(1) The Dental Board would consider it illegal under Pennsylvania law, for a non-licensed business corporation … to enter into a relationship of employer/employee with a licensed dentist; and (2) that a practicing dentist must be treated by [plaintiff] as an independent contractor and not as an employee in compliance with the requirements of the Dental Board." Based on the foregoing, the Court found that plaintiff had a reasonable basis to believe that the dentists should be treated as independent contractors and not as employees and, thus, the third requirement of Act Section 530 was satisfied. The Court held that because Section 530 was applicable, it did not need to conduct a detailed analysis of the 20 common law factors. The Court did note, however, that under the facts at hand, the weight of the evidence supported the conclusion that the dentists were independent contractors and not employees.

H. The IRS ruled that physicians who evaluate EKG's for a tax exempt surgical center are its employees. The physicians work a regular schedule and are paid a fixed amount per evaluation. Each physician has a private practice and carries his own malpractice insurance. The IRS noted that the physicians were "integrated" into the operating organization, LTR 9535001.

I. Albert Ware, et al v U.S. Ware began selling insurance for AAA in 1962. In 1986, AAA offered Ware and two other agents an opportunity to become general agents and open their own insurance office. The three rented an office and AAA approved its general layout and location. Ware was limited to selling AAA policies, although he could place business through other companies when the insurance risks did not meet AAA standards. Ware and the other agents bore the initial cost of leasing the office and buying furniture. AAA paid for the agents' telephone service in order to regulate its advertising in the Yellow Pages. The agents paid all other advertising. Ware hired employees through a temporary agency specified by AAA and agreed to keep his office open at least 45 hours per week. He used a computer system that wrote policies through AAA and was connected directly to an AAA mainframe computer. Either party could terminate the relationship at will. Ware worked solely on a commission basis and received extensive fringe benefits. AAA treated Ware as an employee.

In 1992, Ware sought to amend his income tax return for 1988 to 1990 to reflect his status as an independent contractor and claimed deductions for unreimbursed business expenses. The IRS denied the claim for refund but Ware prevailed in Federal District Court. The judge found that 11 of 20 factors favored Ware's classification as an independent contractor; five were irrelevant and four implied employee status. The Court concluded that AAA's actual influence over how Ware did business was minimal and Ware's financial responsibility for the enterprise dwarfed AAA's financial role and investment. The Court emphasized that Ware was paid by commission, paid most of his travel and business expenses and furnished all of his own tools and materials.

J. Early Referral to Appeals. In Announcement 96-13; IR-96-7 the IRS announced a procedure for taxpayers to request an early referral of employment tax issues to appeals. The taxpayer may request early referral of any developed, unagreed employment tax issue that is under the jurisdiction of the district director arising from an audit. Early referral of employment tax issues is:

1. Optional.

2. Initiated by the taxpayer.

3. Subject to approval of the district director and assistant regional director of appeals.

4. Not limited to coordinated examination program taxpayers.

Generally, the case will **not** get settled at the agent level. Accordingly, if the company continues to treat the workers as other than employees, it will continue to build up liability while the case is being resolved. This program, called the "Classification Settlement Program", should move the case along at a much faster rate.

K. Training Guide. On March 1, 1996, the IRS released a draft of a training guide for agents to use when determining worker classification status. The first example in the guide notes that the wearing of uniforms in some industries no longer indicates an employer/employee relationship. The example reads, in part, "In the past, the fact that a delivery driver was required to wear a uniform bearing the name of the retail business meant that the business exercised control indicative of an employer/employee relationship. Today this requirement may be established to provide customers with some assurance that the worker can be allowed entry to a home or business."

XI. DOCUMENTATION

A. Value of a Written Agreement.

1. Form versus substance.

2. May be better to have nothing than a self-serving document.

B. Documentation Which Establishes an Independent Contractor Relationship

1. A proposal or quote from the worker for work to be done.

2. An invoice for services rendered on the worker's letterhead which is printed (i.e., not a pad from an office supply store where the worker writes in his name).

3. Business cards, advertisements, etc. which establish that the worker has a separate trade or business.

4. The worker's assumed name certificate.

XII. PROFESSIONAL EMPLOYER ORGANIZATION (PEO)

A. In General

A Professional Employer Organization (PEO) is defined as: "an organization that provides an integrated and cost effective approach to the management of critical human resource responsibilities and employer risks for its clients. PEOs deliver these services by establishing and maintaining an employer relationship with the workers assigned to its clients and by contractually assuming substantial employer rights, responsibilities, and risks from its clients."

More specifically, a PEO establishes a contractual relationship with its client whereby:

1. The PEO assigns workers to client locations, and thereby assumes responsibility as an employer of the workers assigned to the client locations;

2. The PEO reserves a right of direction and control of the employees and may share such responsibility with the client, consistent with the client's responsibility for its product or service;

3. The PEO pays wages and employment taxes of the employee out of its own accounts;

4. The PEO reports, collects, and deposits employment taxes with state and federal authorities;

5. The PEO establishes and maintains an employment relationship with its employees that is intended to be long term and not temporary; and

6. The PEO retains a right to hire, assign, and terminate the employees, pursuant to its "At-Will" employment policy.

In the relationship among a PEO, a worksite employee and a client company, there exists a co-management relationship in which both the PEO and the client company have a management relationship. The PEO and client company contractually divide traditional responsibilities and liabilities. The client retains full control over the operation of the business and the delivery of services or production of products. The PEO assumes responsibility for the "business of employment." The PEO assumes the responsibility and the cost-effective management of mandatory benefits like workers' compensation and unemployment insurance. The PEO also provides worksite employees a wide variety of benefits that many employees would not otherwise receive.

PEOs may provide Fortune 500 quality employee benefits including, health insurance and 401(k) savings plans. Job satisfaction and productivity increases when employees are provided quality human resource services like employee manuals, grievance procedures and improved communications.

When a PEO brings on a new client company, the client company discontinues its payroll payments and the PEO assumes the payroll responsibilities for the worksite employees. PEOs have historically asserted either common law or co-employer status with respect to worksite employees and have "restarted" both the social security and the FUTA annual taxable wage base limitations. Unless the client service agreement first becomes effective as of January 1, this "restart" of the annual limitations causes the federal government to receive a greater amount of

FUTA and social security taxes than it would have received but for the PEO relationship.

B. Guidelines for Selecting PEOs

In selecting a PEO:

1. Assess the workplace to determine human resource and risk management needs. The PEO should have a strong infrastructure consisting of key divisions including accounting, payroll, benefits, human resources, risk management/compliance and customer service.

2. Make sure the PEO is capable of meeting the needs of the company and is flexible. Meet the people who will be serving you. The PEO should have an experienced staff.

3. Check the firm's financial background. Ask for banking and credit references. Ask the PEO to demonstrate that payroll taxes and insurance premiums have been paid.

4. Ask for client references, in addition to references from financial institutions. These should be secured prior to selecting a PEO.

5. Understand how the employee benefits are tailored. Determine if they fit the needs of the employees.

6. Review the service agreement carefully. Are the respective parties' responsibilities and liabilities clearly laid out? What guarantees are provided? What provisions permit you or the PEO to terminate the contractual relationship?

7. If your state requires a PEO to be licensed or registered, make sure the PEO being considered meets all such requirements.

8. Inquire as to whether the PEO provides employee handbooks and manuals, training programs, and newsletters.

Before entering into a leasing arrangement, potential client companies must understand the legal implications and potential liabilities that arise with this type of alternative staffing arrangement. Co-employment summarizes the legal relationship, rights and obligations in leasing arrangements. Courts may view only the PEO as the employer obligated to comply with the employment laws. But in some cases, the client company alone may be obligated to comply.

Potential liability for co-employment varies significantly, depending on two principal factors: the context in which the specific claim of liability is asserted and the specific nature of the alternative staffing arrangement.

C. The Co-Employment Relationship.

Co-employment describes a relationship between two or more employers in which each has legal rights and duties with respect to the same employees.

Typically, the PEO's responsibilities encompass the "general" aspects of the employer's role. For instance, the PEO is responsible for managing employee payroll and related taxes (i.e., federal and state withholding, tax returns, W-2 reports) assuring that the company's workers' compensation coverage is intact and administrating employee benefit programs including retirement plans, cafeteria and health care plans, life, disability, accidental death and dismemberment insurance, credit unions, fitness club memberships, child care and tuition reimbursement programs.

Additionally, it is typically the PEO which contractually assumes responsibility for compliance with regulations put forth by the Equal Employment Opportunity Commission, Title VII, National Labor Relations Act, Fair Labor Standards Act, Consolidated Omnibus Budget

Reconciliation Act of 1988 (COBRA), Employee Retirement Income Security Act of 1974 (ERISA), Americans With Disabilities Act (ADA), Family and Medical Leave Act (FMLA), Immigration Reform and Control Act (IRCA), etc. The FMLA, in fact, recognizes the PEO as the "primary" employer and confers to the PEO primary compliance obligations.

The client company, on the other hand, typically has primary responsibility for task management duties such as the employees' daily work assignments, supervision, production or service delivery, and provision of supplies and equipment. Some employer responsibilities are allocated between the PEO and client; others are shared.

When the facts and circumstances of a PEO arrangement are examined appropriately, both the PEO and the client will be found to be an employer for some purposes, but neither party will be found to be "the" employer for all purposes.

Some states, including Arkansas and Florida, consider the PEO the employer of record for workers' compensation purposes. Other states, such as Texas, recognize the PEO as a co-employer but require the client's claims experience to be used for a certain period of time.

Where the PEO is the employer of record, it may be required to establish separate accounts for each client, because different clients will have different experience ratings. In many states with licensing laws, a single, aggregated account is possible.

Who is viewed as "the employer" by government entities when it comes to paying income and unemployment taxes? For this purpose, the PEO is considered by the Internal Revenue Service to be the employer (IRS Revenue Ruling 75-41, 1975 C.B. 323 and I.R.C. § 3401(d)). This determination is based on the fact that the PEO is responsible for payment of employee wages. Case law has upheld this determination even in cases when the PEO failed to live up to its responsibilities in paying these taxes. *General Motors Corp. v. United States*, 91-1 U.S.T.C. 50,032 (E.D. Mich. 1990)

However, it should be noted that in some jurisdictions, the courts' recognition of the PEO as co-employer is based on the condition that the PEO establish and maintain an employment relationship with the worksite employees assigned to its client companies. In other words, absent such a relationship, the client company runs the risk of a court holding it liable for the PEO's responsibilities.

This situation was actually played out in a Florida courtroom in 1995. *In Re Garami*, 184 B.R. 834 (M.D. Fla. 1995). In that case, a bankruptcy court ruled against the client company, finding it liable for the unpaid taxes left by a PEO firm that the court felt assumed no substantive employer attributes. With respect to state unemployment taxes, again it is the PEO that is regarded as the employer in the majority of states. Some states require the PEO to use their client company's account number when filing unemployment tax reports.

Whether temporary services or staff leasing companies are joint employers of temporary and leased workers can determine legal liabilities for everything from errors in tax withholdings to sexual harassment. Unfortunately, there has been little uniformity in answering this question with respect to the numerous state and federal laws governing the employment relationship. In 1995, a federal court addressed this question *(Astrowsky v. First Portland Mortgage Corp.*, Case No. 94-260-P-C (D.Me.1995)). If anything, the court's treatment of the issue illuminates the difficulty courts encounter in distinguishing temporary services from employee leasing. This difficulty will lead to inconsistent rulings by our various court systems under the diverse labor and employment laws regulating the industry.

Astrowsky involved an employee leasing arrangement. Employees of First

Portland Mortgage Corporation, including plaintiff Astrowsky, were terminated and rehired by a staffing firm, Atlantic Staff Management. Atlantic Staff Management provided payroll services. Supervisors were employed by First Portland, and employee commission rates, daily work schedules, and vacation benefits were all determined by First Portland.

Astrowsky sought time off, claiming that he was entitled either to vacation or medical leave time. First Portland allowed Astrowsky four days off and told him he would be disciplined if he failed to return to work after that time. Three and one-half weeks later, Astrowsky tried to return to work and was terminated. Astrowsky sued First Portland and Atlantic Staff Management under state and federal laws for age discrimination, retaliation, violation of the Family Medical Leave Act and additional state tort claims.

The court held that Atlantic Staff Management was not Astrowsky's joint employer because it did not exercise any control over his work environment. Because Atlantic Staff Management was not a joint employer with First Portland, the court ruled that it was not liable under Title VII, the Age Discrimination in Employment Act and state and federal Family Medical Leave Acts.

First Portland was held to be Astrowsky's sole employer. Without the combined payroll of Atlantic Staff Management, First Portland employed too few employees to meet the legal definition of "employer" for purposes of these statutes.

The court may have been influenced by the fact that the IRS in a separate case determined that First Portland, and not Atlantic Staff Management, was Astrowsky's employer for tax purposes. In this regard, *Astrowsky* reflects a growing sense that the legal relationship between the parties should be the same under all employment laws.

On the other hand, the court distinguished a similar case from the U.S. Court of Appeals, which held that a temporary service firm and its customer employer were joint employers for the purposes of Title VII. Without offering a detailed explanation, the *Astrowsky* Court reasoned that temporary services provided in the Court of Appeals decision were factually distinguishable from an employee leasing arrangement. Despite its apparent effort to reach a single inconsistent result, *Astrowsky* began to pave the way for inconsistent treatment of temporary services and staff leasing firms. The case illustrates how little the courts understand the rapid developments within the industry, and how difficult it has been for them to create a legal climate in which the industry can be predictably and fairly regulated.

In order to minimize the risk of joint employer liability, temporary service firms and their customers may structure their relationships to determine who will control the temporary employees' work environment. Such arrangements should be clearly spelled out in the service contract. The parties may also allocate many of the risks of joint employment through the use of carefully drafted indemnity agreements. These precautions will increase the likelihood that courts will rely on the realities of the relationship between the parties rather than their own assumptions about how the industry works.

It is not possible to eliminate all potential co-employment liability, but there are steps both customers and temporary help firms can take to reduce exposure to a minimum.

D. The Contingent Workforce and Alternative Staffing

The "contingent workforce" has become a catch-all of what is loosely described as that portion of the workforce not attached on a more or less permanent basis to a traditional single employer. As such, it includes independent contractors, part timers, contract workers, temporary employees, self-employed persons and free lance workers of all types.

Many employers supplement their existing employment ranks with temporary employees. This strategy avoids the layoff and recall of regular employees, which may provide some sense of job security to employees. An employer also can avoid higher benefit costs since the temporary or contract employees are not placed on the employer's regular benefit program.

For unemployment compensation and workers' compensation purposes, the law generally views the temporary employee as employed by the temporary agency. For OSHA compliance purposes, the law generally treats the temporary employee as employed by the business utilizing the service. For discrimination law purposes, the temporary agency and its customer may be viewed as joint or co-employers, meaning that each may be liable for the others' discriminatory acts.

More and more firms are turning to staffing companies to provide temp-to-perm arrangements whereby a prospective employer can try someone out before making a hiring decision that may be difficult to reverse. Some companies are now filling all of their full-time hiring needs by this means.

E. Contracts

1. General Considerations.

Once a company decides to use an alternative staffing option and identifies a PEO, the terms of the agreement must be put in writing. While the terms of the agreement necessarily vary depending on circumstances, here are a few general points to remember.

a. Beware of preprinted or standard forms. When negotiating a leasing contract, you must understand and agree with every clause. Anything you do not understand should not be in the contract.

b. Clarity is essential. Keep the contract simple and straightforward. Clearly define the respective rights and obligations of both sides. Resist the temptation to leave ambiguous provisions for later interpretation.

c. Consider including an alternative dispute resolution provision.

d. Make sure the contract includes a simple opt-out procedure if the company is dissatisfied for any reason – be wary of fixed-term contracts.

e. Negotiate clear and precise provisions which address what happens when the relationship ends or the contract expires. These are the most likely times for disputes to mushroom into unnecessary litigation.

2. Areas to Negotiate

a. Term of the Contract. The initial term of the average client services agreement can range anywhere from six months to two years. As stated above, be wary of fixed-term contracts. Some PEOs are willing to provide a "guarantee" of sorts with respect to the first six months by agreeing to refund any service fees paid to the PEO if the client company is dissatisfied with the PEO's performance in any way during this period.

b. Health Insurance. PEOs will normally require client companies to pay one month in advance for all health premiums due for the leased employees. Provisions are also added in the event the client company terminates the agreement in the middle of the month, which require that the client company pay all health premiums for its leased employees through the end of the month in which the termination occurs.

c. Workers' Compensation. The PEO should state that it will furnish and keep in full force and effect, at all times during the term of the agreement, workers' compensation insurance covering all of its employees leased to the client company under the terms of the agreement, and that upon the client company's request, shall issue, or cause to be issued, a certificate of insurance naming the client company as an additional named insured.

Needless to say, the PEO will also state in the agreement that the client company shall pay all costs of workers' compensation insurance for all its leased employees.

d. State Unemployment Insurance. The PEO will include a paragraph stating that the client company shall pay all costs of unemployment insurance for all of the leased employees assigned to the client company.

The agreement may also include a special paragraph regarding what would happen if the event of the sale, dissolution, liquidation, reorganization or closing of the client company's business during the term of the Agreement that results in the termination or layoff of any of the PEO's employees assigned to the client company under the agreement. The client company would agree to reimburse the PEO the actual cost for all unemployment expenses and charges incurred by the PEO with respect to such terminated or laid off employees, in the event the PEO is unable to find other employment for such employees and must terminate their employment for lack of work or any other reason.

The client company will also need to agree to cooperate fully with the PEO when required to assist in defending itself against disputes relating to employees, unemployment claims or litigation resulting from personnel decisions or job actions relating to the PEO's employees' performance or failure to perform. The client company's cooperation shall include, but not be limited to, the completion of reports, if requested, participation in meetings, attendance at referee hearings as a witness, answering of questions or interrogatories, under oath or otherwise, and providing access to any compilation of the client company's documents relating to the PEO's employees.

e. Indemnification; Arbitration Clauses. With respect to indemnification, the PEO should indemnify, hold harmless, protect and defend the client company, its directors, officers and shareholders from any claims, expenses and liabilities or failure of the PEO. To withhold and pay taxes and applicable benefits, and to conduct itself in accordance with applicable federal and state law. The indemnification would include, but not be limited to, reasonable attorney fees and other costs and expenses of litigation, if necessary. However, the PEO shall not be liable in the event of the client company's loss of profits, business goodwill or other consequential, or incidental damages.

Except as covered by insurance, the client company would agree to indemnify, defend, and hold harmless the PEO from any and all liability, expense, including court costs and attorney fees and claims for damages or injury of any nature whatsoever, whether known or unknown, which the other may incur, suffer, become liable for or that may be asserted or claimed against one of them as a result of the acts, errors, or omissions, including, without limitation, any violation or breach or non-compliance with all health and safety and non-discrimination and sexual harassment laws, employment laws, PEO directives, etc., and any claim for damages due to sexual harassment or sexual discrimination, solely by the client company. The indemnification would include, but not be limited to, reasonable attorney fees and other costs and expenses of litigation, if necessary. However, the client company will not be liable, in any event, for the PEO's loss of profits, business, goodwill, or other consequential or incidental damages.

f. Personnel matters. When dealing with the issue of supervision and control of leased employees, the PEO will have its "Designated Agent" perform all necessary duties regarding the leased employees assigned to the client company. The PEO, through its Designated Agent, shall have the sole responsibility of hiring, evaluating, disciplining, and firing individuals assigned to fill the client company's Job Function Positions. Under no circumstances will the client company have the right to terminate the PEO's employee (unless it is done by the Designated Agent). The PEO, through its Designated Agent, shall retain full control over all personnel decisions. The client company will agree to comply with the PEO's Designated Agent's directives, both general and specific, regarding the layoff, suspension, or terminations of the PEO's leased employees. Please note, that the "Designated Agent" is, in most cases, an officer, supervisor or member of senior management of the client company prior to the client company entering into the agreement with the PEO. After the agreement is entered into between the PEO and the client company, this "Designated Agent" becomes a leased employee.

g. Safety and Risk Management. The PEO will have the client company agree to cooperate and comply with specific directives from the PEO relating to applicable health and safety laws, although the PEO shall have no duty to give such directives.

The PEO will also require that the client company agree that the PEO's representatives or agents, and its workers' compensation insurer, shall have the right to inspect the client company's premises during normal business hours and at such other times as agreed with the client company. The PEO will agree to give not less than 48 hours advance notice of any such inspection to be conducted unless otherwise agreed to by the PEO and the client company.

In the event of injury, the client company will agree that it will immediately report all accidents and injuries to the leased employees to the PEO.

h. Specific Duties of the PEO. As stated above, the agreement should provide a detailed description of the services to be performed by the PEO with respect to the leased employees. A sample follows:

EMPLOYER shall lease to CLIENT, and CLIENT shall lease from EMPLOYER, sufficiently qualified personnel to meet the CLIENT'S needs ("Leased Employees"). Those persons listed on Exhibit C, by CLIENT, and any individuals subsequently identified by CLIENT as qualified personnel, shall be deemed to be sufficiently qualified personnel for purposes of this Agreement. EMPLOYER shall: (i) compile, prepare, and file all payroll and employee information and make all proper payroll payments and deductions, including payments for income and social security tax requirements under local, state and federal laws for the Leased Employees; (ii) assume responsibility for administrative matters, employee records and personnel files (to which CLIENT shall have access), and the provision of contracted fringe benefits relating to compensation of the Leased Employees; and (iii) secure and maintain insurance coverage for the Leased Employees as required in this Agreement.

i. Payment for Services and Late Payment Charges. PEOs usually provide several ways for client companies to pay their invoices. The agreement should spell out when payment is due, such as upon receipt of the invoice from the PEO, whether payment will be made by company check, direct wire transfer, or through a debit authorization agreement.

XIII. <u>BENEFITS OF PEOS</u>

A. For the Business

1. Controls costs; a client company may reduce its UA and workers' compensation rates.

2. Allows more time to run the business due to reduced amount of time spent on administrative chores.

3. Improves cash flow and predictability of expenses.

4. Saves time and paperwork hassles.

5. Reduces risk in connection with employee-related laws and regulations.

6. Provides professional compliance.

7. Reduces turnover; attracts and retains higher quality employees.

8. Claims management (e.g., workers' compensation, unemployment insurance, garnishments, etc.).

9. Provides better benefits packages; makes available top-shelf medical and dental benefit options, etc.; allows the company to make distinctions between the levels and types of pension and welfare benefits provided to employees.

