

Chapter X

HIRING AND TERMINATING EMPLOYEES IN MICHIGAN

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Introduction

There has been an explosion of employment litigation in recent years, particularly in the State of Michigan, which has assumed a "pro-employee" stance on a number of employment-related issues. Wrongful termination, race, sex, and handicap discrimination and sexual harassment have all become subjects of innumerable lawsuits at considerable cost to employers. In light of the substantial risks facing employers today, all personnel and employment practices should be closely reviewed. It may seem logical that an industrial and historically male-dominated environment such as the construction industry, which necessarily places an emphasis on physical ability, would be subject to a more lenient sexual harassment standard or would be completely exempt from laws protecting disabled employees. However, courts have soundly rejected such defenses and, accordingly, even employers in the construction industry may face significant exposure under these laws. This article sets forth some general guidelines for hiring, termination, and employment procedures, which may be used as starting point to developing a preventive maintenance approach to personnel and employment practices.ⁱ

Applications and Interviews in General. Under the Michigan Elliott-Larsen Civil Rights Act, MCLA 37.2101 *et. seq.*, ("ELCRA") an employer may not discriminate in the hiring process. In recent years, due to litigation concerns, many employers have limited the nature and scope of their pre-employment inquiries. The Michigan Department of Civil Rights, the administrative agency responsible for enforcing the ELCRA, has issued a "Pre-Employment Inquiry Guide" that sets out what questions an employer may or may not ask during the interview process.

An employer may not ask an applicant's maiden name, birthplace of the applicant, birthplace of the applicant's parents, spouse, or other relatives. Inquiries into the age of the applicant, date of birth, religious denomination and affiliation are also prohibited. In addition, the employer may not inquire into the applicant's height or weight, marital status or request a photograph as part of the application process. Inquiries about whether the applicant has children, about the ability to reproduce or about birth control are strictly prohibited. Inquiries regarding an applicant's prior arrests that did not result in conviction are also prohibited. Any inquiry into an applicant's lineage, ancestry, national origin, descent, parentage, or nationality is prohibited, unless made pursuant to the Federal I-9 process. Furthermore, inquiries about whether an applicant is a naturalized or native-born citizen or whether an applicant's parents are native-born or naturalized citizens are also prohibited. Finally, any inquiry into the race of an individual is prohibited.

Additionally, a number of inquiries that may appear to be neutral may unduly impact members of protected groups or disclose information that reveals one's protected classification.ⁱⁱ Among those inquiries that are ill advised, and in some cases contrary to the law, are those regarding an applicant's:

- * Arrest recordⁱⁱⁱ
- * Dates of school attendance or graduation

- * Relationship to a "contact person" or the names of an applicant's spouse or children
- * General military experience, as opposed to experience in the U.S. Military or a state's militia
- * Club or association activities
- * Childcare arrangements or pregnancy status
- * Current or past assets, liabilities, or credit ratings, including bankruptcies or garnishments
- * English fluency.

These inquiries may be subject to challenges of discrimination. If the applicant voluntarily offers the prohibited information, the information should not be recorded on the application or in any notes taken during the interview.

Reference Checks. References are an indispensable source of information and insight regarding job candidates. Unfortunately, the value of this important management tool has been weakened somewhat by a variety of legal developments. Many employers have been advised that when contacted as references they should say nothing about former employees beyond verifying dates of employment and positions held. This advice grows out of the concern that an unsuccessful applicant will sue a former employer who provided a negative reference. This fear, however, is for the most part unfounded, as Michigan law gives an employer immunity from civil liability for the good faith disclosure of information about an employee's work performance, to a perspective employer, so long as such information is documented in the employee's personnel file. The privilege applies to job-related information provided to a person with a "business need" to know that information.^{iv}

As to the employee's right to obtain information first-hand concerning references, the Bullard-Plawecki Employee Right to Know Act, which guarantees employees access to their personnel records, specifies that references from former employers may not be included in an employee's personnel record in such a way that the identity of the person supplying the reference would be disclosed. The Michigan Court of Appeals has also held that this protection applies to references given verbally (i.e., over the telephone) and to handwritten summaries of such references. This provision would seem to encourage the giving of candid references, since by law the identity of the individual cannot be disclosed.

One way to overcome the problem of not receiving meaningful references is to ask applicants to sign a release permitting the prospective employer to obtain their entire personnel file, including disciplinary reports, letters of reprimand, or other disciplinary actions. The release can be included in the employment application itself. Such a release is necessary since, ordinarily, under the Bullard-Plawecki Employee Right to Know Act, an employer or former employer may not divulge disciplinary reports, letters of reprimand, or other disciplinary actions to any outside party without notifying the employee in writing.

Preserving the At-Will Relationship^v. The presumption under Michigan law is that, barring an agreement to the contrary, employment relationships are at-will and, therefore, can be terminated at

the employer's will, with or without cause or notice. Under Toussaint v. Blue Cross, and its progeny, however, this at-will relationship may be altered so that employers are contractually bound by express statements of job security (i.e., that an employee will only be terminated for good cause) or policies that create legitimate expectations of job security.

During the interviewing stage the legal risks associated with the inadvertent creation of just cause contracts are sometimes heightened, based on the involvement of various management and supervisory personnel who may not be sensitive to the potential problems that may arise. Thus, it is essential to limit representations made by recruiters and other personnel from a contractual standpoint. Recruiters and other personnel must be reminded that, in some circumstances, verbal representations about a position can be as binding as written obligations and, therefore, they must be certain not to give the impression to applicants that employment would be anything other than at-will.

Since the application form is usually an employee's first formal contact with an employer, the form provides an opportunity to establish an understanding of basic employment issues from the outset of the relationship. A properly drafted application form can be an employer's best defense, should problems later arise. One of the best defenses to a Toussaint-type contract claim is an express acknowledgement, on the application form, signed by each prospective employee, stating:

Upon employment, if hired, the individual understands and agrees that his or her employment will be "at-will" and therefore terminable with or without cause and with or without notice.

In addition, the employer should also make clear that its policy on termination of employment is intended to supersede any prior policies, understandings, agreements, or alleged oral representations.

Further, even when an employer has expressly reserved the right to terminate at-will, the employee may claim that the at-will policy was modified by subsequent assurances of job security. To reduce the risk of such claims, an employer should give notice that its policies on termination of employment are not subject to modification except in certain circumstances. The following acknowledgment is suggested:

The at-will relationship can only be modified by an express written agreement, and then only if both the employee and a designated top management official sign that agreement.

Obtaining a signed at-will statement, whether on the employment application or a separate acknowledgment form, preserves the at-will relationship and may undercut subsequent claims of a just cause agreement.

While an employer may succeed in preserving the at-will relationship throughout the application process, steps should also be taken after hire to maintain this relationship. Many employers find it beneficial to have written employment policies as a matter of basic personnel relations. A handbook may also contain statements describing the employment relationship. Importantly, a properly drafted handbook (as with a properly drafted application form) can assist an employer in avoiding protracted and costly litigation. As employers must be vigilant in crafting their handbook statements, the following are suggested disclaimers that may be placed in a handbook:

Nothing contained in this booklet (or manual) shall be construed or implied to constitute a contract altering or changing the at-will character of the employment relationship between the Company and its employees.

Nothing contained herein shall preclude the right of either the employer or employee to terminate the employment relationship at any time with or without notice and with or without cause.

The employer retains the right at any time to amend, modify, terminate or replace any of its policies or benefits applicable to employees to whom this handbook is addressed.

It is also important to obtain a signed acknowledgment form to establish the employee's receipt of the handbook and that the terms in the handbook supersede all previously made statements of policy. To avoid any ambiguity, an employer's basic policy on termination of employment should be coordinated with all other policies dealing with duration or termination of employment. This would include policies on probationary employment, disciplinary rules and procedures, performance evaluations and layoff. If an employer has expressly reserved the right to terminate-at-will, it should also be clarified that none of its other employment policies are intended to modify or abrogate that right.

Inquiries about Workers' Compensation Claims. In Michigan, it is a violation of public policy to discharge employees for exercising their legal right to workers' compensation. Further, a provision of the workers' compensation law expressly prohibits retaliation against individuals for exercising their legal right to assert a workers' compensation claim. However, courts have repeatedly rejected claims by individuals who assert that they were terminated due to their employer's anticipation that they would exercise their right to future workers' compensation benefits.