10. Provides professional human resource services (e.g., employee handbooks, forms, policies and procedures).

11. Reduces accounting costs.

12. Advice helps insulate from wrongful termination or negligent acts in the workplace; a client company may avoid liability for discrimination suits if it relinquishes day-to-day control of employees or carefully contracts with the lessor for indemnification and hold harmless clauses in the lease agreement.

B. For the Employee

1. Comprehensive benefits previously unavailable.

2. Better employer/employee communications.

3. Payroll on-time and accurate.

4. Professional assistance with employment-related problems.

5. Professional orientation and employee handbook.

6. Extends statutory protection to employees.

7. Up-to-date information on labor regulations and workers' rights, worksite safety, employee wellness.

8. Efficient and responsible claims processing.

9. Portable benefits (employees can move from one PEO client to another without loss of eligibility for benefits).

C. For the Government.

1. Consolidates several small companies' employment tax filings into one.

2. More professional preparation and reporting.

3. Accelerated collection of taxes.

4. Extends medical benefits to more workers.

5. Expands the communication of government requirements and changes to the small business community.

6. Resolves many problems before they reach court or arbitration.

7. Allows government agencies to reach business through a single representative.

XIV. PAYMENT OF WAGES AND EMPLOYMENT TAXES

PEOs assume responsibility and liability for payment of wages and compliance with all rules and regulations governing the reporting and payment of federal and state taxes on wages paid to its employees. The Internal Revenue Service recognizes the PEO as the employer for federal income and unemployment taxes, and case law affirms the principle that the PEO is responsible for payroll taxes.

As the employer for employment tax and employee benefits, PEOs assume responsibility and liability for payment of state unemployment taxes, and most states recognize the PEO as the responsible entity. A few states require the PEO to report unemployment tax liability under its clients' account number, and four states have laws that hold the client and PEO jointly liable for unemployment taxes.

XV. HUMAN RESOURCE MANAGEMENT

A. Up-To-Date Advice, Re: Employment Law

PEOs provide worksite employees with coverage under the entire spectrum of employment laws and regulations, including federal, state, and local discrimination laws, Title VII of the 1964 Civil Rights Act, Age Discrimination in Employment Act, ADA, FMLA, HIPAA, Equal Pay Act, and COBRA. In some cases, these laws would not apply to workers at small businesses without the PEO relationship, since many statutes have exemptions based upon the number of workers in a workforce. Once included in the PEO's workforce, the workers are protected by these laws.

One of the PEO's functions is to keep its clients updated with respect to changes in employment laws and regulations, and to handle on the client's behalf, situations and events that may call these laws and regulations into play.

B. Benefits and Claims Management

A PEO may sponsor employee benefit plans for its worksite employees. Such benefits are either mandated by law, such as workers' compensation and unemployment benefits, or voluntary, but desirable in attracting and retaining quality employees, such as health, life, dental and disability insurance. Procure these benefits from licensed insurance agents and authorized insurers.

A PEO groups the client companies together and forms a larger base of employees in order to demand better rates from insurance carriers. "Numbers get you noticed," and for PEOs, their benefit programs have the advantage of high volume discounts.

PEOs will offer some or all of the following benefits at no extra charge: Section 125 Cafeteria Plan with medical reimbursement accounts and child care reimbursement accounts, a 401(k) savings and retirement plan, credit union membership, discount travel, entertainment and sporting events discounts, and personnel guidebooks.

PEOs may also provide input to the client company's day-to-day operations, including on-site safety/OSHA compliance programs, personnel policy manuals and seminars, supervisor training programs and ADA-approved job descriptions, and assist their clients in employee recruitment, training, performance evaluation, disciplinary actions, and termination decisions.

C. Unions and Collective Bargaining Agreements

Some proponents of employee leasing argue that it is a vehicle to avoid a union or potential liability under anti-discrimination or other employment laws. Using employee leasing for this purpose is dangerous.

PEOs work equally well in union and non-union workplaces. The National Labor Relations Board (NLRB) recognizes that, in co-employment relationships, worksite employees may be included in the client employer's collective bargaining unit. Where a collective bargaining agreement exists, PEOs fully abide by the agreement's terms. PEOs endorse the rights of employees to organize, or not organize, according to standards of the NLRB.

XVI. BENEFIT AND RISKS

A. Benefit Plans

The sponsoring of various employee benefit plans falls under the regulations set forth in the federal ERISA statute. State laws that "regulate insurance" may also apply. Based on its definition of "employer," ERISA gives PEOs the right to sponsor various employee benefit plans including life, health, disability plans, etc., provided the requisite employment relationship exists. As such, most PEOs also assume complete fiduciary responsibility and liability for their plans' compliance.

Unique issues are raised when a client company wants to retain its own employee benefit plan. This introduces a host of liability and compliance issues for both the client company and its PEO. Primarily, the client company, as plan sponsor, would assume the fiduciary and compliance responsibilities set forth in ERISA. The issue is COBRA applicability (only applicable to groups with 20 or more employees) since the company is now in a co-employer arrangement with a PEO whose employees number more than 20.

Whether the plan is subject to COBRA depends on the size of the "plan sponsor." If the client is the plan sponsor and has under 20 employees, it could be argued there are no COBRA liabilities. If the PEO offers a cafeteria plan and the employees are on its payroll, then it becomes necessary for the PEO to be the medical plan sponsor since it is the entity sponsoring the cafeteria plan and withholding employee contributions from the payroll and not the client company. In that instance, COBRA continuation coverage rights must be provided.

B. Retirement Plans

No area of co-employment has created greater confusion than the issue of benefits.

Similar to issues raised with medical and insurance benefits are those pertaining to the PEO's sponsored 401(k) and other retirement plans for its employees working at client company locations. Pending federal legislation should provide some clarification. The legislation would:

1. clarify that the PEO is the employer of the employees at its client companies, as it relates to federal withholding and sponsorship of benefit plans;

2. authorize PEO-sponsored plans to be tested under the IRS nondiscrimination rules on a disaggregated, "client-by-client" basis; and

3. allow a client company to recognize 401(k) contributions made by their PEO to the PEO's plan.

   In other words, the PEO could maintain a 401(k) for its employees at its client companies, and manage its plan accordingly to the relevant 401(k) tax laws, in accordance with disaggregated nondiscrimination testing. In application, the PEO would provide compensation to the employees, from which they would make their salary deferrals toward the 401(k) plan. These deferrals would be treated by the PEO as pre-tax contributions.

C. Workers' Compensation

Just as some states apply joint liability to the PEO and client company for payment of unemployment taxes, so too is the co-employer concept used when assessing responsibility for workers' compensation. Generally, the judicial system regards the PEO and client company to be co-employers, with the PEO regarded as the "general" employer and the client company viewed as the "special" employer of the "leased employee." Workers' compensation systems are "no-fault." In exchange for access to a no-fault system of redress for on-the-job injuries, employees are limited to workers' compensation claims as an exclusive remedy. It is important that both the PEO and client company realize the exclusive remedy protections.

On a state-by-state basis, there is again some variation as to how workers' compensation responsibility is allocated between PEO and client company. While some states hold the PEO to be the responsible party, other states require the client company to maintain a minimum policy for workers' compensation coverage. There are also those states in which the PEO and client company must demonstrate multiple and coordinated workers' compensation policies to cover their mutual employees.

The Michigan Supreme Court has applied the "economic reality" test in determining that a temporary employee furnished by a labor broker to its client was an employee of both the broker and the client. *Farrell v. Dearborn Manufacturing Co*, 416 Mich 267 (1982). The Court articulated the economic reality test as follows: "Control is a factor, as is payment of wages, hiring and firing, and the responsibility for the maintenance of discipline, but the test of economic reality views these elements as a whole, assigning primacy to no single one." The Court found it important that the temporary agency supplied and paid the employee, while the client exercised day-to-day control and authority over the employee, including the right to fire him or refuse his services.

1. The Court of Appeals has, in applying this test to an arrangement more akin to employee leasing, held that it is not the duration of employment that is determinative. Rather it is the shared responsibility and shared goals of the labor broker and its clients that is determinative. *Parkkonen v. Cleveland Cliff's Iron Co*, 153 Mich App 204 (1986), leave denied, 428 Mich 859 (1987).

2. A finding that the PEO is a joint employer with the recipient under the economic reality test is critical in order for the recipient employer to enjoy the benefit of the workers' compensation exclusivity

provisions. Where employers have not argued they were joint employers and instead attempted to rely on the statutory employer definition of the Act, courts have held they are not protected from tort claims by the exclusivity provision. See *Sexton v. JIT, Inc, 200 Mich App 52* (1993); *Burger v. Midland Co Generation Venture*, 202 Mich App 310 (1993).

XVII. COMPLIANCE ISSUES

Part of the PEO's service on behalf of its client companies is regulatory compliance with various workplace regulations including wage and hour requirements. While the Department of Labor views the PEO as the primary responsible party for wage and hour compliance, it does place some accountability with the client company. Specifically, the client company is held liable for accurate reporting of hours worked, and potentially for certain violations pertaining to inaccurate reporting of hours worked by on-site employees. In fact, the PEO can take action against clients who under report their employees' hours if the PEO has such a contractual right.

Generally, PEOs will assume responsibility for compliance with employment laws such as Title VII, Family and Medical Leave Act (FMLA), Age Discrimination in Employment Act (ADEA), Americans With Disabilities Act (ADA), etc. Generally, regulations put forth by the Occupational Safety and Health Administration (OSHA) also hold the client company accountable for creating a safe and hazard-free workplace based on the principle that the business and not its PEO has a physical presence in the work environment. There are exceptions to this general rule in California and Florida.

The NLRB views the PEO as a joint employer or co-employer. As co-employer, the PEO is expected to uphold fair labor practices, whether pertaining to union organizing, collective bargaining agreements or other labor-related issues.

One of the ways in which the independent contractor employee issue is raised occurs when a worker requests unemployment benefits. One of my clients runs a small but very successful home health agency. This agency provides home health care aides who assist an individual who has just been released from the hospital and is recovering from illness at home. Again, it is a situation in which the customer pays the agency, the agency pays the home health worker. This worker was dissatisfied with her situation and quit. She applied for benefits from what was then the Michigan Employment Security Commission and, of course, there was no record of contributions for this worker. Accordingly, we had a hearing before an administrative law judge. I was not very optimistic because I perceived the agency as being employee oriented. We had the hearing. The claim was represented by an attorney employed by the State of Michigan. Notwithstanding my initial fear, the worker was classified as other than an employee. Benefits were not allowed.

One of the other cases I want to discuss dealt with an optometrist. This optometrist was classified by his company as other than an employee. As a result, the optometrist received a 1099 and paid self-employment tax. In other words, he paid both halves of the FICA. There was a falling out between the optometrist and the company and the optometrist, on his own, contacted the IRS in an attempt to obtain a refund of one-half of the self-employment tax which he had paid. The IRS requested both the company and the worker to fill out a form SS-8. This form is used by the IRS to determine if the worker is an employee or an independent contractor. In almost all cases, the IRS determines the worker to be an employee. Accordingly, the optometrist only had to pay his half of the social security tax. The company had previously been audited by the IRS so it obtained relief under Act Section 530. When I dealt with the IRS on this matter, I asked the agent, I said, "Who pays the other half of the social security tax?" And to my surprise, the agent told me, "Nobody pays the other half of the tax."

Professional Employee Organization

You will see on page 20 there is a definition of a professional employer organization, a PEO. However, in our society today, PEOs come in all shapes and sizes and serve a number of different purposes. For example, if you go into the automotive companies today, you will see there are a lot of designers, computer technicians, etc. that are on the premises of Ford, GM or Chrysler but these are full-time employees of another company and these workers are "leased" to the auto company on really a more or less permanent basis. Second, you find a lot of these temporary employment agencies. Some of these were described before in the section on Employee vs. Independent Contractor. A company needs thirty additional workers for a three-month period or for a two-week period. It calls on the agency and the agency furnishes the workers. These same workers may work for the agency on a full-time basis but may be shifted between a dozen employers during the course of a year. These are sporadic workers, contingent workers; oftentimes these are so-called blue jean jobs that don't require a lot of skill.

Your colleague discussed the optometrist case awhile ago. This optometrist became weary of handling employee payroll, workers comp, fringe benefits, etc. and, as a result, he transferred all of his workers to a PEO and all of the employees of the corporation, except the optometrist himself, are employees of the PEO. He, obviously, compensates the PEO by reimbursing it dollar for dollar for certain costs, paying a servicing fee and other fees. I represent a large medical group that may have forty employees. It no longer wanted to handle its own billing, It hired a billing company and the first thing the billing company did was to hire the four or five employees of the PC engaged in billing. Accordingly, if a patient walks in, he sees the same employees performing the same functions; however, these billers are no longer employed by the PC but by a billing company. Accordingly, today you will see lots of workers on premises who are no longer employed by the company which occupies the premises.

The reasons for these arrangements are varied but, as a general rule, they fall into a few categories:

A. The company shifts the administrative burden of the employees to someone else.

B. The company may not be able to offer the same fringe benefits that a PEO may offer.

C. The company may not be able to justify preparing employee manuals and developing policies on its own whereas the PEO can spread the costs of the same among numerous companies.

You will see on page 25 of the outline a hearing "Who is Liable?" The liability can be for payroll taxes, for injuries on the job, for violations of fair labor standards acts, etc. Without going through all the details and the different decisions, there are really three choices:

A. The PEO;

B. The company; or

C. Joint liability

And, as you will see in a number of cases, there is joint liability.

At page 29 we discuss considerations in entering into an agreement with a PEO. The agreement with a PEO is like any other contract. It should be read, it should be understood and it can be negotiated. We recommend avoiding form agreements to the extent possible or, at least, supplementing and amending those forms to comply with your factual situation.

The benefits of PEOs are on page 35.

In any PEO agreement, you should provide for an exit strategy. If, at any time, you are dissatisfied with the PEO, if you believe the PEO is not fulfilling its obligations, you should be able to cancel the contract on short notice. The difficulty, of course, is the ability to, on short notice, get back to the situation in which you are able to furnish health insurance and other fringe benefits to your employees.

Payroll functions can be easily transferred without all of the other PEO entanglements.

NON-DISCLOSURE AND NON-COMPETE AGREEMENTS - <u>HELP OR HYPE?</u>

By: Stewart C. W. Weiner

I. NON-DISCLOSURE AGREEMENTS

A. What are Non-Disclosure Agreements?

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

2. Types.

a. Non-disclosure agreements

b. Confidentiality agreements

c. Secrecy agreements

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

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

B. Why use Non-Disclosure Agreements?

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

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

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

      i. Competitors.

      ii. General public.

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

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

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

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

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

C. When and How to Use Non-Disclosure Agreements

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

2. Non-Disclosure Agreements should be used with <u>all employees</u> and with <u>all independent contractors</u>.

3. Non-Disclosure Agreements should be used <u>all the time</u>. There is almost no downside to Non-Disclosure Agreements.

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

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

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

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

a. Stamping documents “Confidential,” and

b. Customizing computer software for:

i. Log-on with special confidential acknowledgment,

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

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

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

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

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

3. Non-Disclosure Agreements should cover and prohibit the unauthorized disclosure of all business information, which should

specifically include information which is confidential and non-confidential, secret and non-secret, proprietary and non-proprietary, and generally known and not known.

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

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

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

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

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

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

3. Typical exclusions or omissions may include:

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

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

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

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

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

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

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

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

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

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

II. <u>NON-COMPETE AGREEMENTS</u>

A. History

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

2. The exception was a route list. The ability to compete was limited to a maximum of ninety (90) days.

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

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interest and expressly prohibits an employee from engaging in employment or a line of business after termination of

employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

1. What is an employer's protectable interest?

   a. The statute does not provide a definition.

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

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

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

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

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

C. What are Non-Compete Agreements?

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

2. Names, types, or forms.

   a. Non-compete agreements.

   b. Restrictive covenants.

   c. Non-solicitation agreements.

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

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

D. Why use Non-Compete Agreements?

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

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

3. Non-Compete Agreements help prevent unreasonable competition.

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

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

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

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

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

2. Non-Compete Agreements should be used with <u>most employees</u> and with <u>all independent contractors</u>.

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

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

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

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

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

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

4. The restrictions should be reasonable as to:

   a. Time or Term

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

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

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

   b. Geography or Area

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

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

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

   c. Scope or Coverage

      i. Restriction limited to legitimate business interests.

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

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

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

5. Restrictions should include:

a. Prohibitions against competing with, contacting or soliciting <u>actual</u> and targeted customers or clients.

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

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

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

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

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

2. Unreasonable restrictions are:

a. Restrictions which prevent someone from:

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

ii. Making a living, and

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

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

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

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

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

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

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

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

I. Enforcement

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

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

   Yes. <u>See</u> *Lowry Computer Products, Inc. v Head,* <u>supra</u>.

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

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

b. If a new contract is signed with the current employer. *Robert Half International, Inc. v Van Steemis,* 784 F Supp 1263 (ED Mich 1991).

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

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

   b. The issue is fact sensitive to industries. In certain industries (i.e., computer hardware sales) a shorter restrictive covenant period might increase the ability to enforce the covenant as written.

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

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

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

   Yes. Michigan courts have discretion to modify unreasonable covenants.

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

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

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

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

   b. The plaintiff will be harmed, if temporary relief is not granted, more than the opposing party.

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

   d. The plaintiff will be irreparably harmed if the relief is not granted.

   e. Granting the injunction will preserve the status quo.

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

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

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

Id. at 11.

III. TRADE SECRETS

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

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

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

B. Michigan Law.

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

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

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

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

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

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

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

C. Enforcement.

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

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

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

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

1. Yes. MCL 752.772 states:

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

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

IV. <u>ECONOMIC ESPIONAGE ACT OF 1996 ("The Act")</u>

A. The Act.

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

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

B. Conduct.

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

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

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

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

C. Intent.

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

D. Penalties.

A violation could result in a fine for an individual up to $500,000 or imprisonment up to 15 years, or both. An entity found in violation of the

Act may be liable for a fine up to $10 million and may be required to forfeit property derived from illegal conduct.

E. Safeguards.

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

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

FAMILY AND MEDICAL LEAVE ACT

By: David E. Hart

I. FMLA COVERAGE AND ELIGIBILITY

A. Coverage

Public employers and private employers with fifty or more employees are "covered employers" under the FMLA. 29 U.S.C. § 2611(4); 29 C.F.R. §825.104.

1. Definition of "Employees"

Any individuals on the payroll for twenty or more work weeks in the current or preceding calendar year are counted when determining if an employer has fifty employees. Part-time employees, employees on leaves of absence who have a reasonable expectation of recall and employees from a temporary agency whom the employer reasonably expects to continue using also are counted. 29 C.F.R. §§ 825.105-106.

2. Joint Employment

For temporary agency employees, only the primary employer (the temporary agency) is responsible for providing notice, leave, health benefits and job restoration. However, the secondary employer must accept the employee returning from FMLA leave if that employer is still using temporary employees from that temporary agency and the agency sends the employee returning from leave to the employer. 29 C.F.R. § 825.106. However, if an employer "controls every aspect" of the employee's employment it may be found to be that employee's employer.

D. Eligibility

1. Size of Employer

To be eligible for leave, an employee must work at the worksite with fifty employees or for an employer that has fifty or more employees within seventy-five miles of that worksite.

a. Eligibility is determined at the time the employee gives notice of the need for leave. 29 C.F.R. § 825.110(f).

b. Eligibility is determined by statutory language. Parties may not consent to be bound by any other method.

c. The "integrated employer" test has been adopted by the Department of Labor, (29 C.F.R. § 825.104(c)(2)), but not all courts agree with its application to FMLA claims.

i. Companies under common ownership have been found by some courts to be one for FMLA employee counting purposes.

ii. Reasonings used in ADA cases have been applied by some Courts when looking at how an affiliated corporations should be considered for counting purposes (1) where conditions being present for "piercing the veil" to allow a creditor of one corporation to sue an affiliated person or entity, (2) where a business splits itself up into a number of corporations, each with fewer than fifty employees, for the purpose of avoiding liability under the employment laws; and (3) where the parent corporation might have directed the discriminatory act of which the employee of the subsidiary was complaining.

iii. Some courts have found that the concept of "integrated enterprise" does not apply to claims under FMLA.

2. Length of Employment

To be eligible, an employee must also have worked for the employer for at least (but not necessarily consecutive) twelve months. 29 C.F.R. § 825.110(b). In a joint employment relationship, the periods of employment with each employer can be aggregated.

3. Number of Hours Worked

To be eligible under the FMLA, an employee must have worked at least 1,250 hours (about twenty-four hours per week) over the previous twelve-month period. 29 U.S.C. § 2611(2).

a. The 1,250 hours means "hours worked" under the Fair Labor Standards Act. 29 C.F.R. 825.110(c). Therefore, paid vacation, sick time, holiday pay, paid FMLA leave and other pay for hours not actually worked do not count towards the 1,250 hours.

b. The employer has the burden of showing that the employee has not worked the requisite hours. 29 C.F.R. § 825.110(c).

4. Eligibility Date

Eligibility for leave is determined as of the date leave commences.

5. Employer Responsibility to Notify Employee of Ineligibility

If an employee who is ineligible from FMLA benefits requests leave, the employer must either advise the employee when he or she will be eligible based upon a projection or advise the employee when the eligibility is met. 29 C.F.R. § 825.110(d).

Once an employer advises an employee of a projected eligibility date, the employer may not subsequently challenge the employee's eligibility. 29 C.F.R. § 825.110(d).

a. Failure to give notice of ineligibility.

If the employer fails to notify the employee that the employee is not eligible for FMLA leave within two days of receiving the employee's request for leave that employee may become eligible. 29 C.F.R. § 825.110(d). Courts disagree on the validity of this regulation.

b. If an employer mistakenly confers FMLA benefits, the eligibility requirements are <u>not</u> waived. However, the employee may claim that an employer is estopped from asserting ineligibility if he/she has relied on the employer's failure to notify of ineligibility.

6. Individual who has Resigned is no Longer Eligible

FMLA rights cease upon an employee's resignation. However, employees who have been fired may be eligible.

II. <u>FMLA LEAVE REQUIREMENTS</u>

A. Length and Purpose of Leave

1. Eligible employees are entitled to up to twelve weeks of unpaid leave per twelve-month period:

2. Upon the birth of a child and/or to care for the child;

3. When a child is placed with the employee for adoption or foster care;

4. To care for an immediate family member (spouse, child or parent) of the employee with a serious health condition;

5. When a serious health condition makes the employee unable to perform the functions of his or her position. 29 U.S.C. § 2612(a).