Generally, an inquiry on a job application about workers' compensation claims should be avoided. It could be argued that this information serves to weed out people who previously filed workers' compensation claims, which violates the workers' compensation law anti-retaliation provision and Michigan public policy considerations (even though there is no cause of action under the current state of the law for claims that the employer reached an adverse decision based on anticipated future workers' compensation filings). The paramount concern with making inquiries about an applicant's previous workers' compensation history is that it may be challenged as handicap discrimination.^{vi} Such an inquiry may be viewed as a back door approach to uncovering a physical impairment of the applicant.

The Civil Rights Act of 1991. There are two theories of employment discrimination, disparate impact and disparate treatment. Disparate treatment challenges intentional discrimination by the employer. In contrast, a disparate impact claim addresses the impact of an employment policy that appears to be non-discriminatory, but allegedly adversely affects employees in protected groups. Intent to discriminate is irrelevant in disparate treatment claims.

The Civil Rights Act of 1991 (the "1991 Act") overturned several recent United States Supreme Court decisions which had interpreted a federal law, Title VII, in a way which the civil rights community viewed as turning back the clock on the goal of eradicating employment discrimination. In the context of hiring employees, one of the most significant changes under the 1991 Act is that an

employer now bears a greater burden in defending against a claim of disparate impact.^{vii} Under the 1991 Act, a plaintiff must only prove the existence of a practice that causes a disparate and discriminatory effect. The employer then has the burden to prove that the practice is job-related and consistent with business necessity. Even if the employer meets this burden, the plaintiff still can prove the existence of an alternative employment practice with a lesser disparate impact.^{viii}

Although the 1991 Act does not directly define what constitutes "job related" and "consistent with business necessity," it suggests that an employment requirement must have a manifest relationship to the employment in question. The job requirement, thus, must bear a demonstrable relationship to successful performance of the job in question and must serve a legitimate business objective of the employer.

The 1991 Act prohibits the practice of adjusting test scores or using different cut-off scores or otherwise altering results of employment-related tests on the basis of race, color, religion, sex, or national origin. Actual test scores must be recorded and reported. Tests that have built-in favoritism toward a certain group are improper.

Accordingly, to avoid liability, any recruitment, hiring, promotion, or retention criteria or policy that has a disparate impact on a protected class must be necessarily job-related. For example, because minorities have been found to be more frequently garnished than non-minorities, both the courts and the Equal Employment Opportunity Commission ("EEOC") take the position that a policy of discharging employees after several garnishments violates Title VII. Similarly, a majority of courts have held that an employer who discriminates against its employees or applicants because it is displeased with their off-duty associations or relationships (i.e., inter-racial marriages) also faces liability. Finally, height, weight^{ix}, or grooming requirements that have a disparate impact or disproportionate effect on a protected class are impermissible unless they are shown to be job-related.

Hiring Considerations under the Americans with Disabilities Act ("ADA"). The ADA provides disabled persons with equal opportunities in employment and prohibits employers from discriminating against qualified disabled persons with respect to hiring, advancement, discharge, compensation, and other terms, conditions, and privileges of employment.^x It also prohibits the use of job standards, employment tests, or other selection criteria that unnecessarily screen out disabled persons.

"Disability" is defined very broadly under the ADA. It includes obvious disabilities, such as amputation of a leg, as well as infection with the AIDS virus, and certain emotional illnesses. Some conditions are expressly excluded, such as illness resulting from current illegal drug use or pregnancy. A "qualified individual with a disability" is an individual who satisfies the requisite skill, experience, education, and other job-related requirements of the position and who, with or without reasonable accommodation, can perform the essential functions of the job. Determination of whether a claimant is disabled under the ADA is made through an individualized assessment.

Generally, discrimination against individuals with disabilities might take place on application forms and in pre-employment interviews that inquire into the existence of a disability rather than an applicant's ability to perform the essential functions of a job. Another type of discrimination may be locking individuals with disabilities into dead-end positions that lack opportunity for promotion.