B. Definitions

Documentation of the family relationship may be required by an employer (i.e., court record, birth certificate or a signed statement by the employee).

1. Spouse

"Spouse" includes common law spouses if the state in which the employee *lives* recognizes common law marriages, does not include unmarried domestic partners. When both spouses work for the same employer, the total twelve-month period may be limited to an aggregate of twelve-weeks for leave taken for either the birth/adoption/foster care of a child or to care for a parent with a serious health condition.

2. Child

"Child," includes any child either under eighteen years of age, or eighteen years of age or older who is incapable of self-care because of a mental or physical disability as defined by the Americans With Disabilities Act (ADA). An employee's "child" is a child who is under the actual day-to-day responsibility of the employee for care and includes a biological, adopted, foster or step-child.

a. An employee's right to leave for the birth or placement for adoption/foster care ends twelve months after the child's birth or placement with the employee.

b. Leave to care for an adult child is appropriate where the child is incapable of self-care.

3. Parent

"Parent" means biological parent or an individual who has stood *in loco parentis* to an employee when the employee was a child. *Loco parentis* means any individuals whose daily responsibilities were to care for and financially support the employee when the employee was a child. A biological or legal relationship is not necessary.

4. Discrimination in Granting Leave

Employers must not restrict types of FMLA leave to classes of employees; all employees must be treated equally.

C. Twelve-Month Period

1. An employee's eligibility for leave in a twelve month period may be considered under one of several options:

a. *The calendar year*. An employee may be able to take twelve weeks of leave at the end of the next calendar year and again at the beginning of a calendar year for a total of twenty-four weeks continuous leave.

b. *Any fixed twelve-month year*, like the fiscal year, an employee may take back-to-back leave on either side of the year, for a potential twenty-four week leave of absence.

c. *A variable twelve-month period* the twelve-month period following the date the employee's leave begins. Here, an employee becomes eligible for an additional leave twelve months after the first date the employee began FMLA leave.

d. *A rolling twelve-month period* looking back from the date an employee uses FMLA leave. Under this method of calculation, each time an employee takes FMLA leave, the employee remains entitled to the balance of the twelve weeks but on a staggered basis.

2. If an employer does not advise employees how it will calculate the twelve month period, the *employee* can select the most advantageous twelve-month period. 29 C.F.R. § 825.200(e).

3. An employer must select a twelve month period and uniformly apply it to all employees in all facilities. However, an employer may use the twelve month period required by that state's FMLA statute when state statutes exist. 29 C.F.R. § 825.200(d).

4. Once an employer has selected a twelve month period, it must give sixty days notice of any change to its calculation of the period and must transition the change in a way that affords the greatest benefit to employees. 29 C.F.R. § 825.200(d).

D. Substitution of Paid Leave

1. Possible Substitutions

An employee may elect, or an employer may require, substitution of accrued paid leave for any part of leave provided under the FMLA as follows:

FMLA Leave	Accrued Paid Leave That May Be Substituted
Child care after birth, adoption, foster care	Vacation, personal family
Care for a family member	Vacation, personal, family, medical, sick
Employee's serious medical health condition	Vacation, personal sick

29 U.S.C. § 2612(d)(2).

2. Additional Leave Time

When appropriate paid leave has been substituted, the employer need only provide an additional period of unpaid leave so that the total of paid and unpaid leave equals twelve weeks. 29 U.S.C. § 2616(d)(1).

If neither the employer nor employee designates or elects to substitute accrued paid leave for unpaid FMLA leave, the employee will remain entitled to all of the paid leave the employee is otherwise entitled to under the employer's plan notwithstanding the employee's use of FMLA leave. 29 C.F.R. § 825.207(f).

3. Employer's Plan Requirements

An employee is only entitled to substitute paid vacation, personal, sick or medical leave to the extent provided by the employer's plan. 29 C.F.R. § 825.207(e).

4. Compensatory Time Off

Comp time may be substituted for FMLA leave. 29 C.F.R. § 825.207(i).

5. Workers' Compensation

An employer may also designate workers' compensation leave as FMLA leave if the injury is a serious health condition under the Act. 29 C.F.R. § 825.207(d)(2). If an employee on workers' compensation leave is certified to return to work with restricted or limited duties, the employee may decline the limited duties job and remain on unpaid FMLA leave for the remainder of the twelve-week period.

6. Timing of Election

Substitution of accrued paid leave, whether at the employee's election or required by the employer, must be made before leave starts. 29 C.F.R. § 825.208(c).

7. Disputes

Any dispute between an employer and employee regarding the use of paid leave must be documented.

E. Intermittent or Reduced Leave Schedule

The FMLA allows employees to take leave intermittently (for a few days or even a few hours) or on a reduced schedule (a reduction of working hours per work week or work day) as follows:

1. Child Care Leave

An employee may take leave intermittently or on a reduced leave schedule for child care only with the employer's consent.

2. An employee may take leave intermittently or on a reduced leave schedule to care for an immediate family member with a serious health condition or because of a serious health condition of the employee when "medically necessary." 29 U.S.C. §2612(b)(1).

a. “Medically necessary” reasons include: planned and/or unanticipated treatments by or under the supervision of a health care provider, leave for recovery from or for treatment of a serious health condition.

b. Where possible, leave must be scheduled so as not to disrupt the employer’s operation. 29 C.F.R. § 825.302(c).

c. The employer can temporarily transfer the employee to a position with equivalent pay and benefits that better accommodates periods of leave. 29 C.F.R. § 825.204. Although the alternative position must have equivalent pay and benefits, it need not have equivalent duties. 29 C.F.R § 825.204(c).

d. The employee must be returned to the same or equivalent job as the job he or she had at the time the leave commenced when there is no longer a need for leave. 29 C.F.R. § 825.204(e).

e. Intermittent leave and leave on a reduced leave schedule may be taken for a chronic serious health condition even if no treatment by a health care provider is received for a particular absence. 29 C.F.R. § 825.203(c)(2).

3. Calculation

Only time actually taken as leave can be charged against the employee’s leave entitlement. 29 C.F.R. § 825.205(a).

a. An employer may limit leave increments to the shortest period of time the employer’s payroll system uses. 29 C.F.R. § 825.203(d).

b. When deducting intermittent or reduced schedule leave from the overall FMLA leave entitlement, it is often necessary to break the twelve-week entitlement up into hour-long (or smaller) increments. The number of hours against which leave is taken depends on the employee's normal work schedule. 29 C.F.R. § 825.205(a). For part-time employees and those who work variable hours, FMLA leave entitlement is calculated on a prorated basis. 29 C.F.R. § 825.205(b).

c. An employee cannot be required to take more FMLA leave than he or she needs. 29 C.F.R. § 825.203(d). However, the employee must give his or her employer two business days notice in the event the anticipated leave period changes. 20 C.F.R. § 825.302(a).

III. EMPLOYER NOTICE OBLIGATIONS

A. Posting Requirements

All employers must post, in a conspicuous space, an approved Department of Labor notice that summarizes the pertinent provisions of the FMLA and provides information on the filing of a charge. 29 C.F.R. § 825.300(a). The employer must provide the notice in a language in which the employees are literate. 29 C.F.R. § 825.300(c).

B. Handbooks

Where an employee handbook/policy manual is used, it must include FMLA policy outlining FMLA rights and employee obligations. 29 C.F.R. § 825.301(a).

Where there is no handbook, the employer must provide written guidance to any employee who requests FMLA leave. 29 C.F.R. § 825.301(a)(2).

The Department of Labor "Fact Sheet" satisfies the written guidance requirement. 29 C.F.R. § 825.301(a)(2).

C. Notice to an Employee Requesting FMLA Leave

1. Written Notice of FMLA Rights and Obligations

If an employee requests FMLA leave or the employer designates time off as FMLA leave, the employer must provide the employee written notice that includes;

a. An indication that the leave will be counted against the employee's annual FMLA leave entitlement;

b. Any requirement for a medical certification and the consequences of failing to provide certification;

c. The employee's right to substitute paid leave;

d. Any requirement to make premium payments to maintain health benefits, the arrangements for payments, and the consequences of failing to do so;

e. Any requirement for a fitness-for-duty certificate;

f. The employee's status as a "key employee" and its consequences;

g. The right to restoration to the same or equivalent position; and

h. Potential liability for the employer's share of health insurance premiums paid by the employer if the employee fails to return to work. 29 C.F.R. § 825.301(b)(1).

2. Timing of Written Notice

Written notice of FMLA rights and obligations must be given one to two business days after the need for leave is given. 29 C.F.R. § 825.301(c).

3. Frequency of Written Notice

Written notice of FMLA rights and obligations must be given once every six months unless leave circumstances change. For intermittent or reduced leave schedule leaves, only one notice is required. 29 C.F.R. §825.301(c).

4. Designation of FMLA Leave

a. Oral Designation

Oral designation must be given one to two business days after the need for leave is given. 29 C.F.R. § 825.208(b)(2).

b. Written Confirmation Required

Written confirmation that the time off is FMLA leave must be made by the next pay day, or if the next pay day is less than one week after the oral designation, by the subsequent pay day. 29 C.F.R. § 825.208(b)(2).

c. Frequency of Notice

Time off as FMLA leave must be designated by the employer *each* time an employee takes time off for a known FMLA reason. For intermittent leave or reduced schedule leave, only *one* notice is required. 29 C.F.R. § 825.208(a).

d. Employer may designate leave even when employee has not requested FMLA leave.

5. Failure to Designate Leave

An employer who knows that time off is for an FMLA reason and who fails to designate the time off as FMLA leave may face severe consequences. The time off may not be counted against the employee’s twelve week entitlement but. 29 C.F.R § 825.208(c).

D. Retroactive Designation of Leave

1. Employer Fails to Designate

An employer who fails to designate leave as FMLA leave where the leave is known by the employer to qualify, may <u>not</u> retroactively so designate the leave. The time off may not be counted against the employee’s twelve week entitlement, but the employee receives all FMLA protections.

2. Employer Later Learns of FMLA Reason

If an employer learns that leave is for an FMLA reason after leave has begun and the employee is still on leave, that portion of the leave that is FMLA qualifying may be retroactively designated. 29 C.F.R. § 825.208(d).

3. Employer Learns of FMLA Reason After Employee has Returned to Work

If an employer learns that leave was for an FMLA reason after the employee has returned to work, the employer can retroactively designate the leave as FMLA leave if it does so within two business days of the employee’s return to work. 29 C.F.R. § 825.208(e)(1).

4. Employer has no Knowledge of FMLA Reason

If an employer never learns that leave is for an FMLA reason but the leave *was* for an FMLA purpose, the employee must notify the employer within two business days of returning to work that the leave was for an FMLA reason and may then be retroactively designated. If the employee fails to do so, he/she has no FMLA protection for the absence.

IV. SERIOUS HEALTH CONDITIONS

A. Serious Health Condition

A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves one of two conditions:

1. Inpatient Care at a Hospital, Hospice or Residential Medical Care Facility

An overnight stay at a hospital or residential care facility qualifies. 29 C.F.R. § 825.114(a)(1). So too do periods of incapacity or any subsequent treatment in connection with such inpatient care. *Id*.

2. Continuing Treatment

A serious health condition also occurs where an employee received continuing treatment by a health care provider in five situations:

a. Absence Plus Treatment

Any period of incapacity of more than three consecutive calendar days.

b. Pregnancy

An incapacity due to pregnancy or for prenatal care.

c. Chronic Conditions

Any period of incapacity due to a chronic serious condition. A chronic serious health condition is one that:

i. requires periodic visits or treatment by a health care provider or a nurse or physician's assistant under the direction of a health care provider;

ii. continues over an extended period of time; and

iii. may cause episodic rather than a continuing period of incapacity (e.g., epilepsy, diabetes, asthma, etc.).

d. Permanent/Long Term Conditions

A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's).

e. Multiple Treatments/Non-Chronic Conditions

Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or someone under a health care provider's supervision or referral for:

i. restorative surgery; or

ii. for a condition that would likely result in more than three consecutive days absence without medical intervention or treatment. 29 C.F.R. § 825.114(a)(2).

B. Other Definitions

1. Treatment

"Treatment" is care such as examinations to determine if a serious health condition exists and evaluation of the condition. 29 C.F.R. § 825.114(b). However, routine physical examinations, are not included as treatments.

2. Inability to Perform Job Functions

An eligible employee may take FMLA leave for a serious health condition that makes the employee unable to perform the functions of his/her position. 29 U.S.C § 2612(a)(1)(D).

An employee is unable to perform the functions of his or her position when a health care provider finds that the employee: (1) is unable to work at all; or (2) is unable to perform any one of the essential functions of the employee's position within the meaning of the ADA. 29 C.F.R. § 825.115. Essential job functions are to be determined at the time notice for leave is given or when the leave commences, whichever is earlier.

3. Health Care Provider

a. A health care provider is:

i. a doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the state in which the doctor practices; or

ii. any other person determined by the Secretary of Labor to be capable of providing health care services. 29 U.S.C. § 2611(6).

b. The FMLA regulations further clarify that "health care provider" includes the following:

i. Chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as evidenced by an x-ray)

ii. Christian Science practictioners

iii. Clinical psychologists

iv. Dentists

v. Nurse practitioners, nurse midwives and clinical social workers who provide diagnosis and treatment

vi. Optometrists

vii. Podiatrists

viii. A health care provider who practices in a foreign country who is authorized to practice under the laws of that country. 29 C.F.R § 825.118(c).

C. Serious Health Conditions

When determining whether a condition is a serious health condition, one considers whether the condition requires hospitalization or multiple treatments by a health care provider or whether it causes an incapacity of three or more days.

1. Examples of Serious Health Conditions

a. Anemia

b. Atrial Fibrillation

c. Chicken Pox

d. Common cold, flu, ear aches, minor ulcers, upset stomachs, headaches other than migraines

e. Cumulative Diagnoses. Diagnoses, none of which alone rises to the level of serious health condition, but which are temporarily linked, may constitute a serious health condition when taken together.

f. Death of a Family Member: Although the FMLA does not encompass bereavement leave, leave to recover from the death of a family member may become a serious health condition.

g. Hysterectomy

h. Migraine headaches

i. Pregnancy and Miscarriage

In addition, the Department of Labor has indicated that the following conditions would likely qualify as serious medical conditions:

j. Heart attacks

k. Most cancers

l. Back conditions requiring extensive therapy or surgery

m. Pneumonia

n. Severe arthritis

o. Appendicitis

p. Treatment for allergies

q. Treatment for substance abuse by a health care provider

r. Physical examinations to determine if a serious health condition exists and evaluation of the condition.

2. Examples of Non-Serious Health Conditions

a. Allergy shots

b. Back injuries if there is no treatment with physician

c. Carpal Tunnel Syndrome without actual incapacity

d. Kidney Stones

e. Neck injury without actual incapacity

f. Poison Ivy

g. Rectal bleeding

h. Tooth extraction

i. Treatment for potential sexual abuse

V. EMPLOYEE NOTICE OBLIGATIONS

A. Requirements

1. An employee need not assert that rights be invoked pursuant to the FMLA. 29 C.F.R. §§ 825.302(C) and 303(B).

2. Notice is sufficient if the employee states that leave is needed for a qualifying reason.

3. If the employee fails to properly inform the employer, he or she has no FMLA protection for the absence.

4. If the employee's plans change, he or she must advise the employer as soon as practicable of the change in schedule. 29 C.F.R. § 825.302(a).

B. Foreseeable v. Unforeseeable Leave

If the need for leave is foreseeable, an employee must give thirty days notice to the employer before taking leave; otherwise, the employee must notify the employer as soon as practicable. 29 C.F.R. §§ 825.302(a) and 825.303(a).

"As soon as practicable" means both possible and practical (usually one or two business days after the need for leave becomes known). 29 C.F.R. § 825.302(b).

If an employee fails to give thirty days notice for a foreseeable leave with no reasonable excuse for the delay, the employer may deny the taking of leave until at least thirty days after the employee provides notice.

C. Intermittent/Reduced Schedule Leave

For intermittent/reduced schedule leave only one notice is required. 29 C.F.R. § 825.302(a).

D. Written Request

When there is an established policy, an employer may require an employee to submit a *written* request for FMLA leave. An employee's failure to provide written notice *cannot* result in denial of FMLA leave; however, the employee can be disciplined for violation of the policy. 29 C.F.R. § 825.302(d).

E. Paid FMLA Leave

If an employee substitutes paid leave under an employer's policy for FMLA leave, the employer's notification requirements for the particular paid leave apply. 29 C.F.R. § 825.207(h).

VI. EMPLOYEE PROTECTIONS UNDER THE FMLA

A. Benefit Protection

1. Group Health Plan Coverage

Group health plan coverage must be provided by the employer during FMLA leave under the same terms offered to employees not on leave. 29 U.S.C. § 2614(c)(1). Any plan changes which apply to all employees also apply to an employee on FMLA leave. 29 C.F.R. § 825.209(C).

2. Termination of Coverage for Late Payment

If an employee chooses to continue his or her group health insurance during FMLA leave, but the employee's payment is more than thirty days late, an employer may *terminate* the group health plan coverage, but all other FMLA rights continue, including all other coverage or benefits to which the employee would be entitled if the employee was not on leave. 29 C.F.R. § 825.212(a)(1); and 29 C.F.R. § 825.212(c).

In order to drop group health coverage for an employee whose payment is late, the employer must:

- give written notice that the payment has not been made;
- give written notice to the employee at least fifteen days before coverage is to cease; and
- give written notice to the employee that the group health plan coverage will be dropped on a specified date at least fifteen days after the date of the letter unless payment is received by that date. 29 C.F.R. § 825.212(a).

If the employer has established policies allowing the employer to cease coverage retroactively to the due date of a missed payment in non-FMLA circumstances, the employer may retroactively drop coverage provided the fifteen-day notice was given.

3. Election Not to Retain Coverage

An employee may choose *not* to retain health coverage during an FMLA leave. The employer, however, must reinstate the employee's coverage when the employee returns from leave on the same terms as before the leave, including family or dependent coverage, and subject to any change in the plan that occurred during the leave. 29 C.F.R. § 825.209(e).

4. No Requalification Permitted Upon Return

An employer may not require a returning employee to take a qualifying physical examination or be subject to a qualifying period upon his or her return from FMLA leave. If necessary, an employer may have to pay an employee's share of health insurance premiums during the leave in order to ensure that the coverage is continued without any qualifying conditions when the employee returns from leave. The employer may recover the cost of the employee's share of these premiums at the conclusion of the leave whether or not the employee returns to work. 29 C.F.R. § 825.213(b).

5. Termination of Employer's Obligation to Provide Group Health Plan Coverage

An employer's obligation to maintain group health plan benefits during FMLA leave (and to restore an employee to the same or equivalent employment) ceases if and when:

a. the employment terminated for reasons unrelated to the employee's FMLA leave;

b. the employee quits and gives the employer notice that he/she does not intend to return; or

c. the employee does not return from leave or continues on leave after the allowable twelve-month period. 29 C.F.R. § 825.209(f).

6. Other Benefits Other Than Group Health Plan Coverage

Benefits other than group health plan coverage during FMLA leave are determined by the employer's established policy during other forms of leave. 29 C.F.R. § 825.209(h). An employer's duty to reinstate an employee upon return from FMLA leave extends to such benefits. 29 U.S.C.. § 2614(a); 29 C.F.R. § 825.215(d).

7. Retirement Plans

Benefits under retirement plans must also be reinstated after FMLA leave as well. 29 C.F.R. § 825.215(d).

Any period of unpaid FMLA leave must not be treated as or counted toward a break in service for purposes of vesting or eligibility under retirement and pension plans. 29 C.F.R. § 825.215(d)(4). Unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility.

If a plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave will be deemed to have been employee on that date.

B. Job Protection

1. Requirements

Employers must restore an employee returning from FMLA leave to their same or an equivalent position. 29 U.S.C. §2614(a). An employee maintains this right to reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. 29 C.F.R. § 825.214(a).

a. An Equivalent Position

An equivalent position is one that is "virtually identical" to the employee's former position. 29 C.F.R. § 825.214.(a). Responsibility, authority, pay, benefits and status must be equivalent. 29 C.F.R. § 825.215(a).

b. Terms of Employment

An employee on FMLA leave may not lose any benefits or seniority accrued prior to leave. However, there is no entitlement to have additional benefits accrue during leave. The following conditions apply to employees returning from leave:

i. Work Assignment

The employee must be reinstated to the same worksite or one close in proximity, the same shift or similar work schedule and have the same opportunity for bonuses, profit sharing, etc. 29 C.F.R. § 825.215(e).

ii. Pay Increases

In general, an employee returning to the same or an equivalent position is entitled to any unconditional (*e.g.,* cost of living) pay increases that occurred during the leave. 29 C.F.R. § 825.215(c). Pay increases based on seniority, length of service, and work performed, however, may be delayed for employees on FMLA leave (unless the employer routinely gives such increases to employees on other types of unpaid leave) and may take into account the employee's unpaid FMLA absences.

iii. Employee Bonuses

An employee may not be disqualified from receiving a bonus because of FMLA leave. Although time off for FMLA leave may affect bonuses contemplating production or performance, FMLA leave may *not* affect bonuses based on the absence of occurrences such as perfect attendance or safety.

iv. Training

If an employee is no longer qualified because of inability to attend a course, renew a license, etc., he or she must be given a reasonable opportunity to fulfill those conditions upon return from leave. 29 C.F.R. § 825.215(b)

2. Exceptions to Restoration

a. Limitations on Restoration Rights

An employee's restoration rights are whatever they would have been had the employee not been on leave. Thus, if the employee would have been laid off but for the leave, the employee would not have the right to be reinstated. The employer's FMLA obligations, including leave, continuation of benefits and restoration, cease as of the date the employee is laid off. 29 C.F.R. § 825.216(a) and (b).

b. Employee is Unable to Perform an Essential Function

If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employee may have additional rights under the Americans with Disabilities Act (ADA). 29 C.F.R. § 825.214(b).

c. Exemption for ‘Key Employees”

An employer may refuse to reinstate a salaried employee who is the among the highest paid ten percent of all employees within seventy-five miles of the employee’s worksite, so long as the denial of restoration is necessary to prevent “substantial and grievous economic injury” to the employer’s operations. 29 U.S.C. § 2614(b). The following restrictions apply to this exception:

i. The determination that the employee is a “key employee,” or a highly compensated employee, must be made at the time the leave is requested. 29 C.F.R. § 825.217(c).

ii. The determination of “substantial and grievous economic injury” is made based on restoration, not the employee taking leave. 29 C.F.R. § 825.218(a).

iii. In order to prove “substantial and grievous economic injury” the DOL will take into account:

a) The employer’s ability to replace the employee on a temporary basis and the cost of reinstating the employee if a permanent replacement is hired;

b) The effect on the employer's operations in reinstating the employee;

c) Whether reinstatement causes a sub-stantial, long-term economic injury. 29 C.F.R. § 825.218.

VII <u>ENFORCEMENT OF THE FMLA</u>

A. Department of Labor

The FMLA is enforced by the Department of Labor. The Secretary of Labor has the same investigative, subpoena and dispute resolution authority as under the Fair Labor Standards Act.

B. Filing Suit

1. DOL Charge or Direct Suit

An employee may either file a charge with the DOL or bring suit directly in state or federal court for violation of the FMLA.

2. Limitations Period

An employee or the Department of Labor must file suit under the FMLA within two years after the last violation or within three years if the violation is willful.

3. Interplay with ADA

Employee's ADA claim might be barred by an earlier FMLA claim involving the same issues.

C. Jury Trials

The Sixth Circuit Court of Appeals has joined other courts in holding that the FMLA provides for a jury trial. This is true even in spite of an absence of any express language in the Act.

D. Damages

1. Actual Damages

An employee can recover lost wages and benefits, or where no tangible loss has occurred, any other actual monetary losses (*i.e.,* the cost of providing substitute care), up to the equivalent of twelve weeks of pay.

2. Compensatory and Punitive Damages

Punitive and emotional distress damages are not available under the FMLA.

3. Equitable Relief

An additional equitable amount is also recoverable as liquidated damages unless the employer can show it had reasonable grounds to believe its actions were not lawful. An employee can also recover other equitable relief (*i.e.,* reinstatement, promotion) as well as prejudgment interest, attorney fees, expert witness fees and other costs.

E. Individual Liability

The vast majority of courts which have addressed individual liability under the FMLA have held that the individuals can be held in their individual capacities for FMLA violations. The courts have compared the FMLA to the Fair Labor Standards Act, which recognizes individual liability where a person has some control over the employee's ability to take leave.

DISABILITY LAW COMPLIANCE

By: Ronald A. Sollish

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

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

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

B. What is a "Covered Entity"?

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

C. Prima Facie Case Under the ADA.

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

a. He or she is disabled;

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

c. He or she suffered an adverse employment decision;

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

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

D. Cap on Damages.

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

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

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

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

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

II. WHAT IS A "DISABILITY"?

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

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

C. What is an "impairment"?

1. ADA regulations define impairments affecting any number of body systems broadly so as to include: a wide variety of disorders and conditions effecting any number of body systems including the neurological or musculoskeletal systems, special sense organs, respiratory, cardiovascular, reproductive, digestive, genitourinary hemic, lymphatic, or endocrine systems or the skin. In addition,

impairments include mental or psychological disorders, including mental retardation, organic brain syndrome, emotional or mental illness, and certain learning disorders. (29 CFR §1630.2(h).

2. The EEOC has stated that physical characteristics such as left-handedness, common personality traits such as being irresponsible for showing poor judgment, cultural, environmental, or economic disadvantages, homo-sexuality, bi-sexuality, pregnancy, and normal deviations in height, weight or strength are not impairments. Appendix to 29 CFR §1630.2(h). Similarly, traits like irritability and chronic lateness are not themselves impairments. EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, Number 915.002 (March 25, 1997) at page 4. DA the Board of Education of Franklin Park Public School District No. 84, 133 F.3d. 1054 (7th Cir. 1998) ("mere temperament and irritability" are not covered under the ADA). Courts have stated that conditions like general grief or stress are not covered under the ADA. *Johnson* v *Boardman Petroluem, Inc.,* 923 F.Supp. 1563 (SD GA 1996); *Mundo* v *Sanus Health Plan of Greater New York*, 966 F.Supp. 171 (ED NY 1997) (Electronic Publication, only) ("an inability to tolerate stressful situations is not an impairment" under the ADA; the ADA "was not intended to categorize people with common personality traits as disabled"); *DeWitt* v *Carsten*, 941 F.Supp. 1232 (ND GA 1996), aff'd. 122 F.3d 1079 (llth Cir. 1997) (Job related stress, caused by an unpleasant boss or having unpleasant duties (working around prisoners) is not an ADA disability); "while characteristic predisposition to illness or disease" because of environmental rather, economic, or social conditions is not an impairment, discrimination because of *genetic* predispositions is discrimination based on disability. EEOC Compliance Manual §902.2(C)(2). Some conditions which are *expressly excluded* from ADA's protections are: transvestitism, transsexualism, pedophilia,

exhibitionism, voyeurism, many gender identity disorders, other sexual behavioral disorders, compulsive gambling, kleptomania, pyromania, and psycho active substance use disorders resulting from current illegal drug use. 42 USC §12211.

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

3. The voluntariness of the impairment is irrelevant. For example, lung cancer is still an impairment even though the cancer was caused by one's smoking. Similarly, even though plaintiff's "morbid obesity" could have been lessened by behavioral changes, the morbid obesity was still an impairment. *Cook v. Rhode Island Department of Mental Health*, 10 F.3d. 17 (lst Cir. 1993).

D. What is a "major life activity"?

1. The EEOC has said that major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 CFR §1630.2(I). In the appendix to its regulations, the EEOC added sitting, standing, lifting, and reaching to its list of major life activities. Appendix to 29 CFR §1630.2(I). In its compliance manual, the agency added "mental/emotional processes such as thinking, concentrating, and interacting with others to its list of major life activities. EEOC Compliance Manual §902.3(B) at page 15. In a 1997 policy guidance, the EEOC added sleeping as a major life activity. EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, Number 915.002 (March 25, 1997) at page 4, and in an *Amicus Curae Brief,* the EEOC stated that the "ability to control basic bodily functions, specifically one's bowels" is a major life activity. EEOC's

Amicus Curae Brief, in *Pangalos* v *Prudential Insurance Company of America,* 96-2022 (Brief filed in 3rd Cir., February 13, 1997).

2. At least one federal court has held, however, that "interacting with others" is not a major life activity. *Soileau* v *Guilford of Maine*, 105 F.3d 12 (1st Cir. 1997) (although "the ability to get along with others" is "a skill to be prized, it is different in kind from breathing or walking," EEOC's manual is "hardly binding"). Another federal court has held that "caring for others" is not a major life activity. *Krauel* v *Iowa Methodist Medical Center*, 95 F.3d 674 (8th Cir. 1996). Another court has stated that "getting a sound night's sleep and reporting to work on time, clear minded" is not a major life activity. *Sarko* v. *Penn-Del Directory. Co.*, 968 F.Supp. 1026 (ED PA 1997). In *Bragdon* v *Abbott*, (1998) the U. S. Supreme Court held that reproduction is a major life activity. The court noted that an activity does not have to have a "public, economic, or daily dimension" to be a major life activity and suggested, by stating that "sexual dynamics surrounding" reproduction are "central to the life process itself," that sex itself might be considered a major life activity. Courts have also found that eating, (*Coughlal* v *H.J. Heinz Co*., 851 F.Supp. 808 (ND Tex 1994)) and reading (*Bartlett* v *New York State Board of Law Examiners*, 156 F.3d 321 (2nd Cir. 1998)) are major life activities. However, courts have held that recreational swimming (*Martinez* v *City of Roy*, (unpublished) 1998 U.S. App LEXIS 5906 (10th Cir. 1998)), driving, working on cars, basic chores, shopping in a mall, skiing, golfing, yard work, painting, plastering, and shoveling snow (*Colwell* v *Suffolk County Police Department*, 158 F.3d 635 (2nd Cir. 1998)), climbing (*Robinson* v *Global Marine Drilling Co*., 101 F.3d 35 (5th Cir. 1996)), driving at night, (*Wade* v *General Motors Corp*., 165 F.3d 29 (6TH Cir 1998)) everyday mobility such as taking vacations or going to a shopping mall alone (*Reeves* v *Johnson Controls Roll Services,*

Inc., 140 F. 3d 144 (2nd Cir. 1998)), and awareness (*Deas* v River West, 152 F.3d 471 (5th Cir. 1998)) are not major life activities. The courts ruling in *Deas* that awareness is not a major life activity was part of a decision in which the court held that epilepsy is not a disability. In contrast to the court's decision in *Reeves* that everyday mobility is not a major life activity, the court in *Anderson* v *Gus Mayer Boston Store*, 924 F.Supp. 763 (ED Tex 1996) ruled that asymptotic HIV is a disability because an asymptotic HIV positive individual cannot travel freely without worrying about exposure to bacteria infection and fungi. Similarly, the court in *Kralik* v *Durbin*, 130 F.3d 76 (3d Cir. 1997) suggested that traveling is a major life activity.

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

1. The EEOC has stated that an impairment "substantially limits" a major life activity if the person is either (a) unable to perform a major life activity that the average person in the general population can perform; or (b) significantly restricted as to the condition, manner or duration under which he or she performs the activity as compared to the condition, manner or duration under which the average person in the general population performs the activity. 29 CFR §1630.2(J)(1). *Davidson* v *Midelfort Clinic, Ltd*., 133 F.3d 499 (7th Cir. 1998). Therefore, the court in *Vonderheide* v *U. S. Post Office*, (unpublished) 1998 U.S. App. LEXIS 16885 (6th Cir. 1998) held that a plaintiff who was unable to work more than 40 hour work weeks because of an organic brain syndrome was not substantially limited since "most people work 40 hours per week." The EEOC has stated that if someone is "extremely nauseous" or "constantly fatigued" while performing a major life activity, that person could be considered substantially limited compared to the average person. EEOC *Amicus Curae Brief* in *Ellison* v *Software Spectrum, Inc.,* No.

95-10704 (Brief in Support of Petition for Rehearing filed in 5th Cir. June 28, 1996). The court in *Roush* v. *Weastc*, *Inc*. 96 F.3d. 840 (6th Cir. 1996) stated that if the plaintiff suffers pain while she works due to a bladder condition she might be considered substantially limited in working. In contrast, the court in *Hill* v. *Baltimore City Department of Social Services*, (unpublished) 1998 U.S. App. LEXIS 772 (4th Cir. 1998) stated that "severe chronic pain in the shoulder, upper and lower back, and sharp pains, and shooting pain in the arms and legs" would not rise to the level of a disability. When determining whether pain or nausea is considered a disability, courts consider the severity of the pain and nausea. Typically, pain and nausea must be severe in order to constitute a disability.

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

substantially limit, a major life activity, then courts typically dismiss the complaint. Similarly, if an impairment is only short-term and temporary, then courts typically do not consider it substantially limited.

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

   a. According to the EEOC and the Department of Justice, the effects of medication or prosthetic devices should not be considered when determining whether an impairment substantially limits a major life activity. That is, an employer must consider whether the person's condition, in the absence of a prosthetic device or medication, would substantially limit a major life activity. EEOC Compliance Manual, §902 at pp 35-36; 28 CFR part 35, app. § 35.104.

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

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

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

G. Substantial limitation in major life activity of working.

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

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

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

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

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

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

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

H. "Record of" Disability Cases.

1. Where an individual does not currently have an impairment that substantially limits a major life activity, the individual may still be protected by the ADA if he has a record of an impairment that substantially *limited* a major life activity. The U.S. Supreme Court, in *School Bd of Nassau Cty v Arline*, 480 US 273, 281 (1987), held that a plaintiff's lengthy hospitalization for tuberculosis established a record of an impairment substantially limiting a major life activity. Lower courts, however, have subsequently held that hospitalization does not necessarily create a record of a disability. See *Gutridge v Clure*, 153 F.3d 898 (8th Cir. 1998), and *Colwell v Suffolk Cty Police Dept*, 158 F.3d 635 (2d Cir. 1998).

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

I. "Regarded as" Disabled Cases.

1. An individual is protected by the ADA where his or her employer perceives that the individual has a disability. An employer may "regard" an individual as being disabled in several ways: An individual might have an impairment, but one that does not substantially limit a major life activity, and the employer may treat him or her as having an impairment which substantially limits a major life activity; an individual may have an impairment that substantially limits major life activities only because of the attitudes of others; and an individual may not have an impairment, but the

employer treats the individual as having a substantially limiting impairment. 29 CFR §1630.2(l), Appendix. Most "regarded as" cases involve an employer perceiving that an employee has an impairment that substantially limits the major life activity of working. Courts have held that an employer could not have "regarded" an employee as substantially limited in the major life activity of working when the employer encouraged the employee to work.

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

III. <u>REQUIREMENT THAT EMPLOYEE BE "QUALIFIED"</u>

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

B. Reasonable Accommodation. The ADA prohibits an employer from failing to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 USC §12112(b)(5); *Soto-Ocasio*, 150 F.3d 14 (1st Cir. 1998); *Rhoads v. Federal Deposit Insurance Corporation*, 956 F.Supp. 1239 (1997). Therefore, in order to establish discrimination based on denial of accommodation, a plaintiff must demonstrate that he or she is an otherwise qualified individual with a disability and that a reasonable accommodation was denied in a discriminatory fashion. *Rhoads v. Federal Deposit Insurance Corporation*, 956 F.Supp 1239 (1997), *citing Bryant v. Better Bus. Bureau of Greater Maryland*, 923 F.Supp. 720, 733 (D. Md. 1996), *citing Myers v. Hose, et. al*, 50 F.3d 278, 281-82 (4th Cir. 1995). A request for an accommodation consisting of granting an employee additional sick days has been held to not be reasonable since "it is in substance a request not to perform (one's) job, and hence, facially unreasonable." *Rhoads v. Federal Deposit Insurance Corporation*, 956 F.Supp. 1239, 1248 (1997). The court in *Rhoads* did note, however, that the use of accrued sick leave and of part-time or modified work schedules is an appropriate accommodation in some circumstances. *Rhoads* at 1249. Similarly, the Court in *Soto-Ocasio* stated, "The term 'reasonable accommodation' may include 'job restructuring [and] part-time or modified work schedules.' 42 USC §12111(9)(B). However, the ADA does not require an employer 'to reallocate job duties in order to change the essential function of a job.'" *Soto-Ocasio* at 18, *citing Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1124 (10th Cir. 1995), *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 913 (7th Cir. 1996), and *Fussell v. Georgia Ports Auth.*, 906 F.Supp 1561, 1571 (S.D. Ga. 1995).

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

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

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

A. Administrative Prerequisites

1. ADA General Rule.

Before filing an ADA lawsuit, a plaintiff must file a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") and receive a right-to-sue letter from that agency. As a general rule, a plaintiff may sue only those claims that accrued not more than 300 days before plaintiff's filing of the discrimination charge. Authority - *Dao* v *Auchan Hypermarket,* 96 F.3d 787 (5th Cir. 1996).

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

2. MPDCRA General Rule.

Under the MPDCRA, an individual has the choice of filing a claim with the MDCR or filing a lawsuit directly in court for injunctive relief, damages, or both. Thus, the MDCR and the circuit courts have concurrent jurisdiction over claims under the Michigan Act. Authority - MCLA 37.1605-1607, MSA 3.550(605) - (607).

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

B. Burden of Proof.

1. ADA General Rule.

If a disabled individual challenged a particular job requirement as unessential, the employer will bear the burden of proving that the challenge criteria is necessary. Authority - *Monette v. Electronic Data Sys. Corp*. 90 F.3d 1173 (6th Cir. 1996).

It is important for the practitioner to realize that *Monette* does not shift the overall burden of persuasion in an ADA case. Rather, the burden of persuasion remains with the ADA plaintiff at all times.

Hamlin v. Charter Township of Flint, 165 F.3d 426 (6th Cir., 1999). Monette only shifts the burden of persuasion to the employer on the “essential function" issue in a situation when an employer admits relying upon a disability when making an adverse decision or if there exists direct evidence that the employer relied on plaintiff’s disability in making the adverse employment decision. 90 F.3d at 1184.

2. MPDCRA General Rule.

Plaintiff retains the burden of proof on all qualification issues including the essential nature of a job function. Authority - *Crittenden v. Chrysler Corp.*, 178 MichApp 324, 443 NW2d 412 (1989).

C. Definition of "Reasonable Accommodation:

1. ADA General Rule.

While the ADA does not define the term "reasonable accommodation" the administrative regulations indicate that the term is quite broad. Examples include making existing facilities readily accessible to and useable by individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modification of examinations, training materials or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. Authority - 29 CFR §1630.2(o)(2) (lists examples of possible types of reasonable accommodations); 42 USC §12112(b)(5)(A) (employer failing to provide reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability commits unlawful discrimination unless it can demonstrate that the proposed accommodation would impose an undue hardship on its business).

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

2. MPDCRA General Rule.

As a result of 1990 amendments, the MPDCRA recognizes three types of accommodation: (a) the purchasing of equipment and devices; (b) the hiring of readers or interpreters; and (c) the restructuring of jobs and the altering of schedules for minor or infrequent duties. Importantly, the duty to accommodate under the MPDCRA does not include placing the employee in a new job. In addition, under the MPDCRA, a person with a disability may allege a failure-to-accommodate claim only if that person notifies the employer in writing of the need for the accommodation within 182 days after the person with the disability knew or reasonably should have known that an accommodation was needed. The ADA does not contain such a requirement. However, the employer waives the right to notice if it fails to post notice or use other appropriate means to notify all employees and job applicants of the 182-day rule. Authority - MCLA 37.1210(2)-(5),(8)-(11),(14)-(15), MSA 3.550(210)[2]-[5][8]-[11],[14]-[15] *Hall v. Hackley Hosp*)., 210 MichApp 48, 532 NW2d 893 (1995). *Rourk* v. *Oakwood Hospital Corp*, 458 Mich 25, 580 NW2d 397 (1998) (duty to accommodate under MPDCRA does not include new job placement).

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

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

1. ADA General Rule.

The ADA Interpretive Guidance suggests that a possible form of accommodation is permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. ADA Interpretive Guidance §1630.2(o). A growing number of courts have held that while unpaid leave for medical care and treatment may be appropriate under certain circumstances, leave of an <u>indefinite</u> duration is not a reasonable accommodation. In these cases, the courts reason that the employee is not a qualified individual with a disability. See e.g., *L. Nowak* v *St. Rita High School*, 142 F.3d 999, (7th Cir. 1998) (employee failed to meet burden that he was a QIWD when absent from position for 18 months and failed to inform employer during that period that he intended to return to his teaching duties); *Hudson* v. *MCI Telecoms Corp*., 87 F.3d 1167 (10th Cir. 1996) (plaintiff failed to present any evidence of expected duration of impairment).

2. MPDCRA General Rule.

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

With the demise of the reasonable time to heal doctrine in Michigan the practitioner should consider the ADA in situations where an employee requires additional time off work due to a disability. One form of the accommodation recognized by the ADA is the use of accrued leave or unpaid leave. In an important recent decision, the Sixth Circuit held that no presumption should exist that uninterrupted attendance is an essential job requirement and that a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances. *Cehrs* v. *Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 782 (6^{th} Cir. 1998). Applying *Cehrs*, a factual determination will be whether the leave of absence would unduly burden the employer, much like any <u>other reasonable accommodation analysis</u>.

E. Differing Interpretations of "Undue Hardship".

1. ADA General Rule.

"Undue Hardship" is defined as "an action requiring significant difficulty or expense, when considered in light of [certain] factors." As the EEOC indicates in its March 1, 1999, enforcement guidance addressing the subject of reasonable accommodation and undue hardship, undue hardship addresses "quantitative, financial or other limitations" on an employer's ability to provide reasonable accommodation." Undue hardship is an affirmative defense to a failure to provide reasonable accommodation under the ADA. The burden of proving undue hardship is on the employer. In determining whether an accommodation would pose an undue hardship, the ADA indicates that several factors should be considered, as more specifically set forth in the statute itself. Authority--42 USC §12111 (I0)(A); 42 USC §12112(b)(5)(A); *Riel* v. *Electronic Data Sys. Corp*, 99 F.3d 678 (5th Cir. 1996); 42 USC §12111 (I0)(B).

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

2. MPDCRA General Rule.

If a person with a disability establishes a prima facie case that an accommodation is possible, the employer bears the burden of producing evidence that an accommodation would pose an undue hardship on the company. If the employer produces evidence that an accommodation would pose an undue hardship, the person with a disability must demonstrate that the accommodation would not pose an undue hardship. This is contrary to the ADA, under which the burden of *proving* undue hardship falls squarely on the employer. In addition, the MPDCRA sets forth a "formula approach" to determining whether the purchase of any equipment or device or the hiring of readers or interpreters constitutes an undue hardship. The determination whether the proposed accommodations would cause an undue hardship depends on the number of employees employed by the person and is tied to state average weekly wage. The ADA does not adopt a formula approach to proving undue hardship. Authority--MCLA 37.1210(1), MSA 3.550(210) [*Hall* v *Hackley Hosp*., 210 MichApp 48, 532 NW2d 893 (1995); 42 USC §12112(b)(5)(A); MCLA 37.1210(2)-(6), (8)-(12), MSA 3.550(210)[2]-[6], [8]-[12].

Under the MPDCRA, the burden of proving undue hardship falls on the employee. A "formula approach" places definitive limits on the costs which employers must expend to accommodate an individual under the MPDCRA. In addition, a person who employs fewer than 15 employees is not required to restructure a job or alter the schedule of employees as an accommodation. MCLA 37.1210[14], MSA 3.550(210)[14].

F. Differences in Construing "Mitigating Measures."

1. ADA General Rule.

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

2. MPDCRA General Rule.

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

G. Individual Liability.

1. ADA General Rule.

The ADA does not provide for supervisor liability, only employer liability. Authority--*Mason* v *Stallings*, 82 F.3d 1007 (11^{th} Cir. 1996); *EEOC* v. *AIC Sec. Investigations*, 55 F.3d 1276 (7^{th} Cir. 1995); *Montez* v *Romer*, 32 F.Supp. 2d 1235 (D. Colo, 1999); *Meara* v. *Bennett*, 27 F.Supp. 2d 288 (D. Mass.1998).

2. MPDCRA General Rule.

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

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

H. Monetary Relief.

1. ADA General Rule.

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

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

2. MPDCRA General Rule.

The MPDCRA allows a person to bring a civil action for injunctive relief, damages, or both. Damages also include reasonable attorney fees. Punitive damages cannot be recovered under the

Michigan Act. However, there is no limit on the amount of compensatory damages that can. obtained under the statute. Authority - MCLA 37.1606, MSA 3.550(606).