Employers should review applications and interviewing techniques to eliminate all references to medical history, physical or mental disabilities, workers' compensation history and physical appearance. An employer may not inquire about disabilities or conduct a medical examination prior to making a conditional job offer (although tests for illegal drug use are permitted). Questions about an applicant's ability to perform job-related functions are permitted, but cannot be phrased in terms of a disability or medical condition. Thus, it is permissible to inform the applicant of the company's attendance policies or the lifting requirements of a particular job and ask the applicant if he can satisfy those requirements. However, the employer cannot ask an applicant how many sick days he took last year or whether his back condition precludes him from any heavy lifting.

An employer may require a medical examination after making an offer to a job applicant and before the applicant begins his employment if (1) it is required of all applicants for similar jobs, (2) the criteria for rejecting an applicant are job related and consistent with business necessity, and (3) the results of the medical examination are treated confidentially and kept in separate medical files.

An employer may not reject a qualified job applicant or discharge an employee based on a disability if a reasonable accommodation would make it possible for the person to perform the essential functions of the job. However, under the ADA, an employer is still free to select the most qualified applicant available and to make decisions based on reasons unrelated to the existence or consequence of a disability.

Employers who have taken time to spell out the essential functions of jobs are in the best position to determine their obligations under the ADA since job descriptions are useful in establishing appropriate and consistent qualification standards. According to the EEOC, an employer's judgment as to which job functions are essential and a written job description prepared before advertising or interviewing for a job will be the best evidence of essential job functions. To be helpful, however, written job descriptions require an employer to look at the individual jobs as they exist in the company and observe how current employees perform the jobs. Marginal functions should be separated from essential functions by looking at how the job fits into the overall company operation. Job descriptions should be minimal statements of job functions -- they must not be inflated.

The ADA requires employers to make more reasonable accommodations^{xi} to the known physical and mental limitations of an otherwise qualified job applicant, unless it can be demonstrated that the required accommodation would pose an undue hardship on the operation of its business. The ADA does not define "reasonable accommodation," but it offers some examples:

- * Making existing facilities readily available to individuals with disabilities (e.g., installing a wheelchair ramp, etc.)
- * Job restructuring
- * Part-time or modified work schedules
- * Reassignment to a vacant position
- * Acquiring or modifying equipment or devices

- * Adjusting or modifying examinations, training materials, or policies
- * Providing qualified readers or interpreters

Undue hardship posed with respect to the provision of accommodation means significant financial difficulty or expense incurred by the employer, looking at financial resources, costs involved, and the impact, financially and operationally, on the employer.

Drug Testing. In recent years, drug abuse in the work place has become a serious problem with both significant human and economic costs, including increased illnesses, accidents and injuries, higher insurance costs, and productivity losses. A controversial approach in combating the problem is the implementation of drug testing^{xiii} by employers and there has been much litigation surrounding the administration of drug testing.

The U.S. Supreme has held that drug-testing may constitute a “search” in violation of the Fourth Amendment to the U.S. Constitution, which applies to federal, state, and local governments, but not to private employers. Since the Michigan Constitution does not contain a provision guaranteeing the privacy rights of all employees, an employer in the private sector is not restricted in the area of drug testing unless an employee or applicant can prove any of the four common-law right-to-privacy torts: 1) public disclosure of embarrassing facts, 2) appropriation of a name or likeness, 3) intrusion on seclusion, solitude, or private affairs, or 4) false-light publicity.

The following guidelines for drug testing will help place an employer in a good defensive position in the event an applicant challenges a drug test:

- * The employment application should clearly set forth that the applicant would be required to submit to a drug test. The employment application should be signed, indicating the applicant's consent to the drug test.
- * The drug test should be administered to respect the privacy and dignity of the applicant. Both screening and reliable confirmatory tests should be employed. Laboratories should be certified and experienced.
- * The chain of custody of the documentation surrounding the drug testing must be accurate and filled with safeguards.
- * In the event a drug test comes back positive, it should be confirmed with a second test.
- * In some circumstances, the applicant should be given a chance to explain positive test results.
- * The results of the test should be kept private. They should not be disseminated to anyone else but the

applicant. Messages should not be left at the home of the applicant with whoever answers the telephone. The results of the drug test should be kept separate from the rest of the application process.