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

WORKPLACE CRIME, VIOLENCE, OFF DUTY MISCONDUCT, THEFT & FRAUD

By: Joseph A. Lavigne

I. WORKPLACE CRIME

A. Employee theft.

1. Sample statistics.

a. According to the Small Business Administration, 60% of all small businesses fail because of employee theft. Example: *People* v *Jason DiLorenzo*, Oakland County Circuit Court.

b. U.S. businesses annually lose more than $10 million to employee theft and commercial bribery.

c. Each year U.S. businesses lose more than $4 billion to employee embezzlement.

2. Types of employee theft.

a. Larceny.

b. Embezzlement.

c. Fraud.

d. Financial instrument crimes (fraud involving credit cards, checks, etc.).

e. Misappropriation of proprietary information and industrial sabotage (so-called "trade secret" crimes).

f. Electronic sabotage (viruses set by disgruntled employees, etc.).

3. Prevention.

   a. Pre-employment screenings including personal interviews, background checks and verification of applications, résumés and references.

   b. Have clear policies. While theft and embezzlement are against the law, too often this is not enough to encourage employees to conduct themselves accordingly. Employers do not need to inform employees that stealing is against company policy. There are, however, some other policies that will help prevent theft of and damage to company assets. Among them are the following:

      i. Ensure that supplies, products, etc., are not removed from their normal locations.

      ii. Do not allow over-produced, damaged or discarded items to be removed from the premises by employees. This should serve to prevent deliberate damage and placing some items for removal that the employee intends to appropriate for their own use at a later time, as well as the manufacture of unnecessary items that an employee would otherwise appropriate for his or her own use.

      iii. Do not allow inventory to be removed from the workplace.

iv. Have clear, strong, enforceable computer use policies.

c. Have strong financial controls.

i. This goes without saying, but is perhaps the most important way to prevent crime, especially economic crime.

ii. Maintain accurate cash and property control and accounting systems.

iii. Have built-in checks and balances, and division of authority and responsibility for handling of cash receipts and other valuables.

d. Be aware of indicators of theft/misconduct.[1]

i. Photocopies of documents in files where originals are usually supposed to be.

ii. Excessive number of voided documents or sales.

iii. Unusually high percentage of refunds or credits (including bottle returns).

iv. Decreases in average sales when a particular cashier is on duty.

v. Unusually high activity at certain employees' registers/points of sale (especially in relation to others on duty at the same time).

[1] Of course neither a single one of these factors nor a combination thereof necessarily means that an employee is stealing. They are simply indications that an employer may wish to further investigate or monitor relevant employee's activity.

vi. Cash drawer is open between sales, or certain amounts of change are readily available outside of the register.

vii. Excessive number of voids, over-rings, "no sale" entries, “t-reds,” etc.

4. Response.

a. Have strong internal polices, including a zero tolerance approach to employee theft.

b. Report criminal activity to the appropriate law enforcement agency.

c. Support law enforcement after the fact. This means staying involved with prosecuting the offender after he or she has been caught. Too often employers lose interest once the offender has been caught and/or after some or all of the money or property has been recovered. Staying involved and pursuing prosecution keeps law enforcement interested in your case(s) because they are not being treated like a glorified collection agency. Moreover, it sends a strong message to current employees that there is a real cost to stealing from you. If the only repercussion to getting caught is paying back the money one stole, what is the real risk to taking it in the first place? Maintaining credibility across the board can only be had by consistently supporting prosecution of those who steal or embezzle from your business.

B. Drug and alcohol abuse.[2]

1. Drug-Free Workplace Act, 41 USC § 701 et seq.

a. In 1988, Congress passed the Drug-Free Workplace Act, which requires federal grantees of any amount and recipients of federal contracts of $100,000 or more to comply with requirements that include:

i. Posting a notification statement to employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the workplace, and outlining or describing the consequences for violation.

ii. Establish a drug-free awareness program to advise and inform employees of the dangers of drug abuse (especially in the workplace), the employer's policies regarding the same, available rehabilitation and counseling programs, and the penalties to which employees can be subject for violations of the policy.

iii. Distribute a copy of the notification statement to all employees directly engaged in the performance of the federal contract.

iv. The employees must agree to abide by the terms of the notification statement, and to advise the

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[2] To the extent that drug use, possession, and distribution are against both state and federal law, little discussion is required regarding the underlying events discussed herein. Instead, this section attempts to outline for the employer some of the employment-related implications of such occurrences.

employer of any drug-related conviction for a "violation occurring in the workplace" within five days.

v. Impose sanctions and/or require satisfactory participation in a rehabilitation program by anyone convicted of a workplace, drug-related crime.

vi. Notify the contracting agency within ten days of the employer's notification or awareness of an employee's workplace-related drug conviction.

vii. Take affirmative continuous efforts to maintain a drug-free workplace.

viii. There is no provision in this Act that requires drug testing.

2. Policies to deal with drug and alcohol use and abuse.

a. The company drug policy must clearly state in writing that employees are subject to discipline or termination if they are under the influence of alcohol or other drugs.

b. In addition to compliance with all legal mandates that may restrict drug testing, the written policy should also take into consideration the following issues:

i. Prohibition of the use, possession, or distribution of drugs or alcohol. It all starts here. In addition to prohibiting use, possession, or distribution of these substances, policies should also incorporate prohibitions that include related paraphernalia. Your policy should not have a loophole which allows the employee found in possession of a crack pipe to escape sanction simply because he already ingested the substance prior to the discovery of the paraphernalia.

ii. Incorporate any existing fitness for duty policies into the drug and alcohol policy.

iii. If your policy includes drug testing, be specific about when tests are to be taken, the manner in which they are to be taken, who can require a test, confidentiality provisions (if any), and procedures following a positive test such as chain of custody of evidence (especially if your policy incorporates provisions related to prosecution), re-testing/ appeal, etc.

iv. Have adequate rehabilitation provisions. Even if the employee is terminated, he or she should be informed of available resources to overcome their substance abuse problem.

3. Discrimination/accommodation.

a. Use of illegal drugs is not a protected disability under the federal Americans With Disabilities Act ("ADA") or the Rehabilitation Act of 1973.

b. Alcohol abuse *is considered a disability* under the ADA. Employers that are covered by both Michigan law and the ADA must comply with the ADA requirements and treat alcohol abuse as a disability.

c. Alcohol or substance abuse may not qualify as a disability under the Michigan Persons With Disabilities Civil Rights Act, MCL § 37.1101 et seq. The Act expressly excludes from the definition of disability any physical or mental characteristic caused by the current use of alcohol or the current illegal use of a controlled substance, if the characteristic prevents performance of job duties. *See id.*

4. Additional information.

The following sources are among those that provide additional information that you may find useful in establishing a workplace drug and alcohol policy, and in providing rehabilitative assistance.

a. Institute for a Drug Free Workplace. (202) 842-7400. <www.drugfreeworkplace.org>.

b. Center for Substance Abuse Prevention; Drug-Free Workplace Helpline. (800) 967-5752. <www.samhsa.gov>.

c. Department of Labor, Substance Abuse Information Database (SAID). (202) 693-5916. <www.dol.gov>.

d. Department of Transportation, Office of Drug & Alcohol Policy and Compliance Information Line. (800) 2253784. <www.dot.gov>.

e. National Institute on Drug Abuse. (888) 644-6432. <www.nida.nih.gov>.

f. National Council on Alcoholism and Drug Dependence, Inc. (800) 622-2255. <www.ncadd.org>.

g. Small Business Administration.

1. District Office, McNamara Building, 477 Michigan Avenue, Suite 515, Detroit, Michigan 48226. (313) 226-6075.

2. Branch Office, 501 South Front Street, Marquette, Michigan 49855. (906) 225-1108.

C. Gambling

1. General considerations.

a. In the State of Michigan, the gambling chapter of the penal code proscribes conduct ranging from operating a gambling house, to participating in monetary games of cards or dice, or games of chance, to mere possession of wagering information. *See* MCLA § 750.301-750.315a (West 1992 & Supp 2001). In some instances, organized gambling rings have been prosecuted in both state and federal courts under racketeering statutes. *See e.g., People* v *Lederman*, Oakland County Circuit Court. Under Michigan state law, penalties for these various activities can range from up to twenty years in prison to a $100 fine.

b. Despite these prohibitions on gambling, this event that is traditionally seen as a "victimless crime" exists in one form or another in most workplaces. In addition to loss of productivity, it can lead to other problems such as increased aggression and fighting to lying, cheating, financial difficulty, and even to criminal activity by or among employees.

c. Compulsive gambling is a progressive behavior disorder characterized by a psychologically uncontrollable urge to gamble. It was first classified in 1980 as a "disorder of impulse control" by the American Psychiatric Association. Compulsive gambling is considered to be a diagnosable and treatable illness.

d. While it is in management's best interest to restrict gambling activities in the workplace, the restrictions must be realistic, appropriate, enforceable, and consistent.[3] Management must be cognizant of the fact that if there is a policy restricting gambling, the failure to enforce it calls into question the efficacy of other company policies. If it is to be enforced, it must be done so consistently and even-handedly.

2. Identifying a problem gambler.[4]

a. Bragging about wins but not talking about losses.

b. Frequent mood swings, higher when winning, lower when losing.

c. Being preoccupied with gambling or with obtaining money with which to gamble.

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[3] Because almost all forms of gambling are against the law, the issues discussed in this forum will not focus on whether or how, if at all, employers should tolerate some forms of gambling, but instead upon aiding employers in spotting problem gamblers that could present a threat to the organization either in terms of criminal activity, distractions in the workplace, or other issues.

[4] Like the indicators of theft or misconduct in part A of this section, no one of these factors necessarily means that an employee is a problem gambler. They are simply indications of which an employer may wish to be aware.

d. Distractions from work such as decreased productivity, lack of concentration, and excessive telephone use.

e. Frequent absences from work for hours at a time or for parts of a day.

f. Borrowing money to gamble, such as from co-workers, taking out secret loans, or maximizing credit cards.

g. Secretive behavior such as hiding betting slips or receipts; having mail, bills, etc., sent to work, a post office box or other address.

h. Theft or embezzlement to pay for increasing losses.

3. On-line gambling.

a. This is simply an additional alternative to the more traditional means of gambling.

b. On-line gambling becomes more acute in the employment context because it creates issues for employees who have internet access.

c. From a strictly result-oriented perspective, on-line gambling allows a problem gambler to in many respects not outwardly appear to have a problem (i.e., he or she is not missing work to be at a casino, etc.), but still has the same negative impacts on productivity, behavior, etc.

4. Gambling assistance and additional information.

The following sources are among those that provide additional information that you may find useful in establishing a workplace gambling policy, and/or in providing rehabilitative assistance.

a. National Council on Problem Gambling. (800) 522-4700. <www.ncpgambling.org>.

b. Gamblers Anonymous. Post Office Box 72-1296, Berkley, Michigan 48072. Hotline numbers: Detroit area: (313) 792-2877; Grand Rapids area: (616) 776-0666.

c. Michigan Council on Problem and Compulsive Gambling. 18530 Mack Avenue, Suite 552, Detroit, Michigan 48236. (313) 396-0402.

d. State of Michigan Gambling 24-hour Help Line. (800) 270-7117.

D. Copyright issues.

1. Software licensing.

a. Most commercial software is copyrighted material.[5] In order to be lawfully in possession of, or to use, such material, the employer must have purchased either an original copy of the software and/or a license for the same.

b. Failure do so can result in both civil and criminal penalties.

c. The copyright act authorizes a minimum fine of $500 per willful infringement, *see* 17 USC § 101 et seq., and that is often treated as a floor from which the actual fines will be determined.

[5] There are obviously some exceptions for certain types of shareware, etc., but in the business context, the instances where these types of software are used are rare indeed.

d. If infringing copies of software are discovered, the hardware on which they have been installed may be seized.

e. Needless to say, it would be an inconvenience at best, and in most cases crippling for a business to have its computer hardware packages seized due to an unlicensed piece of software.

2. Periodicals.

a. Many businesses subscribe to newspapers or trade publications, and make copies of them for distribution to other employees.

b. In many instances, this can be a violation of copyright laws. *See American Geophysical Union* v *Texaco, Inc*, 60 F3d 913 (CA 2 1994).

c. The way to avoid such infringement is to purchase original copies of the material and to circulate the original among the intraoffice recipients. *See* 17 USC § 109 (1988) (the so-called "first sale" doctrine).

3. Music and video.

a. Providing means whereby employees obtain copies of copyrighted material may constitute what is known as "contributory infringement."

b. "Contributory infringement itself is of two types -- personal conduct that forms part of or furthers the infringement and contribution of machinery or goods that provide the means to infringe" 3 Melville B. Nimmer &

David Nimmer, Nimmer on Copyright §§ 12.04[A][2] & [A][2][b] (2000).

c. Cases involving videotape reproductions. Example: *Sony Corp* v *Universal City Studios, Inc*, 464 US 417 (1984).

d. Cases involving reproduction of music. Example: *A&M Records, Inc* v *Napster, Inc*, Nos. 00-16401, 00-16403, reported at 2001 US App LEXIS 5446 (CA 9 2001).

II. <u>VIOLENCE</u>

A. Recognizing and identifying the stages of violence.

1. Initial stage of violence.

a. Name-calling.

b. Race/gender/sexual orientation-based insults.

c. Sexual harassment.

d. Other verbal abuse.

e. Challenging authority, or other types of insubordination.

f. Regularly being argumentative with co-workers, customers, other parties, etc.

2. Escalated stage of violence.

a. Ignoring company safety (or other) policies and procedures.

b. Stealing from co-workers, the company, or others.

c. Making threats.

i. Against others.

a. Verbally.

b. In writing.

c. Via e-mail.

d. Via voice mail.

ii. Threatening suicide.

d. Blaming others for the employee's problems, or for problems in general.

3. Critical stage of violence.

a. Displaying or brandishing (including the use of) a weapon.

b. Punching, kicking, slapping, pushing, shoving, etc.

c. Criminal activity, including:

i. Assault and battery.

ii. Arson.

iii. Damaging property.

B. Violence within the workplace.

"These things happen over time. Employees don't go from zero to 'postal' overnight."

1. Establish a policy.

   a. Develop and implement a policy to address the initial stages of aggression and other similar behavioral problems that can ultimately manifest themselves in greater violence. Zero tolerance is the key to a successful, evenly applied policy.

   b. Be sure to involve managers and employees that are representative of every level to ensure that the policy is workable for situations across the different strata of employee classifications. Also, doing so necessarily generates involvement in the process at all levels and adds credibility to the policy as well as the goals sought to be achieved.

2. Publicize the policy.

   a. It is critical to notify all employees (as well as customers, clients, vendors, suppliers, and other visitors)[6] that your organization will not tolerate violent behavior at any level and that violations will be dealt with in a swift and responsible manner.

   b. This includes so-called "low level" violence such as insults, threats, mistreatment of others, misuse of others' (or the company's) property, exaggerated anger, etc.

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[6] Obviously one must take the types of contact you or your employees have with these third parties into account. From a practical perspective, you want to make them aware that you do not tolerate violence in the workplace, but you do not want them to think that you have reason to believe that any of your employees could snap at a moment's notice either. As with most business practices, taking a reasonable, yet firm approach is usually the most appropriate course of action.

3. Record keeping.

   a. In order to properly implement the policy and to evenly enforce it over the long run, it is important to keep track of any such behavioral displays.

   b. Have an incident report form to standardize reporting and management response. Include such information as:

      i. The date, time and location of the incident.

      ii. The offender and others who were involved, if any.

      iii. Names of witnesses, if any.

      iv. A brief description of the incident.

   c. This is not meant simply to compile a scorecard on employee violence, but it will help to document patterns of behavior (if the situation progresses far enough), and to protect management in the long run.

4. Facilitate communication regarding the policy and related incidents.

   a. Perhaps most importantly, employers should have an open door policy for employees to be able to easily but confidentially (if desired) report such incidents.

   b. All employees will perceive things differently, just as any of us would. Some will perceive greater levels of violence and/or aggression than others will.

c. It is important that they feel free to use management as a safety outlet and to report these incidents, even if management ultimately downplays the incident.

d. Remember, you are not concerned only with the initial aggressor, because if the person on the other end of their behavior feels threatened enough, they may be the ones escalating the violence in an attempt to protect themselves or to strike back.

e. By keeping the channels of communication open at all levels and providing employees and other parties with the ability to seek a remedy, you and your organization will be in the best position to diffuse any potentially harmful situations.

5. Ensure compliance.

a. Remember that your policy is only as effective as its enforcement.

b. Train your staff to recognize the early stages of violence and how to intervene in violent or potentially violent situations. Train employees and/or management in anger control/recognition so that your company will have eyes and ears in the workforce capable of responding to situations as necessary.[7] As in most instances, a human resources training and development specialist can be invaluable in this regard.

[7] You obviously want to avoid the perception (as well as the reality) that your employees are being watched by big brother, but you still want to be in the position to adequately and responsibly react to situations that merit a rapid response.

c. By treating all incidents as serious, even those that appear to be less significant, you send a clear message that violence, even low-level violence, will not be tolerated in the workplace.

d. Although you want to treat such incidents as serious, do not go overboard in your response—remember you want to keep the lines of communication open, and implementing a fair and consistently followed policy are the keys to maintaining a workable system.

e. By acting fairly and reasonably, while still being firm, you send the message to your employees and those who deal with your organization that you take their safety and security seriously and that you expect them to do the same.

f. By doing these things, you encourage respect for the system and its goals. If the employees do not respect the system or its goals, they will not respect the process. If they do not respect the process, they are less likely to participate in it. If they do not participate in it, it does you no good to have the policy in the first place.

6. Suggested intervention techniques.[i]

a. Begin by interviewing the worker(s) who made the reports. Also speak with any witnesses that they may name, to gain as many specifics as possible.[8] If you

[8] This is important both from a fact-finding perspective as well as a tool for the investigator to ferret out any underlying personality conflicts that may be underlying the relevant employees' interpersonal relationship, and to get a perspective from those who (very likely) deal with the relevant employees on a daily basis. Those folks are often in a

have a confidential reporting policy, be sure to conduct your investigation accordingly.

b. Speak with the subject employee about the reports (again, plan accordingly to preserve employee confidentiality if that is an issue). Stick to the specifics and how they relate to job performance, a team/cooperative environment, and overall office harmony. Advise the subject employee of how the behavior intimidates (or perhaps even frightens) co-workers. The subject may not have even realized his or her impact on others and in many cases this epiphany may be enough to resolve the situation.

c. During or after that meeting, recommend employee assistance, intervention, mediation or facilitation of particular disputes with co-workers,[9] exploring possible modifications of conditions or policies the worker finds objectionable, or anything else that is both reasonable and responsive to the concerns that the person (as well as the subject) has expressed.

d. At the same time, describe a performance/behavior improvement plan for the individual to follow, including such regular monitoring as weekly or monthly reviews and target dates. Make it clear that discipline—up to termination—may follow if there is no improvement.

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much better position than management to evaluate what may be inappropriate (or perhaps uncharacteristic) conduct by individuals.

[9] It is a good idea to provide the same information to the employee reporting the problem so he or she can have access to the same resources. It is recommended that this occur after the situation has been addressed with the subject employee, however, and/or after a resolution has been made, to avoid placing the reporting employee in a position of feeling that they should not have made the report, or that they are perhaps "at fault."

e. If, having followed all of these suggestions, the supervisor soon finds that nothing worked, call in higher-level management and/or an HR professional to assist by participating in the next intervention.

f. Trust your instincts. You know your business and your workforce. If something seems too out of place, it probably is.

g. Some other helpful pointers:

   i. Without agreeing with the employee's behavior, show some understanding of it.

   ii. Find something positive about the employee's performance to discuss and focus on as an example of alternative behavior that is appropriate and/or respected/liked by management.

   iii. Remember to remain calm and professional even if the person becomes agitated or angry. It will not do you any good to address an employee who has already exhibited the potential for violence by raising voices or escalating emotions.

   iv. Be proactive about keeping in touch with the workforce to help management become aware of potential issues before they develop into larger problems.

   v. Encourage individuals to discuss problems openly and to facilitate communication.

   vi. Whenever possible, refer the individual to resources that can help with anger management, including those both inside (if available) and outside the company, or other such appropriate counseling.

7. Termination issues.

   a. Whenever an employee is discharged, especially one who is being discharged for behavioral/aggression problems, there is the potential for violence.

   b. It is a good idea in any situation, but especially in those involving those who have exhibited violent behaviors, to consider the following precautionary steps:

      i. If the employee will not be permitted to return to his or her workstation immediately after the termination, be sure to choose an office near an exit in which to conduct the termination.

      ii. Minimize the furniture and other objects in the room (i.e., staplers, etc.).

      iii. Request that security personnel be present or nearby.

      iv. If you have not already done so, establish a set of termination procedures and stick with them.

      v. Try not to surprise the individual; issue plenty of warnings beforehand (obviously this should be measured by the incident(s) preceding the termination—some circumstances do not allow for such advance notice).

vi. Deliver the news early in the week rather than later. The traditional Friday afternoon can give a bitter ex-employee plenty of time to plot revenge, and Monday afternoon gives them much more time to try to line up a new job before having down time at home.

vii. Offer as much counseling, outplacement, or other services as you can afford. Remember that even token efforts help to defuse anger and calm an otherwise volatile situation.

C. Violence from outside the workplace.

1. Domestic violence.

a. Domestic violence is a crime that has reached epic proportions in America. It must be treated seriously and not tolerated at any level. Often, employers (and those in society at large) view domestic violence as a problem that should be confined to the home. Nothing could be further from the truth. In addition to the veritable plethora of reasons that the epidemic should be treated appropriately, in this forum there are a number of self-interested reasons for employers to be wary of such concerns.[10]

b. Although an obviously sensitive area, it is important for an employer to be aware if an employee has reason to fear a non-employee spouse/significant other.