With respect to current employees,^{xiii} employee testing generally has been upheld where there is "reasonable cause" for such testing. Thus, some individualized suspicion is usually required to support the administration of the drug test.

Employers should also be aware that under certain circumstances, disclosure and authorization requirements under the Fair Credit Reporting Act ("FCRA") might also be required. The FCRA may apply when the laboratory hired by the employer to conduct testing sends the sample to another laboratory for analysis. In such cases, the laboratory hired by the employer becomes a "consumer reporting agency," and the requirements for employers under the FCRA will be triggered.

Sexual Harassment. Although not directly related to the hiring and termination issues generally addressed in this article, the issue of sexual harassment warrants mention as it is one of the most explosive issues facing employers today. The law requires employers to provide a work place free of sexual harassment, and, in some circumstances, may hold them responsible for harassment suffered by an employee, even if they do not know that harassment is occurring.

Two types of sexual harassment may occur in the work place, quid pro quo harassment and hostile environment harassment. Quid pro quo harassment occurs when sexual favors are demanded in return for a promotion or some other employment benefit, or when an employee is threatened with discharge, demotion, or other punishment by failing to comply with sexual demands by a supervisor. Hostile environment sexual harassment occurs when employees are subjected to gender-based unwelcome conduct that affects a term, condition, or privilege of employment. Generally, sexual harassment is any repeated and unwanted verbal, nonverbal, or physical advance of a sexual nature--looks, touches, jokes, gestures, innuendos, epithets, or propositions in the work place. Sexual harassment allegations, however, can also arise from a friendly arm around the shoulder or accidental brushes or touches. Similarly, an employee who tells off-color jokes or teases a co-worker in jest may be oblivious to the fact that his conduct may be perceived as harassment. Maintaining or condoning an offensive or hostile work environment by ignoring sexual or derogatory remarks can lead to claims of hostile environment sexual harassment.

At the federal level, the distinction between quid pro quo and hostile environment harassment is not significant; an employer is liable when an employee proves either type of actionable sexual harassment by a supervisor, regardless of whether the employer had knowledge of the conduct or not. On the other hand, at the state level in Michigan, employers are strictly liable for quid pro quo sexual harassment, even if they do not know that the supervisor is engaging in harassing behavior, but are liable for hostile environment harassment by coworkers and supervisors only where the employee shows that the employer knew, or should have known about the hostile environment, but failed to take prompt and appropriate corrective action.

Employers that have an effective policy for resolving complaints of sexual harassment can avoid liability for hostile environment claims and may lessen their liability in quid pro quo cases. Stating that sexual harassment will not be tolerated in the work place is a good start, but employers must do more than merely state their good intentions since some employers with a policy prohibiting sexual harassment have been held liable because they failed to investigate and take corrective action after receiving a complaint. Although the law does not require that employers have a sexual harassment

policy or complaint procedure, an employer with a well-designed sexual harassment policy can limit its liability for harassment if the policy is fully and fairly applied to every complaint.

Allowing employees to file complaints internally, and providing an effective method for investigating and resolving them, can keep a relatively minor problem from growing into a costly lawsuit. Although no complaint of sexual harassment is minor, having policies and procedures in place can encourage employees to come forward early when the first incident of alleged sexual harassment occurs. An effective sexual harassment policy should include the EEOC's definition of sexual harassment^{xiv} and give examples of harassing conduct. Sexual joking, lewd pictures, and any type of conduct that tends to make employees of one gender "sex objects" should be prohibited. The policy should make it clear that sexual harassment^{xv} in the work place is unacceptable and will not be tolerated. Provisions for discipline, up to and including discharge of any employee who engages in harassing conduct, are an essential part of an effective policy. The sexual harassment policy must also be clearly communicated to all employees.

The following elements may be part of an effective sexual harassment policy:

- * Holding meetings to discuss the subject with employees.
- * Expressing strong management disapproval of harassment.
- * Informing employees of their rights and the methods for registering complaints of sexual harassment.
- * Outlining the sanctions for harassers.

To be effective, a sexual harassment policy should also contain procedures for making, investigating and resolving complaints. The procedure should provide as much confidentiality as possible, for both the complaining employee and the alleged harasser. Employees should also be protected from retaliation for filing a complaint of sexual harassment.

Once an employee complains of sexual harassment, employers should take prompt and effective corrective action, which necessarily includes conducting an investigation, quickly, discretely, and thoroughly. Both parties to the complaint should be interviewed, as should any other person who witnessed the incident or who has other information concerning the matter. Once the investigation is complete, the results should be reported to both the complaining employee and the alleged harasser. Confidentiality should be protected, to the extent possible, with information disclosed only on a "need to know" basis.

Finally, disciplining the harasser is a key component to an effective remedial action. The disciplinary action taken should be proportionate to the severity of the harassment and may range from a reprimand for mild and first offenses to a change of assignment, suspension, demotion, probation or discharge. The policy should also include follow-up procedures to make sure that the harassed employee does not suffer retaliation and that harassing conduct does not resume.

Other Forms of Harassment. The laws regarding claims for harassment based on age, disability, race, religion, or national origin, closely follow the requirements for claims of hostile work

environment sexual harassment, discussed above. The elements required for a prima facie case of hostile work environment based on race or religion, as explained by the Sixth Circuit in *Hafford v. Seidner*, 183 F.3d 505 (6th Cir. 1999), include: 1) plaintiff is a member or a protected class, 2) plaintiff was subject to unwanted racial and/or religious harassment, 3) the harassment was based on religion or race, 4) The harassment had the effect of unreasonably interfering with his work performance by creating an intimidating, hostile, or offensive work environment, and 5) the existence of employer liability. In all of these situations, the employer is liable if it knew or should have known of the charged harassment, and did not take positive action where necessary to remedy the effects and eliminate unlawful practices.

The Michigan Supreme Court has held that conduct or communication that is gender-based, but is not sexual in nature, does not constitute sexual harassment under the ELCRA. However, although no action lies for sexual harassment in such a situation, the employee may still make a claim under the ELCRA's prohibition of gender discrimination. *Haynie v. State*, 2003 Mich. LEXIS 1192 (Mich. 2003)

Effective Termination Procedures. Once a decision to terminate an employee has been made, care must be taken in implementing the decision. In many situations, a separation letter is advisable, both for purposes of explaining the decision to the employee and also to create a record as to the legitimate business reason for that decision. Although the letter should not be harsh, it should also not be misleading or inaccurate as to the reasons for termination. In other words, do not cover up the real reason or attempt to soften the impact of the discharge by giving irrelevant reasons. The separation letter should also outline the benefits, if any, that will be available to the employee upon separation, including separation pay and continuation of medical benefits.

A separation meeting with the employee is also recommended. Although the meeting should be conducted in private, a witness should be present to verify what was said. If the discharge decision can be explained to the employee, then the company is also in a good position to defend its decision to a government agency or jury. In addition to informing the employee of the reasons for termination (consistent, of course, with the actual reasons for separation and the separation letter), the employee should be asked at the meeting to return any company equipment and to remove any personal items from his locker, desk, or office. Ideally, the employee should be given an option of how and when to accomplish these tasks, provided that it would not create a security problem. Following the separation meeting, an accurate and complete record should be made as to what was said at the meeting.

Confidentiality is important. The reasons for separation should remain, to the extent possible, confidential and disclosed only to those persons within the company who have a legitimate reason to know. Unwarranted disclosure may result in claims for defamation, invasion of privacy, and intentional infliction of emotional distress.

In many circumstances, separation pay should be considered as a means of cushioning the blow and reducing the animosity, which sometimes leads to litigation. If an employer offers any separation benefits beyond what the employee is already entitled to receive, the employer should consider a separation agreement, which includes a release of liability. If the release is knowing and voluntary, and is supported by adequate consideration, it may bar the employee from bringing future lawsuits as to any claims that were covered by the release. Some employers are reluctant to use separation agreements because of the belief that they may prompt the employee to bring a claim or may be used as evidence in a subsequent termination to show that the termination was improper. The benefits of

a separation agreement, of course, must be weighed against the risks, and the propriety of using a separation agreement may depend upon the particular circumstances of each case. In general, the risk of proposing a separation agreement can be minimized if it is a standard practice and it recites that it is not being proposed because of any wrongdoing or perceived wrongdoing, but only for the purposes of bringing finality to the parties' relationship. The parties may also want to agree on references that may be made to prospective employers and have the discharged employee sign a statement approving specific reference language.