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[10] Of course, there could be an additional symposium on this issue alone. By necessity, this portion of the outline deals strictly with portions of those issues as they relate to the employment context.

c. If so, precautions should be taken to see that the employee is not working alone in the workplace, especially at night.

d. A related issue that is a subset of domestic violence,[11] although not always necessarily relationship-oriented, is stalking.

e. Stalking can create a myriad of issues for the employer, including:

    i. The threat or actual infliction of violence against the "target"/victim employee.

    ii. The physical involvement of others in the violence (i.e., if the stalker arrives on the premises looking for the victim).

    iii. The "indirect" involvement of others in the violence (i.e., "covering" for the victim when the stalker telephones, etc.).

    iv. Increased potential for disruption of the business. Example: *People* v *David Keith Gurnsey*.

    v. Putting victim and non-victim employees in harm's way. Example: *People* v *Gerald M. Atkins*, Oakland County Circuit Court No. 1997-155349-FC; Michigan Court of Appeals No. 212190; Michigan Supreme Court No. 118145 (2001).

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[11] Not all incidences of stalking evolve from domestic relationships. However, it is also true that those with the greatest potential for violence are domestic-related incidents. For purposes of convenience, stalking is discussed in this context in both general and specific terms.

f. In any domestic violence or stalking situation, it is critical for the employer to be supportive of the employee and to reinforce that the situation is not the victim's fault. It is the abuser/stalker who is taking the action that is creating the violence and/or disturbance.

g. The victim will feel enough terror and fear about the situation itself, coupled with feelings of guilt and embarrassment that the situation has spilled over into the workplace. The worst thing the employer can do is exacerbate the situation by placing additional stress on the victim.

h. In this regard, it is a good idea for members of management to be familiar with the process of obtaining a Personal Protection Order ("PPO").[12] Unlike what is commonly thought of as a simple "restraining order," in Michigan a PPO is available to anyone who has been physically, emotionally or sexually abused by a spouse, former spouse, family member, partner, parent of your child, current or former roommate, or current or former dating partner. A PPO might also be given if there is proof of stalking. The forms to request a PPO can be obtained in the County Clerk's office, and in some instances from domestic violence resource centers.

[12] This is not to say that employers have to become experts in the legal process of obtaining PPOs. While ideal, this is not always realistic. Management should at least be in a position to provide appropriate information so that the victim(s) of stalking can receive assistance in beginning the process of protecting themselves, and in the process the workplace as well.

2. Crime and other violence at the work site.

   a. While a majority of employees report feeling safe inside the workplace, a similar majority also reports having concerns around the workplace.

   b. For example, while employees usually feel secure at their desk, many feel unsafe walking to or from their vehicles.

   c. A poorly lit, unattended employee garage or parking lot is an invitation to predators.

   d. Although women are considered particularly vulnerable, anyone can become a crime victim under certain circumstances.

   e. In addition to individual precautions (being alert, surveying your surroundings, etc.), a broader, general deterrence is important also. Bright lights, surveillance cameras, fences, guarded gates, parking lot patrols, etc., can be the best defense against crime.

   f. The failure to take appropriate precautions could be the basis for a lawsuit in the event that an employee, or other party on the premises, is attacked.

3. Bomb threats.

   a. Bomb threats can dramatically and seriously interrupt daily operations, and despite the fact that the vast majority of such scares are hoaxes, they must each be treated seriously.

b. Employers should, at a minimum, have contingency plans in effect for such an event. Such plans should include centralized management of the situation, alternative and effective means of communication, management training, employee awareness, and other such means of implementation. This list is of course by no means exhaustive.

c. Local, county, and state law enforcement officials often will offer advice in handling such problems and in facilitating contact with organizations that can help you pre-plan for such an emergency.

4. Some suggested methods of deterrence.

a. Violence policy and procedure is foremost in this regard. Making employees aware of their options and the availability of support services is key to deterring violence, and to resolving violent situations when they arise.

b. Job site security. Such prevention policies can range from metal detectors to security guards to gated facilities. Obviously the degree of security will depend on the facility. What might be appropriate for a courthouse or other public building may not be appropriate for the local coney island. However, the employees face many of the same threats from sources outside the workplace.

c. Visitor sign-in sheets and badges. While modestly inconvenient, this system can be very effective in deterring violence and other harm to employers such as corporate espionage.

d. Employee identification badges. Even the most simple ID badges (i.e., not including those necessary to gain access to facilities) is an easy way to identify those that belong in a certain facility or area, and who may be a visitor, or worse, an intruder. While there will always be some employees who will resist an ID badge system, most will realize that it is for their own protection and with appropriate guidelines and maintenance of security procedures the system should be easy to implement.

III. INTERNET AND OTHER ONLINE ISSUES

A. Improper use of internet service.

By now, most organizations have internal policies governing appropriate and inappropriate uses of employer-provided internet access.

It is axiomatic that unauthorized use of the internet by employees decreases productivity. There are however, greater concerns of which employers should be aware as well.

The failure to establish and enforce such policies can, in some instances, result in liability to the employer. Example: *New York Times* case where an employer was found liable for sexual harassment for allowing employees to distribute offensive emails that created a hostile work environment.

B. Improper uses of electronic mail.

1. To promote/participate in illegal activities.

a. Gambling.

b. Obtaining and/or distributing pornography.

2. Distribution of offensive or inappropriate material.

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PRIVACY IN THE WORKPLACE

By: Kristina D. Maritczak

I. PRIVACY

A. Employers have a right to monitor e-mails, Internet use, telephone conversations, computer files, faxes and any other forms of communications.

B. The reason for monitoring is for employers to be certain that company products are being used appropriately, that employees are productive, and that the work environment is safe.

C. Employers should balance rights of privacy of the employees with the need to monitor. Should weigh employer's need to know with the employees' expectation of privacy.

D. Key is to have a productive work environment and avoid possible litigation for invasion of privacy.

E. Private employees have only a few remedies. There are generally four types of claims that may be brought:

1. Intrusion into private solitude or seclusion.

a. The employer's intrusion must be one that involves a private matter and one that a reasonable person would deem to be offensive.

b. This may be alleged by an employee who feels that an employer unreasonably searched their personal area such as a desk or locker, or conducts surveillance in improper areas such as changing rooms or bathrooms.

c. This claim may be brought even when an employer asks improper questions regarding any employee's private life such as sexual orientation.

2. Public disclosure of true, but private facts.

a. When an employer publicly discloses private and embarrassing facts about an employee to a wide audience without his/her permission.

b. The employee must prove that the information is private, the employer's release of the information is offensive and the employee suffered injury as a result of the employer releasing the information.

3. Portraying an individual in a false light.

a. If an employer attributes false or offensive conduct or characteristics to an employee.

b. The characteristics attributed to the employee is untrue.

4. Use of an individual's name or likeness.

a. When an employer uses an employee's photograph, likeness, or attributes specific statements to an employee.

b. The employer does not have permission from the employee to do so.

F. Michigan recognizes the common law tort for invasion of privacy as embodied in the Second Restatement of Torts (1977). Specifically, Michigan recognizes the four above-mentioned privacy claims.

G. Physical searches of employees.

1. The most intrusive search is a physical search.

2. A physical search may be lawful if the employer, or another reliable employee, observes an employee taking something.

3. Prior to hiring the employee, the employer should make known to the applicant the policy of videotaping and that a subsequent search of the employee may result.

4. The rule is that the employer may search the employee or other work area provided that it is limited to a work-related reason and is based on a valid suspicion of criminal or civil wrongdoing or violation of company policy.

5. In practice, the employer should issue company locks and make an extra set of keys for all lockers, files and desks. The employer should inform employees that they are doing so because it will give employees notice that the employer has access to all locked areas.

6. If you have to search an employee, avoid touching him/her. Order him/her to remove the contents of his/her pockets or other suspected areas where the goods may be stored. Do the same with employees' purses, briefcases, cars, etc.…

7. The employer should notify the police if there is substantial and credible evidence of criminal activity.

H. Video Surveillance. (Please see electronic monitoring discussion.)

1. Employers have valid reasons for videotaping such as theft, prevention of violence, crime detection, or ensuring productivity.

2. Employers should only videotape public areas of the workplace and provide notice to employees of taping.

3. Employers should not tape private areas of the workplace such as locker rooms and/or bathrooms.

I. Internet and E-mail. (Please see electronic monitoring discussion.)

1. The Electronic Communications Privacy Act of 1986 (ECPA) prohibits the unlawful and intentional interception of any wire, oral, or electronic communication and prohibits access to information while it is in storage.

2. The employer may intercept these communications when the employer obtains an employee's express or implied consent.

3. The employer may have access if it is the provider of the service and there is a legitimate business purpose to review it in the normal course of business.

J. Employment Interviewing and Testing.

1. The employer cannot inquire into a variety of areas such as marital status, disability, and/or age for example.

2. Interview questions should be based on the applicant's ability to perform the job.

3. Tests and procedures used by the employer in hiring applicants may intrude on their privacy and discriminate against the applicants. For example, the Americans with Disabilities Act prohibits employers from requesting a medical exam until after an offer of employment has been made.

K. Nonfraternization Policies.

1. The employer may institute a policy of non-dating.

2. It is reasonable to have a policy involving superior-subordinate but not a general policy involving all employees.

L. Medical Information.

1. The Americans With Disabilities Act and Family Medical Leave Act regulate the release of information.

2. The employer should have provisions involving confidentiality in the release of medical record information.

3. The employer should always obtain written consent of the employee before releasing the information.

M. How to Formulate a Privacy Policy.

1. The key is to focus on the employees' reasonable expectation of privacy.

2. The policy should be reasonable.

3. The employer needs a carefully drafted policy and should communicate it to all of the employees.

4. The policy should balance the employer's need to know and the employees' right to privacy.

5. The employer needs to outline the procedures to be used in a search. An example is for a neutral third party at the management level to be involved in any search and/or investigation. Be sure to stress that this procedure ensures fair and adequate treatment.

6. The employer should consistently enforce the policy.

7. The employer should reissue the privacy policy periodically and obtain the employee's signature indicating an understanding of the policy and providing written authorization.

8. The employer should post the policy in areas that employees frequent.

9. The employer should include copies of the policy as a part of the orientation process for employment.

II. APPLICANT SCREENING

The following methods can be utilized in screening applicants before making hiring decisions.

A. Background checks.

Before making an employment and/or hiring decision based on an applicant's or employee's criminal record, the employer should consider the following:

1. The length of time since a conviction;

2. The nature of the crime;

3. The relationship between the job to be performed and the record of conviction;

4. The number of convictions;

5. Rehabilitation efforts; and

6. Subsequent employment history.

These factors should be utilized unless there is a state or federal law that prohibits a conviction in order to qualify for employment.

A. Fingerprinting.

1. Most employers have no reasonable basis to fingerprint employees.

2. Only should be done when a federal or state law permits the employer to do so.

B. Obtain applicant's consent in doing a background check. Be sure that the consent is written and the applicant signs the waiver.

C. Fair Credit Reporting Act.

Federal Law. Credit reporting agencies provide background financial and personal information on prospective and current employees to employers (15 USC Sec. 1681). Michigan law controls unless it is inconsistent with federal law. There are two types of reports:

1. Consumer reports which give the employer financial and personal information such as an individual's payment history, indebtedness, and addresses.

a. The employer may only obtain the report for a permissible "employment purpose" which is considered to be an employer's evaluation of an individual for employment, promotion, re-assignment, or retention.

b. Prior to obtaining a consumer report an employer must:

i. make a clear disclaimer to an individual in a written document which sates that a consumer report may be obtained for employment purposes; and

ii. obtain the individual's signed authorization to obtain the report.

c. Before taking negative action against an individual, the employer must provide the applicant or employee a copy of the report, and a written statement of the individual's rights under the law as prescribed by the Federal Trade Commission.

d. If a negative decision is made based in whole or in part on the information in the consumer report the employer must provide either orally, in writing, or electronically to the employee:

i. Notice of adverse action;

ii. The name, address, telephone number of the consumer reporting agency that provided the consumer report;

iii. A statement that the consumer reporting agency did not make the negative decision and cannot provide the individual with the specific reasons supporting the action;

iv. Notice of the person's right to obtain a free copy of the consumer report (if requested within 60 days of notice then the agency must provide the report free of charge); and

v. Notice of the person's right to dispute the accuracy or completeness of the information contained in the report.

2. Investigative consumer reports.

a. Before obtaining an investigative report there must be a clear and accurate disclosure to the person that this type of a report may be obtained.

b. The disclosure must:

i. be in writing;

ii. be mailed or delivered through other means to the person no later than three days after the report was first requested;

iii. include a statement informing the person of his/her right to request additional disclosures and to receive a written summary of his/her legal rights; and

iv. if a request is made regarding the investigation, the employer must mail this within five days of receipt of the written request, or request date of the report, whichever is later.

3. Because this information is sensitive, an employer should only request a consumer report when a prospective employee or current employee will have great responsibilities such as handling large amounts of cash or products or when the potential employee would have financial discretion with respect to operations.

4. STANDARD: There should be a legitimate and rational business reason when an employer requests a consumer report.

5. Information that may be excluded from these reports is medical information and/or criminal history (unless earns a salary of $75,000 or more).

6. The Federal Trade Commission is responsible for enforcement. It may impose civil and/or criminal penalties.

D. Information Regarding Educational History.

1. If an employer would like to inquire about an employee's or prospective employee's educational background, the employer should include a written release or disclosure statement as part of the employment application.

2. The Family Educational Rights and Privacy Act may prevent a university or college from releasing such information without written consent (20 U.S.C. Sec. 1232(g)).

E. Driving Records.

1. The Driver's Privacy Protection Act of 1994 regulates third party access to individual driving record information (18 U.S.C. Sec. 2721).

2. An employer may obtain vehicle information if the employee or potential employee provides written and signed consent.

3. The Act prohibits the department of motor vehicles from disclosing personal information.

4. Automobile accidents, driving violations, and driver status information are not considered to be personal information.

5. The Act allows employers to obtain and verify personal information for holders of commercial driver's licenses.

F. Reference Checks.

1. Many employers do not reveal information about their former employees for fear of being sued.

2. An employer should always require that an applicant sign a release that authorizes a prospective employer to contact past employers for information.

3. The release should be included as a part of the employment application and kept in the personnel file after the individual is hired.

G. General Information Regarding Investigations.

1. Don't overreach in conducting the investigation.

2. Only do checks if there is a legitimate reason to know and the reason is closely or substantially related to an employee's future or current job.

3. Individual background checks should only be requested after a job offer has been made. Costs and delays may be great. Also, any allegations of employment discrimination may be avoided by conducting post-offer investigations.

4. All background check information should remain confidential. All professionals should be trained to maintain confidentiality. All records should be kept in a secured area.

5. Develop a policy regarding the employer's right to conduct background checks. Be sure to explain that the employer's goal is to maintain an orderly, safe and productive workplace which serves as the basis for the policy. The employer should remain open to employees concerns and suggestions and articulate this information to the workforce.

6. Allow employees an opportunity to explain any damaging or negative background information before and/or after discovery.

H. Information to Include in Forms and Applications.

1. Include a statement above the applicant's signature line describing the type of background checks to be conducted.

2. Include a provision indicating that false or misleading employment information may result in a refusal to hire and if information is discovered it will lead to discipline or discharge.

3. Monitor gaps in employment or education by requiring monthly or yearly designations of employment and/or education information.

I. Michigan Law.

1. Arrests and Convictions.

a. State law prohibits employers from asking about arrests that did not result in convictions.

b. Employers may ask about arrests <u>resulting in convictions</u>.

2. Mandatory Background Checks.

a. The employer must request a criminal history check for teachers or school administrators upon an offer of employment.

b. Applicants must give written consent at the time of application for the Criminal Records Division of the Department of State Police to conduct a criminal history check.

c. The employer may offer conditional employment based on the outcome of the check.

3. Driver Record Information.

a. The State will only release personal motor vehicle operator information under certain limited circumstances.

b. The employer may access the information to verify personal information in connection with a valid commercial driver's license.

c. Personal information is defined as "Identifying information, including an individual's photograph or image, name, address (excludes zip code), driver license number, Social Security number, telephone number, digitized signature, and medical and disability information."

d. This does not include information on driving or equipment-related violations or civil infractions, driver or vehicle registration status, accidents, and other information related to behavior.

III. ALCOHOL AND DRUGS

A. Alcohol and Drug Screening.

1. Drug Free Workplace Act of 1988.

2. Components of a Drug-Free Workplace Program.

a. Needs Assessment.

b. Employee Education.

c. Supervisor Training.

d. Employee Assistance Programs (EAPS).

e. Drug Testing.

3. Employer Policy.

A written policy should be drafted by the employer. It should include an explanation of the law of the state. It should include the following:

a. A statement that the use, possession, or sale of drugs or alcohol is prohibited;

b. A statement that employees should be in good physical and mental condition to be able to perform their duties;

c. An explanation of the situations where drug/alcohol testing would occur;

d. An explanation of the types of tests employees would be given;

e. An explanation of which supervisory individuals could require an employee to undergo testing;

f. An explanation in the application process that drug testing will be a condition of continued employment;

g. A procedure to ensure that the sample that was given by the employee is the one that is tested by the lab;

h. A procedure for a subsequent and more accurate, more expensive, retest;

i. An explanation of the company and/or physician who will do the testing;

j. A policy of whether the employee would be offered a chance of rehabilitation to avoid discharge;

k. A statement ensuring strict confidentiality in the drug testing process; and/or

l. A statement requesting that employees notify the employer of taking over-the-counter or prescribed medication.

B. Detection of Drugs on the Premises.

1. When a private employer conducts searches of employees for drugs, the Fourth Amendment's prohibition for unreasonable searches and seizures applies.

2. When a private employer cooperates with a law enforcement agency in searching its employees for drugs, the Fourth Amendment applies.

C. When Drug Testing May be Performed.

1. On a random or company-wide basis;

2. On specific employees about whom the employer has a reasonable suspicion of drug abuse because of accidents, physical symptoms, or other reliable evidence of physical or mental impairment; or

3. In conjunction with a physical examination.

D. Drug Testing of Private Sector Employees.

1. Private sector employers may require all applicants to submit to a drug test.

2. Also, private sector employers may require all employees, except those who are unionized, to submit to drug tests.

3. When testing unionized employees the employer must negotiate the tested procedure as part of the union contract. This does not affect applicants.

E. Drug Testing of Public Sector Employees.

1. There are constitutional dimensions and the law is not settled. The U.S. Supreme Court held in Skinner v Railway Labor Executives' Ass'n, 489 US 602 (1989) and National Treasury Employees Union v Von Raab, 816 F2d 170, 182 (5th Cir 1987), aff'd in part and vacated in part on other grounds, 489 US 656 (1989) that:

   a. A urinalysis is considered a search under the Fourth Amendment.

b. In certain types of employment the employer is exempt from the Fourth Amendment. For example. a railroad transportation worker can be tested even if his/her conduct is not suspicious because the government has a compelling interest in having the railroad system be safe.

2. Generally, a public employer has to have a legitimate reason to drug test the employees and the courts will look at the job duties of the employees in determining whether the reason is legitimate.

F. Random Drug Testing.

1. Must test every employee.

2. Includes president or CEO.

3. Most reliable because employees do not have time to cheat.

G. Beware of Employee Evasion.

1. Employees find ways to evade drug tests through the following methods:

a. Purchase of dehydrated urine;

b. Adulteration of urine with eyedrops, dish soap, vinegar, bleach, drain cleaner to mask or invalidate the sample;

c. Substitution of urine sample;

d. Drinking large amounts of fluid;

e. Excusing the use as being second hand, i.e., in a room where someone was smoking marijuana and inhaled second hand smoke (tests do not have positive results in these circumstances);

f. Others indicated on Internet websites such as www.passyourdrugtest.com.

2. A possible solution is to indicate in the policy that samples that are tampered with and efforts to alter the tests are violations of the employer's policy and can lead to discharge.

IV. <u>ELECTRONIC MONITORING</u>

A. Includes monitoring of employee's e-mail or Internet use, fax use, telephone monitoring, video monitoring, and audio surveillance.

Reasons to monitor are:

1. To ensure that employees are using business resources for work purposes and not personal use;

2. To prevent theft, and

3. To deter violence.

B. Consider effects on employee morale before installing a monitoring system.

C. Right to Privacy.

1. Private employers are not bound by the right to privacy in the U.S. Constitution. Private employers may be subject to provisions in the Michigan Constitution or state and federal statutes.

2. Public employers are bound by the U.S. Constitution and should consider this when enacting policies such as search policies of employees.

D. Collective bargaining agreements may preempt claims of privacy. An example is if there is an electronic monitoring policy in the agreement, which would preempt a unionized employer's check of a privacy violation

E. Expectation of Privacy.

1. Courts have determined that employees have a greater expectation of privacy in locker room and bathrooms.

2. The employees expectation of privacy is lessened in common areas and places where the public has access.

F. Communication.

1. In order to lower an employee's expectation of privacy, an employer should provide all employees with a clear explanation reflecting the monitoring policy, surveillance techniques and rules on the use of faxes, telephones, and e-mail.

2. Employees should be aware of the level of privacy to expect at the time of being hired.

3. The employee should sign such a statement at the time s/he is hired.

G. Electronic Communications Privacy Act of 1986 (ECPA).

1. Federal law which allows monitoring in the workplace in certain situations:

a. When one party consents;

b. When the provider of communication services can monitor communications, or

c. When monitoring is done in the ordinary course of business.

2. Courts have not addressed the interception of e-mail under the Act. Employers must be careful when intercepting or recording on servers they do not own. Employers may search stored messages if the employer maintains the system on which the message is stored.

3. Exceptions exist if:

a. There is written express or implied consent given for monitoring, and/or

b. The message is stored on a telephone business extension maintained and controlled by the employer.

H. Employer Policies.

1. Generally an effective policy should have the following information:

a. The employer has a legitimate business interest for searches and monitoring of employees;

b. An express policy regarding the right to perform searches; and

c. The searches and monitoring would be of e-mail and voicemail only.

2. How to word an electronic mail policy statement:

   a. The computer system is company property and is to be used for business only;

   b. The employee's use of the network reflects the employee's consent to searching and monitoring by management and acknowledges the employer's right to access and review e-mail, listen to telephone conversations, voicemail, and/or monitor Internet activity;

   c. E-mail, phone calls, and Internet use should be for business purposes only and not for personal reasons.

   d. It is **very important** to include the following disclaimer because an employer can be liable for anything that can be harassment that takes place over e-mail**: "Foul, offensive, defamatory, pornographic or other inappropriate communication is prohibited."**

3. The policy should note that the employer reserves the right to monitor the telephones, Internet and e-mail networks at anytime without notice to make certain that they are being used for business purposes only and to make sure there is no harassment. Also, the employer should state that s/he is allowed to access this information at any time.

4. The policy should state that the employees have no right to privacy in any matter created, received, or sent from the telephone, Internet, or e-mail systems.

5. The employer should send reminders to all employees that everything can be intercepted at all times, even if disclosed by mistake.

6. The employer should remind employees that the employer can look at anything for business purposes and, as a result, the employee must disclose the passwords to the relevant computer programs.

7. Employees should disclose information or messages from an Internet, telephone, or e-mail network only to authorized employees and managerial staff. E-mail and voicemail is limited to those who need to know.

8. Confidential information should not be sent vial e-mail.

9. Policy violations will cause an employee to be disciplined and even discharged. The employees should sign a form indicating that they reviewed and understand the policy. The policy should be in the employment manual, included in orientation, and, as a constant reminder, the employer should program a prompt that flashes on each employee's screen every time the employee logs on to the computer.

I. Telephone Monitoring.

1. Under the ECPA, it is acceptable to tape as long as one party to the conversation consents, even if that party is the one who is taping.

2. Voicemail should be accessed if there is a legitimate business reason in the ordinary course of business.

3. Telemarketers and customer service monitoring of phone calls should have a recorded message for all callers and should inform all employees that the conversation is being recorded.

4. If there is a personal conversation on the line, the employer can monitor the length of time of the call but must discontinue recording the contents of the conversation.

J. Internet Use.

1. The employer should consider monitoring for productivity reasons.

2. Inform employees that their activities may be automatically monitored by a surveillance system and reviewed for legitimate business reasons.

3. Remind employees when they surf the net, they represent the company and if any employees send out harassing or otherwise inappropriate messages, they are subject to discipline. Be sure to establish guidelines for proper conduct.

4. Install monitoring and filtering software to block out specific Websites.

5. Encourage employees using the Internet for personal reasons to do so after hours.

6. Periodically review your system for illegally copyrighted materials.

7. Ensure system integrity involving issues such as downloading software, protection of trade secrets and confidential information, and encryption of documents sent via e-mail.

8. If a company Website exists, be sure to have it updated and require the activity to be monitored. Be sure to note that if there are defamatory postings on the Website, the employee will be dismissed.

K. Video Monitoring.

1. Helps deter theft and other inappropriate behavior.

2. Employees have no reasonable expectation of privacy in an open office environment. May be intrusive if targeting one employee's work area without cause.

3. Keep machinery and tapes in a confidential secure spot.

4. Do not keep the recordings for an unreasonable time.

5. In areas where videotaping is taking place, provide notice to employees that video monitoring equipment is in use. Also, may serve as added security for employers who come into contact with the public.

6. There are areas where employees do have an expectation of privacy and monitoring should be avoided in bathrooms and locker rooms.

7. The law applies differently to mere video monitoring and video monitoring with audio.

L. Michigan Eavesdropping Statute. (MCLA 750.539 et. al.)

1. Prohibits the interfering with an individual's right to privacy by prohibiting interception of private conversations.

2. States that any person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties, or who knowingly aids, employs or procures another person to do so, is guilty or liable.

3. Whether a conversation is private depends on whether the conversation was intended for, or restricted, to the use of a particular person or group or class of persons and is intended only for the persons involved.

4. Eavesdrop means to overhear, record, amplify, or transmit any part of the private discourse of others without the permission of all persons engaged.

5. Criminal penalty is a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than $2,000, or both.

6. Civil penalties are:

    a. An injunction by a court of record prohibiting further eavesdropping;

    b. All actual damages against the person who eavesdrops; and

    c. Punitive damages as determined by the court or by a jury.

7. Act applies to cordless telephone conversations.

8. A violation of the Act occurs even if the employer records the conversation and does not listen to it.

EMPLOYER PITFALLS

A CASE STUDY

By: Michael S. Leib

Bob is a line worker at an auto supplier, ACME Manufacturing, which employs approximately 150 full-time workers. He is supervised by Carol, who has been with the company for several years and recently divorced. Bob, never married, is friendly with many women. His work record is fair. Carol has risen through the ranks and is in line for promotion to another administrative position where she will supervise additional departments.

Bob, 33, has been at the company for approximately 15 years. He makes a good salary and has a pension plan to which he and the company contribute.

Bob and Carol became friendly and began dating outside work. Bob told his friends at work about Carol's physical attributes and Carol, not to be outdone, jokingly described Bob's attributes to her friends at work. Bob, being the bachelor he is, did not wish to make a commitment to Carol, which thoroughly displeased and angered Carol. They decided to stop dating.

When the time came for Bob's semi-annual review his evaluation took a sudden nosedive. Before his difficulties with Carol arose, he was rated as a slightly above average employee, but his evaluation now indicated a below average rating, and was placed on probation.

Bob became concerned about his job because both his previous supervisor and the person who interviewed him at time of hire had said that as long as he did a good job, he would have a job — one big happy family. ACME's slogan is "If you are good, we are home." Although Bob recalls receiving a thick book with his paycheck, he didn't pay much attention to the "at-will employment" section.

After his negative evaluation, Bob noticed that Carol was extremely moody, sometimes cold to him one day and real friendly the next. He began receiving "hang up" telephone calls at home, and a photograph showing Bob and Carol in an intimate moment, taken by Carol during happier times, was left at his work station. When Carol talked to Bob during her good moments, she often placed her hand on his rear end and pressed herself against him. Once her face was within a few inches from his but he stepped away.

After several weeks, Bob asked Carol to stop being physical and overly friendly. She said she would, but she didn't. Not knowing who to complain to, Bob found the manual he had received with his paycheck years earlier and read it for the first time to see if it contained anything that would help him deal with the situation. Finding nothing in the manual, Bob went to Ted, who he thought was Carol's boss, and told his story. Ted laughed and told Bob he had a good thing going and should keep his mouth shut. Bob tried to do that, but he became more and more anxious at work. Sometimes he missed work because his stomach was so upset. He never knew when Carol would turn up beside him and touch him in a way that made him uncomfortable.

Then Bob learned that Carol had shown some private pictures of him to her girlfriends, one of whom told Ted, and also made a comment about Bob's physical attributes. The next thing Bob knew, one of his co-workers told him that he had seen the pictures and was “really impressed.”

A few weeks later, Bob was called into the human relations office. Ted, Carol and Alice, the HR manager, were present. Alice explained that Bob’s work performance had suffered and the company could not carry him anymore. His employment was terminated. Bob, in shock and speechless, left work that day in a daze.

Bob did not leave his house or eat for five days. One of his friends called to see how he was doing and, getting no answer on the telephone, came to Bob’s house, where he found Bob almost comatose. The friend called an ambulance and Bob spent the next two weeks in a hospital psychiatric ward. Bob was discharged, placed on anti-depression medication and has undergone regular, intense therapy with a psychiatrist ever since.

Since Bob was fired he has gained almost 30 pounds and started smoking again (he had quit before he was hired by ACME), but he has finally started looking for a new job. He can no longer afford health care coverage and has not received any information from ACME about his health care coverage.

Incidentally, ACME’s plant is located in Detroit and Bob is an African-American male. Carol, Ted and Alice are white.

As previously noted, Bob had worked at ACME for fifteen years and had contributed to a pension plan. In desperate need of money, he wrote a letter to the company requesting his pension benefits. In response, he received a letter saying that the company would look into it. However, Bob did not receive anything more from ACME regarding his request, even after he sent the company a second letter.

Bob continued to submit employment applications to other companies. In each application Bob identified ACME as his most recent employer and Carol as his supervisor. One prospective employer was very encouraging and appeared ready to make Bob an offer but that opportunity fizzled. The employer told Bob that he could not be hired and showed him a letter from Carol, in which she said that Bob had harassed her and was not an honest person.

Bob sought the advice of a lawyer who, after hearing the story, was eager to represent him.

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Epilogue:

This is not a true story in the sense that it does not involve real people and events, but it is one that could occur in a working environment such as the fictional ACME Manufacturing. In truth, all of the events described here have occurred someplace, some time, but not all necessarily at one company or to one employee. In that sense, the story is fact-based and realistic. I have chosen to present a set of facts that will allow us to talk about various claims that can arise. This is not intended to describe every claim but only a few and, therefore, the following material does not attempt or purport to be a primer on employment law but, rather, to highlight particular issues.

I. IS THE EMPLOYMENT RELATIONSHIP AT WILL, JUST CAUSE OR SOMETHING ELSE?

Generally speaking, employment relationships can be described as (1) "at will", (2) "satisfaction", or (3) "just cause."

Employment contracts for an indefinite length of time are presumed to be terminable at the will of either party, with or without a good reason. Such contracts include those that purport to promise "permanent" or lifetime employment. On the other hand, contacts for a definite, fixed term are presumed to be terminable (at least by the employer) only for just cause. See *Lytle v Malady* (on rehearing) 458 Mich 153, 579 NW2d 906 (1998), *Rood v General Dynamics Corp.* 444 Mich 107, 507 NW2d 591 (1993).

Like most things in law, there are exceptions to the at will/indefinite duration policy based upon "distinguishing features." These features are not well defined but are found in situations where the existence of certain facts suggest that some leeway should be given. For example, where an employee gives up a job upon being "hired" by a new employer and then arrives at the new employer's place of business, ready to work, only to be told that the job does not exist, the courts may (or may not) consider that to be a sufficiently "distinguishing feature" to justify making an exception.

There is also a "promissory estoppel" theory, which provides that certain promises and assurances by an employer can give rise to an enforceable employment claim when the employee has reasonably relied on those promises. A promissory estoppel claim is usually met by a "statute of frauds" defense by the employer, who argues that the promises were not in writing and, therefore, not enforceable. See, *e.g. Schipani v Ford Motor Co,* 102 Mich App 606; 302 NW2d 307 (1981). However, this is not a sure-fire defense because not all promises need be in writing in order to be enforceable.

A "satisfaction" contract is one under which the employee is to be employed "as long as" the employee's services are "satisfactory" to the employer. In these situations there can be no inquiry into the reasonableness of the employer's dissatisfaction; the employer's discretion is without limit so long as his "dissatisfaction" is not a sham. The jury (or the judge if there is no jury) is asked only to determine whether the employer's manifestation of dissatisfaction was made in bad faith, dishonestly or fraudulently. See *Lynas v Maxwell Farms*, 279 Mich 684; 273 NW 315 (1937).

Then, there is the "just cause" employment relationship, where an employer must have "just cause" to terminate an employee. Such contracts can be established by written agreements, oral agreements or a "legitimate expectation" of job security through a contractual provision implied at law. See *Lytle v Malady, supra* at 164.

II. <u>CHANGES OF EMPLOYMENT POLICIES</u>

An employer can unilaterally change its personnel polices provided that it gives appropriate notice to its employees. See *In re Certified Question (Bankey v Storer Broadcasting Co),* 432 Mich 438; 443 NW2d 112 (1989). On the other hand, bad faith policy changes are not permitted. Bad faith might be found, for example, where a unilateral change in policy is made shortly before the discharge of an employee and is the basis for the discharge. The question of whether an employer made a policy change in "good faith" is for the fact-finder. *Farrell v Automobile Club of Michigan,* 187 Mich App 220; 466 NW2d 298 (1990).

III. <u>TORT THEORIES</u>

A. Intentional Infliction of Emotional Distress.

The elements of this claim are (1) extreme and outrageous conduct intentionally or recklessly (2) causing severe, emotional distress if bodily harm to the other results from it. Restatement (Second) of

Torts § 46. This tort assumes that a person is entitled to be free of serious, intentional and unprivileged invasions of his or her of mental and emotional tranquility. *Campos v Oldsmobile Div, General Motors Corp,* 71 Mich App 23; 246 NW2d 352 (1976). The generally accepted test is whether the conduct at issue is "so outrageous and extreme as to be beyond all possible bounds of decency."

The Michigan Supreme Court has never expressly recognized this tort but there are Michigan Court of Appeals cases that do. Those cases are and will remain binding upon the lower courts until they are overruled by the Supreme Court.

B. Defamation.

Defamation is a tort theory based on communications regarding a person (including legal entities such as corporations) that are both false and defamatory. Defamatory statements that are made in a tangible form (writing, pictures, etc.) are "libel," and intangible statements (such as spoken words or gestures) are "slander." A defamatory statement is one that tends to harm the reputation of a person so as to lower him in the estimation of the community or deter others from associating or dealing with him. The statements must be communicated to a third person and must concern the party who claims injury. In order for a statement to be actionable, it must be established that the publisher of the information, such as an employer in an employment situation, acted at least negligently by failing to use the proper amount of care to investigate the truth of the statement. Then, a party must establish that the alleged false and defamatory statements caused either general harm, such as damage to a reputation, or special harm such as not being hired by a prospective employer. There is, however, a qualified privilege to comment on employees so long as the communications are made in good faith, in a proper manner, on a proper occasion, with a proper motive and limited in scope to that purpose, and to proper parties only. *American Transmission, Inc v Channel 7 of Detroit, Inc,* 239 Mich App 695; 609 NW2d 607 (2000).

C. Invasion of Privacy.

There are four distinct claims for invasion of privacy, three of which bear mention here.

1. A claim for intrusion upon seclusion can arise when an employer attempts to dig too deeply into matters regarding which the employee has a legitimate expectation of privacy, such as an employee's sexual habits.

2. A claim for public disclosure of private facts can arise where an employer exposes private facts such as an employee's sexual habits to a public whose knowledge of those facts would be embarrassing to the employee. Such a "public" need not be the general public; a particular public such as fellow employees may be sufficient. *Beaumont v Brown,* 401 Mich 80; 257 NW2d 522 (1977). See, for example, *Dzierwa v Michigan Oil Co, 1*52 Mich App 281, 393 NW2d 610 (1986), which requires the dissemination of objectionable statements to the general public or "a large number of people."

3. A "false light" privacy claim can arise from "[p]ublicity which places the plaintiff in a false light in the public eye." In general, there must be falsity or fiction concerning plaintiff, with the same degree of public disclosure as required for "public disclosure of private facts." Typically, this tort is found where a person falsely attributes some opinion or statement to another

or uses the other's picture to illustrate some book or article with which he has no reasonable connection. However, it applies to any falsity that a reasonable person would find objectionable if presented to the public. *Beaumont v Brown, supra.*

IV. SEXUAL HARASSMENT

Federal and state courts recognize two types of sexual harassment:

A. *Quid pro quo* harassment. This is found where an employer or a supervisor demands sexual favors as a condition of employment or continued employment.

Quid pro quo harassment is perhaps best understood as a situation in which an employer makes a demand or request for sexual favors that amounts to a term or condition of employment and is causally related to a tangible employment action such as hiring, firing, failure to promote or reassignment to a different position.

B. "Hostile environment" harassment. In Michigan, the Elliot-Larsen Civil Rights Act provides a statutory basis for a discrimination claim, including hostile environment harassment. MCL 37.2202; MSA 3.548.

1. A hostile environment claim requires a showing of five elements:

    a. The employee belonged to a protected group.

    b. The employee was subjected to communication or conduct on the basis of his or her status as a member of the protected group.

    c. The employee was subjected to unwelcome sexual conduct or communication.

d. The unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment and created an intimidating, hostile, or offensive work environment.

e. Respondeat superior (an employer's "vicarious" liability for wrongful acts by its employees and agents).

Radtke v Everett 442 Mich 368; 501 NW2d 155 (1993).

C. In examining the allegedly hostile environment the courts must determine (i) whether the harassment was "because of" sex or gender, (ii) whether the conduct at issue was unwelcome, (iii) whether the conduct was sufficiently severe and pervasive, and (iv) the extent to which the employer is responsible.

Where an employee is subject to conduct by a supervisor having immediate or successively higher authority over the employee, the employer is vicariously liable for an actionable hostile environment claim. Where there is no tangible employment action such as demotion or discharge, an employer may raise, as an affirmative defense to liability or damages, that it exercised reasonable care to prevent and promptly correct improper behavior and the employee unreasonably failed to take advantage of preventive or corrective opportunities. Where the hostile environment is created by a non-supervisory co-worker, the employer is liable for the harassment only if it failed to take reasonable action to stop the harassment upon receiving notice (actual or constructive notice) of the harassment. See *Glickstein v Neshaminy School District*, No. 96-6236, 1999 U.S. Dist LEXIS 727 (ED Pa Jan 26, 1999). Even complaints by employees other than the specific complaining employee can constitute notice sufficient to raise a question as to whether the employer <u>should have</u> known that a hostile work environment existed. See *Harris v Holiday*

Companies, No 2: 95-CV-153, 1996 US Dist LEXIS 7986 (WD Mich May 23, 1996).

D. Most recently, in *Chambers v Trettco Inc.* 463 Mich 297; 614 NW2d 910 (2000), the Michigan Supreme Court focused on the liability of the employer for the conduct of its employees. It stated the question as being whether it can be fairly said that the employer committed the violation, either directly or through an agent. The court then observed that an employer is strictly liable (*i.e.,* liable with or without any fault on the employer's part) only for *quid pro quo* sexual harassment and held that, in an hostile environment situation, the conduct of an employee can be attributed to the employer <u>only if the employer failed to take prompt and adequate remedial action after having been reasonably put on notice of the harassment</u> (*i.e.,* knew or should have known of the harassment). The *Chambers* decision rejected recent federal case law from the U. S. Supreme Court and reaffirmed a previous Michigan Supreme Court case, *Radke, supra,* holding that it is the employee's burden to prove that the employer failed to take prompt and adequate remedial action upon reasonable notice of the creation of a hostile environment, even where the harassing conduct is committed by a supervisor.

V. <u>ERISA RIGHTS</u>

A participant in a pension plan governed by ERISA may bring a quasi-contractual claim for the payment of benefits. ERISA § 502(a)(1)(B), 29 USC § 1132(a)(1)(B). In addition, ERISA requires certain plans to provide notice and the opportunity to elect self-paid continuation of health coverage upon termination under certain conditions. 29 USC §§ 1161-1168. The failure to provide such notice by an employee subject to COBRA and the opportunity to elect self-pay continuation of health coverage can result in monetary damages against the employer including an excise tax of $100.00 per day and, more significantly, medical expenses incurred by the former employee. See e.g. *Brown v Neely Truck Line, Inc.*, 884 F Supp 1534 (MD Al 1995). Fortunately, such claims are not susceptible to a jury trial in the Sixth Circuit and punitive damages are not available. However, a prevailing Plaintiff may be awarded reasonable attorney fees in the court's discretion. 29 USC § 1132 (g)(1). There is a five factor test to determine entitlement to discretionary attorney fees which includes bad faith, ability to satisfy an award, deter an effect of an award, common benefit and relative merits.

VI. <u>RELIEF AVAILABLE TO A SUCCESSFUL PLAINTIFF</u>

A. If the employee's claim is based on an expressed or implied contract, then the employee is entitled to recover economic damages that can be proven with reasonable certainty, which generally includes lost wages and benefits. In a contract action, damages for emotional distress are not recoverable. See *Valentine v General American Credit Inc.* 420 Mich 256; 362 NW2d 628 (1984); *Stopczynski v Ford Motor Co.* 200 Mich App 190; 503 NW2d 912 (1993).

B. The amount of money an employee is entitled to recover in a contract case (and a tort case) may include lost wages or back pay, which includes all monetary awards based on earnings and other fiscal benefits that the Plaintiff would have received but for the unlawful employment practice. *Rasheed v Chrysler Corp.* 445 Mich 109; 517 NW2d 19 (1994). However, this amount can be reduced by the amount the employee received in unemployment compensation benefits. "Front pay" may also be awarded. Front pay is compensation for lost employment extending past the date of the judgment. Front pay may also include the difference between the Plaintiff's present salary, if he is working, and his former salary. *Diggs v Pepsi-Cola Metro Bottling Co,* 861 F2d 914 (Sixth Cir. 1998). Such an award might include shares of stock to which the employee would have been entitled under the employer's special stock purchase or incentive plan. *Stafford v Electronic Data Systemps Corp.* 749 F Supp. 781 (ED Mich 1990). In addition, a jury may even award lost future pension benefits, excluding those that were vested at the time of discharge. *Teper v Park West Galleries, Inc,* 431 Mich 202; 427 NW2d 535 (1988). Such awards for future damages are reduced to present value. MCL 600.6306(2), MSA 278.6306(247).

C. The employee is under an obligation to mitigate his damages by trying to find work through a "reasonable" job search. *Flickema v Henry Kraker Co,* 252 Mich 406; 233 NW 362 (1930), *Katch v Spedeil Division of Textron Inc,* 746 F2d 1136 (Sixth Cir. 1984). The employee must make "reasonable efforts to obtain work of like nature, taking into account whether the replacement job is merely part-time, whether it involves substantially reduced pay, and whether the job conditions are comparable." (*Katch, supra,* at 1143).

D. Under a tort theory, such as employment discrimination, the employee may recover mental or emotional distress damages in addition to loss of wages, pension rights, benefits, seniority and loss of employment. *Phillips v Butterball Farms Co,* 448 Mich 239, 531 NW2d 144 (1995). In addition, the employee's spouse may recover for loss of consortium. *Eide v Kelsey-Hayes Co,* 431 Mich 26; 427 NW2d 488 (1988).

E. In general, each party bears his or her own attorney fees in the absence of a specific statute or court rule that provides otherwise. *Petition of State Farm Mut Auto Ins Co,* 50 Mich App 71; 212 NW2d 821 (1973). The Elliot-Larsen Civil Rights Act, which prohibits, among other things, discrimination based on sex, includes such a provision. MCL 37.2802, MSA 3.548 (802). Attorney fees are also permitted under the Persons With Disabilities Civil Rights Act, MCL 37.1606 (3), MSA 3.550 (606)(3), and federal laws such as Title VII and the Age Discrimination in Employment Act (ADEA).

F. Reinstatement is available as a remedy and an unconditional offer to return the employee to his previous position could provide support for a claim that his damages should be reduced. The fact-finder will take into account whether the employee was claiming, originally, that the position he held was the result of discrimination, whether the offer of reinstatement can be viewed as a demotion or whether the offer of reinstatement places the employee in the same situation he was in before the employment action that is the subject of the discrimination claim. In other words, an offer of reinstatement must be carefully examined to determine whether rejection of such an offer is unreasonable. See *Rasheed v Chrysler Corp, supra*, *Boomsma v Greyhound Food Management, Inc,* 639 F Supp 1148 (WD Mich 1986), app dismissed 815 F2d 76 (Sixth Cir. 1987).

VI. CONCLUSION

Although these situations often (if not to say typically) present many legal issues, common sense and fairness dictate the outcome of most employment cases. Juries look to how fairly the employee has been treated taking into account his or her length of employment with the employer. Virtually all jurors consider themselves to be experts in the area of employment law because they have all had a job of some sort. Notwithstanding all the paperwork, employment applications, employment handbooks and other good legal advice that can be given and received, nothing will help an employee-employer relationship more than supervisors who treat employees fairly and who respond promptly and appropriately when employment related issues come to their attention.

MADDIN, HAUSER, WARTELL, ROTH, HELLER & PESSES, P.C.
ATTORNEY BIOGRAPHIES

Michael W. Maddin is the President and one of the Managing Directors of the firm. Mr. Maddin has been practicing law for over 30 years, primarily in the areas of real estate, corporate and business law, and probate and estate planning. He is a member of the Southfield, Oakland, Michigan and American Bar Associations and the America Judicature Society. He is also a member of the Real Property Law Section Council of the State Bar of Michigan and for years acted as Chairman of the Commercial Leasing and Management Committee of the Real Property Law Section of the State Bar of Michigan. Mr. Maddin has been a speaker at numerous ICSC, ICLE, National Business Institute and State Bar of Michigan Real Property Law Section Seminars and has authored a number of articles.

Mark R. Hauser is a Managing Director of the firm who specializes in the areas of real estate, partnerships, finance, corporate and business law, taxation and estate planning. A 1964 graduate of the University of Michigan, he obtained his Juris Doctor magna cum laude from Wayne State University in 1967 where he served as an Editor of the Wayne Law Review. A member of the Real Estate, Business Law & Taxation Sections of the State Bar of Michigan, Mr. Hauser has lectured at numerous professional seminars for attorneys and accountants on real estate and tax-related issues. Mark is listed among the "Best Lawyers in America" and is currently President of the United Jewish Foundation of Metropolitan Detroit.

C. Robert Wartell is a former Chairperson of the Michigan State Bar, Real Property Law Section; former Chairperson of the Michigan Land Title Standards Committee and a member of the American College of Real Estate Lawyers. He is also a council member of the Litigation Section of the Michigan State Bar. Mr. Wartell is also a Member of the Michigan Board of Law Examiners. Mr. Wartell is a graduate of the University of Michigan Law School and received his Juris Doctor Degree with distinction in 1960. He is a firm shareholder and has practiced for 30 years in the areas of real estate and real estate litigation, including representing condemning authorities and owners of property in condemnation proceedings. Mr. Wartell has been particularly active in representing the interests of the owners of property, lenders and their title insurers. In this regard, Mr. Wartell has had extensive experience in enforcing or defending claims relating to interests in real property including construction liens.

Richard J. Maddin is a firm shareholder who has practiced law for over 30 years. He is a graduate of Michigan State University and University of Detroit Law School. His areas of practice include general business, commercial and residential real estate, construction, corporate, land use planning, zoning and probate law. Mr. Maddin is an active litigator, representing both plaintiffs and defendants in the above described areas of practice, including the areas of real estate, construction, zoning and real estate tax appeals. He is a member of the real estate and litigation sections of the State Bar of Michigan, the Southfield, Oakland and American Bar Associations, and the American Judicature Society.

Richard F. Roth is a shareholder in the firm who attended the Wharton School of Business at the University of Pennsylvania where he received a Bachelor of Science in Economics. He graduated from the University of Michigan Law School, cum laude, in 1972. Mr. Roth has a business practice with a concentration on corporate law, real estate, estate planning, and taxation. On the corporate side, he has facilitated mergers, acquisitions and financing for his corporate clients. He has handled many corporate and individual tax matters and Michigan sales, use and single business tax issues. He co-authored the statute which exempts from Michigan sales tax the purchase of hi-tech computers used in computer integrated manufacturing and CAD-CAM. Mr. Roth has lectured at numerous professional seminars.

Harvey R. Heller is a shareholder of the firm who has over the past 20 years specialized in the area of litigation, primarily professional liability defense. He is an honors graduate of Michigan State University, as well as a cum laude graduate of Detroit College of Law. In addition to being an active litigator, Mr. Heller is also a long-standing member of the State Bar of Michigan Committee on Insurance Law, the Michigan Defense Trial Council and the Defense Research Institute. On a national level, Mr. Heller is a member of the American Bar Association Standing Committee on Lawyers Professional Responsibility. He has authored articles on the subject of professional responsibility and has been a featured speaker at professional responsibility seminars.

Ian D. Pesses is a shareholder in the firm and a graduate of the University of Michigan. For the past 21 years, he has developed a wide range of expertise in the areas of business and corporate law, mergers and acquisitions, finance, real estate, employment and estate planning. Mr. Pesses has written a number of articles and is a frequent speaker on these and related subjects. He is a member of American Bar Association and State Bar of Michigan Sections Business Law and Taxation, Corporate Law, and Real Estate.

Michael S. Leib is a shareholder in the firm. He is a trial lawyer practicing in the areas of business disputes, real estate litigation, creditor's rights law including bankruptcy law, employment law and professional malpractice defense. Mr. Leib is the Chairperson of the State Bar of Michigan Character and Fitness Committee and has lectured on behalf of the Institute for Continuing Legal Education. He is a graduate of Kalamazoo College, the University of Montana and Wayne State University Law School.

Robert D. Kaplow is a shareholder in the firm. His practice is concentrated in estate planning and personal and corporate income tax planning. He is a graduate of Cornell University, receiving his law degree from the University of Michigan. He received a Masters in Tax Law from Wayne State University. He is a member of the State Bar of Michigan (Taxation and Probate and Estate Planning sections), Oakland County Bar Association (Taxation Committee), American Bar Association

(Taxation, Real Property, Probate and Trust Law Sections) and the Financial and Estate Planning Council of Metropolitan Detroit, Inc. Mr. Kaplow is a frequent lecturer before professional groups pertaining to tax and corporate matters. He is listed in Who's Who in American Law and Who's Who in America. Mr. Kaplow is active in various charitable and bar related activities.

William E. Sigler is a shareholder in the firm whose practice involves financial and estate planning, corporate law, taxation, pension and employee benefits, emphasizing business organization and planning, pension, profit sharing and employee benefit plans, federal income taxation, partnership law, executive compensation, and business succession and estate planning. He graduated from Michigan State University and the University of Detroit School of Law where he was an editor of the Law Review. He has lectured frequently on the topics of estate planning and employee benefits and taught federal income taxation at Lawrence Technological University. He has authored several articles, including "Supreme Court Declares Qualified Plan Benefits to be Exempt from Bankruptcy," Michigan Bar Journal, Volume 71, No. 10 (October 1992), "New Revenue Ruling Encourages Gifts of Stock in the Family Business, But Beware!", Michigan Bar Journal, Volume 72, No. 10 (October 1993) and "Qualifying for the Annual GST Tax Exclusion," Latches, No. 387 (April 1998). Mr. Sigler is a member of the Financial and Estate Planning Council of Metropolitan Detroit, Inc. and is active in charitable and bar related activities.

Stewart C. W. Weiner is a shareholder of the firm who has concentrated his practice over the past 17 years in business transactions, acquisitions, real estate and has a particular focus on the resolution of business, construction, partnership and shareholder disputes. He regularly counsels clients on employment and computer related matters. He serves as an arbitrator for the National Association of Securities Dealers, as a private arbitrator and is a member of the American Bar Association (Business Law, Computer Law, Construction Law Forum and

Employment Law Sections), State Bar of Michigan, Real Property Section (Construction Lien Committee), and Oakland County Bar Association.

Charles M. Lax is a shareholder of the firm who has practiced primarily in the areas of employee benefits, tax and corporate law. He has authored numerous articles appearing in legal and public accounting journals. He has lectured extensively on qualified retirement plans and other tax topics before the Michigan Institute of Continuing Legal Education, the Michigan Association of Certified Public Accountants and other professional groups. Mr. Lax presently serves as a member of the Tax Section Council and as a member of the Advisory Group to IRS, Northeast Region's Chief of EP/EO Division. Mr. Lax has previously served as a member of the IRS Employee Plans, Ad Hoc Advisory Group for the Assistant Commissioner of Internal Revenue Service, EP, the IRS Regional Council Bar Advisory Group, Central Region and the Chairman of the State Bar of Michigan - Section of Taxation Employee Benefits Committee. He has extensive experience in representing clients in tax controversy matters before the Internal Revenue Service and Tax Court of the United States.

Stuart M. Bordman is a shareholder of the firm who, in addition to being an attorney, is a certified public accountant. His practice is devoted to general corporate work with extensive experience in health care, franchise work and representation before the Internal Revenue Service. Mr. Bordman is the 1997-98 Chairman of the Oakland Bar Association Tax Committee. Mr. Bordman is a frequent lecturer before the Michigan Association of Certified Public Accountants and a regular contributor to LACHES, the Oakland County Bar Association Publication. He has written on use tax, corporate finance under the Michigan Business Corporation Act and single business tax. He is a graduate of the Northwestern University School of Law.

Steven D. Sallen is a shareholder in the firm and member of the firm's Executive Management Committee. Mr. Sallen received his undergraduate degree from the

University of Michigan and his law degree, *cum laude*, from the University of Detroit School of Law where he served as Case and Comment Editor of the University of Detroit Law Review. Mr. Sallen concentrates his practice in the areas of real estate law, environmental law and corporate law, and his clients include real estate developers, general contractors, commercial real estate brokers and environmental consulting firms. Mr. Sallen's publications include "The Leaking Underground Storage Tank Act: A Trap For the Unwary?" 72:9 Michigan Bar Journal, September, 1993, and an article on lead battery recycling in Recycling Today, June, 1994.

Gregory J. Gamalski is a shareholder in the firm who received his undergraduate degree from Kalamazoo College and his law degree from University of Detroit. After graduation he worked at the Michigan Court of Appeals and was law clerk for Judge Walter P. Cynar. His practice is concentrated in the areas of real estate and corporate matters. Mr. Gamalski specializes in condominium law and related areas such as planned unit developments and cooperatives. He is a former Chairman of the Oakland County Bar Association Real Estate Committee and past President of the University of Detroit-Mercy Law Alumni Association.

Julie Chenot Mayer is a shareholder of the firm who received her undergraduate degree from the University of Michigan. She obtained her Juris Doctor cum laude from the Detroit College of Law in 1986 where she was a member of the Law Review. Ms. Mayer concentrates her practice in the area of litigation with an emphasis on employment disputes, commercial litigation, and professional liability defense. Ms. Mayer is a member of the State Bar of Michigan and the American Bar Association.

Nathaniel H. Simpson is a shareholder of the firm. He graduated from Wayne State University Law School in 1988 with honors and was awarded the Order of the Coif. His practice focuses primarily on litigation matters with an emphasis on commercial, employment and property disputes. He is a 1985 graduate of Michigan

State University, majoring in Financial Administration, where he was awarded high honors. Nate is involved in a number of local community and charitable organizations.

Ronald A. Sollish is a shareholder in the firm who specializes in the areas of employment, real estate, partnership, finance, corporate and business law. Ron is a frequent speaker on legal topics and has spoken to such groups as the Michigan Chamber of Commerce, Michigan Association of Certified Public Accountants, and the American Society for Industrial Security. He is licensed to practice law in both Michigan and Illinois. He graduated from the University of Detroit School of Law where he was the managing editor of The Law Review. Ron received his undergraduate degree from the University of Michigan. Ron is a member of the State Bar of Michigan, the Illinois Bar Association, the American Bar Association and the Oakland County Bar Association.

Lowell D. Salesin is a shareholder in the firm who has been practicing with the firm since graduation from the George Washington University National Law Center in 1993, where he graduated with high honors and served as an Associate Editor of the George Washington Law Review and an Intern at the Small Business Clinic. He received his undergraduate degree from Indiana University in 1990. Mr. Salesin is a member of the American and Oakland County Bar Associations as well as the State Bar of Michigan and concentrates his practice in the areas of real estate, lending, finance, partnership and corporate law.

Mark H. Fink is a Shareholder who graduated from Wayne State University, College of Business Administration and the Detroit College of Law with highest honors and is admitted to the practice of law in the states of Michigan and Arizona. Mr. Fink's practice areas include litigation, with concentration on commercial and real estate matters, and civil appeals. Mr. Fink is the author of several articles which have appeared in publications such as the Michigan Bar Journal and the Detroit College of Law Review. He is a professional affiliate with the American Bar

Association and Oakland County Bar Association, and a member of the Appellate Section of the State Bar of Michigan.

Steven M. Wolock received his law degree from University of Michigan Law School in 1985 and obtained a Bachelor's of Science in Economics from the University of California at Santa Cruz in 1977. Mr. Wolock specializes in general commercial litigation and professional liability litigation and has extensive experience in labor and employment law. Mr. Wolock is a member of the Labor and Employment and Negligence Sections of the State Bar of Michigan, the American Bar Associates and the Oakland County Bar Association. He also serves as a panelist on the State Bar of Michigan Attorney Discipline Board.

David E. Hart joined the firm in 1999. He earned his Bachelor Degree in Philosophy and Political Science from the University of Michigan in 1988 and received his Juris Doctor Degree, cum laude, from the Detroit College of Law in 1991. While at the Detroit College of Law, Mr. Hart was a senior member of the Detroit College of Law Review and he participated in several national Moot Court competitions. He concentrates his practice in the areas of business disputes, real estate litigation, creditor's rights law including bankruptcy and in general civil litigation. Mr. Hart is a member of the State Bar of Michigan and the Oakland County and Federal Bar Associations.

Lori E. Talsky joined the firm as an associate after graduating summa cum laude from the Detroit College of Law at Michigan State University in January, 1996. Ms. Talsky has an extensive working knowledge of the Canadian legal system. She is a member of the State Bar of Michigan and the American Bar Association.

Marjorie Salem Hansel joined the firm in August, 1999. She attended the University of California at San Diego where she earned her B.A. in Political Science in 1984; and attended the University of Miami School of Law and received her J.D. in 1988. She was admitted to the State Bar of Michigan in 1996 and the State Bar of Florida in 1988. Marjorie is also admitted to the United States District Court Eastern District of Michigan and the United States District Court Northern District of Indiana. Her concentration of law is professional liability and personal injury defense.

Martin S. Frenkel graduated from the University of Michigan in 1991 and Wayne State University Law School in 1994. He was admitted to practice by the State Bar of Michigan and the Federal District Court, Eastern District of Michigan in 1994. Mr. Frenkel worked for the Michigan Department of Attorney General from 1994 to 1997 with practice in the areas of tax fraud, debt collection, and. employment litigation. Mr. Frenkel joined the firm in 1997 and practices in the areas of commercial and title related litigation. Mr. Frenkel is also a member of the Real Property Section of the State Bar of Michigan.

Gary Remer received his law degree from the Detroit College of Law at Michigan State University where he graduated summa cum laude in May 1997 and obtained a Bachelor of Arts in Accounting from Michigan State University in 1990. Mr. Remer was a Revenue Agent with Internal Revenue Service, Employee Plans Division, from 1992 through 1996. Mr. Remer concentrates his practice in the areas of employee benefits, corporate law, taxation and estate planning. He has lectured extensively on qualified retirement plans and other tax topics. Mr. Remer is the co-author of The Insider's Guide to IRS Plan Audits. He is a Certified Public Accountant and Chair of the MACPA Employee Benefits Committee.

George V. Cassar, Jr. graduated with honors from Drake University Law School in 1996 and received a Masters in Tax Law from Wayne State University Law School in 1997. He obtained a Bachelor of Arts in Psychology from the University of Michigan in 1993. George concentrates his practice in the areas of estate planning, probate and tax law. He is a member of the State Bar of Michigan, the State Bar of Iowa, the American Bar Association, the Federal Bar Association and the Detroit

Bar Association. George has also been accepted as Life Member of the National Registry of *Who's Who in America Law*.

Paul V. McCord joined the firm in February, 2000. He concentrates his practice in the areas of federal and state tax planning. Paul graduated from Marquette University in 1988. Prior to beginning his legal career, he served as an officer in the U.S. Navy, including service in the Gulf War. He earned his law degree from the University of Illinois in 1995 and a master's of law with a specialty in taxation in 1997 from the Georgetown University Law Center. Paul clerked for the Honorable David Laro and the Honorable Juan F. Vasques of the United States Tax Court from 1995 to 1996 and also served as in-house tax counsel for a Fortune 15 company. Paul is admitted to the practice of law in Illinois and before the United States Tax Court. He was admitted to the practice of law in Michigan in 2000. He is a member of the Illinois State Bar Association and the American Bar Association (Taxation Section).

Daniel H. Serlin graduated from University of Michigan Law School in 1997. Mr. Serlin concentrates his practice in the areas of estate planning, probate and tax law. In addition to advising individuals and family-owned, closely-held businesses with regard to estate planning, tax and corporate matters, Mr. Serlin often counsels clients contemplating transfer of control and ownership to younger generations. Mr. Serlin is a member of the American Bar Association and its Committee on Cyberspace, the State Bar of Michigan and the Oakland County Bar Association.

Sheryl K. Silberstein, is a 1986 *cum laude* graduate of the Detroit College of Law and a 1978 graduate of the University of Michigan. Her concentration of law is in the area of real estate, corporate, and related business matters. Ms. Silberstein has thirteen years experience in the real estate industry in the corporate sector.

Patrick D. Filbin, earned his Bachelor Degree from James Madison College at Michigan State University in 1987, then served as a lobbyist and a legislative assistant to a U.S. Congressman in Washington, D.C. In 1992, Mr. Filbin received his Juris Doctorate *cum laude* from The Thomas M. Cooley Law School. Through William & Mary College, Mr. Filbin also studied international law and economics at the University of London and Exeter University, in England. While in law school, Mr. Filbin served as an Associate Editor of The Cooley Law Review. Mr. Filbin concentrates his practice in the areas of general civil litigation, professional malpractice defense and insurance coverage disputes. Mr. Filbin is the author of numerous articles, and is a member of the State Bar of Michigan, the Bar for the U.S. District Courts for the Eastern and Western Districts of Michigan and the Bar for the U.S. Circuit Court of Appeals, 6^{th} Circuit.

Dale Wilson attended Yale University and earned his B.A. in Environmental History in 1992. He acquired his J.D. cum laude from the University of Detroit School of Law in 1999. Dale practices primarily in the areas of banking, corporate and business law, and real estate. He is a member of the Oakland, Michigan and American Bar Associations. He is also a member of the Business Law and Uniform Commercial Code sections of the American Bar Association.

Joseph A. Lavigne joined the firm in 2000 as an associate in the commercial litigation practice group. Prior to coming to Maddin Hauser, Mr. Lavigne served more than four years as an Assistant Prosecuting Attorney in Oakland County, Michigan. In addition to his duties as a prosecutor in the circuit court division, he was a member of the Oakland County Internet Crimes Task Force and a legal instructor at the Oakland Police Academy. He graduated cum laude in 1996 from the University of Detroit Mercy School of Law and received his Bachelor of Arts degree in 1993 from Michigan State University. While at UDM, Mr. Lavigne was a member of the Law Review, the Michigan Business Law Journal, two national moot court teams, and completed internships with the United States Attorney's Office for the Eastern District of Michigan, the Wayne Country Prosecuting Attorney, and the Honorable Joe Knollenberg, Member of Congress. He has published articles in *The Law Review of Michigan State University - Detroit College of Law,* the *Wayne Law*

Review, the *University of Detroit Mercy Law Review,* the *Michigan Business Law Journal, The General Practitioner,* the *Emmet-Charlevoix Bar Association Newsletter,* and *Laches*.

Kristina D. Maritczak joined the commercial litigation practice group at the end of 2000. She served as an Assistant Prosecuting Attorney in Oakland County, Michigan for over five years. Ms. Maritczak has had extensive trial experience through her assignments to specialized units as well as the circuit court division. In addition, she has served as an instructor at the Oakland County Police Academy and has conducted legal training seminars in police departments located within Oakland County. Ms. Maritczak has been a consultant to the Ukrainian government to assist in the democratization of the criminal justice system. Also, she was selected by the Brookings Institute as a representative from the United States to attend an international leadership seminar in Trieste, Italy and address issues involving the future of N.A.T.O. and the European Union. Ms. Maritczak served as a clerk for the United States Court of Federal Claims. At the University of Michigan Law School, she was an assistant editor of the Journal of Gender & Law and an editor of A Modern Approach to Evidence, Gross et.al. (2000). She is a member of the Federal Bar Association, State Bar of Michigan, Women's Lawyers Association of Michigan, and the Oakland County Bar Association. She has knowledge of Ukrainian and Russian languages.

Timothy A. Greimel received a Bachelor of Arts Degree from the University of Michigan in 1996, received a Master's Degree in Public Policy from the University of Michigan in 1997, and graduated from the University of Michigan Law School in 2000. He was admitted to practice by the State Bar of Michigan and the Federal District Court, Eastern District of Michigan in 2000. Mr. Greimel has worked in the Washington, D.C. office of United States Congressman Dale E. Kildee, on political campaigns for various levels of elected office ranging from Oakland County Commission to U.S. Congress, and in both the employee benefits and legal departments of the United Auto Workers, International Union. Mr. Greimel joined the firm in 2000 and primarily practices in the areas of commercial and title related litigation.

Brandy L. Swykert attended the University of Michigan earned a Bachelor of Arts in English and Political Science. She obtained her Juris Doctor, cum laude, from Wayne State University Law School in 2000. Prior to attending law school, Brandy worked as a paralegal in real estate transactions. She concentrates her practice in the areas of real estate and transactions and corporate law.

Kasturi Bagchi received a Bachelor of Arts in Political Science with honors from UCLA in 1992 and subsequently was awarded her Juris Doctor degree with honors from Tulane University School of Law in 1995. While at law school, Ms. Bagchi was a managing editor of the Tulane University School of Law Environmental Journal where she published an article entitled “Application of the Rule of Lenity: the Specter of the Midnight Dumper Returns.” 8 TUL.ENVTL. L.J. 265 (1995). Upon her graduation from Tulane, she clerked for the Honorable William Albrecht and the Honorable Harry K. Seybolt of the Superior Court of New Jersey, Warren county. She concentrates her practice in the firm’s commercial lending and real estate groups. Ms. Bagchi is admitted to the Bars of New Jersey, Pennsylvania and Michigan.

Catherine H. Finn is a 1996 Cum Laude graduate of the Wayne State University Law School and a Member of the Order of the Coif Honor Society. After law school, Ms. Finn served as a judicial clerk to the Honorable Martin M. Doctoroff of the Michigan Court of Appeals. She joined the firm in 2001, and concentrates her practice in commercial litigation.