Shortening the Periods of Limitation for Employment Related Disputes. Language shortening the statutory or common-law period of limitations for employment disputes is commonly added to employment applications and agreements. There is still some question regarding the validity of language that shortens the limitation period for civil rights claims, under federal law. In a recent Court of Appeals ruling upholding a provision for a six-month shortened limitations period, the court held that there was no “inherent unreasonableness” in such a provision. *Timko v. Oakwood Custom Coating, Inc.*, 244 Mich. App. 234; 625 N.W.2d 101 (2001), *cert. denied*, 464 Mich. 875 (2001).

Agreements to Arbitrate. Michigan courts have held that employment contracts that include a provision requiring arbitration of all employment disputes are valid, as long as the arbitration process is fair, and the employee does not waive any rights or remedies under the applicable statute. The elements that must be met in order for the process to be considered fair are: 1) clear notice of such a provision, 2) the right to counsel, 3) a provision for reasonable discovery, 4) a fair hearing, and 5) requirement of a *neutral* arbitrator. *Rembert v. Ryan's Family Steak Houses, Inc.*, 235 Mich. App. 118; 596 N.W.2d 208, *appeal denied*, 461 Mich. 927; 605 N.W.2d 318 (1999). Arbitration provisions are more likely to be enforced if they are in a separate document, not simply included in the employee handbook.

For collective bargaining employees, the requirements for an arbitration provision to be enforceable are even more stringent. At the federal level, the arbitration provision must be “clear and unmistakable,” and must state with specificity the particular statutes for which the judicial forum is waived. At the state level, Michigan courts have held that a union may not waive a judicial forum for an individual union member. *Arslanian v. Oakwood United Hospitals, Inc.*, 240 Mich. App. 540, 550; 618 N.W.2d 380 (2000).

CONCLUSION

One cannot look at a newspaper or magazine today without seeing an article about a company being sued by an unsuccessful job applicant or former employee regarding some allegedly illegal employment practice or policy. In reviewing and revising employment hiring and termination policies, employers should closely review a number of state and federal statutes and regulatory guidelines, as employment related lawsuits could often expose companies to substantial liability. In light of the substantial risks facing employers today, we have attempted to address a few of the legal considerations in this article that may influence your employment decisions.

Endnotes

i. It is beyond the scope of this article to explain all the legal issues influencing employment decisions in Michigan. The information in this article is intended to make you aware of the implications of several aspects of employment law and is not intended to be, and should not be

regarded as, a legal opinion or legal advice. It is simply not possible or prudent to offer legal advice or a legal opinion without a prior thorough investigation and analysis of the facts attendant to any specific situation.

ii. See also the discussion on pages 5 and 6 regarding the Civil Rights Act of 1991 and the disparate impact theory of discrimination.

iii. However, applicants for employment may be asked if they have ever been convicted of a felony or if there are any pending felony charges.

iv. Even a "no reference" policy does not automatically protect employers since there is a suggestion under Michigan law that an employee may sue for defamation even if the employer does not directly communicate the allegedly defamatory statement to a third party. Under the "self-defamation" theory, where an applicant is forced to tell a prospective employer that he has been discharged for an adverse reason, the applicant has thereby been forced by the former employer to defame himself.

v. This article does not address an employer's contractual legal obligations to its unionized work force, as unionized employees are traditionally protected by "just-cause" provisions in collective bargaining agreements.

vi. See discussion on pages 6 through 8 regarding the Americans with Disabilities Act.

vii. Among other things, the 1991 Act also creates a right to a jury trial under Title VII and allows recovery of compensatory and punitive damages for intentional discrimination under Title VII.

viii. Congress enacted this provision of the 1991 Act to overrule several Supreme Court cases that did not govern Michigan courts. Michigan civil rights law has always held that the employer must show that the practice is job-related, and that the plaintiff can argue that a less discriminatory practice exists.

ix. Under the Michigan Elliott-Larsen Civil Rights Act, an employer cannot discriminate on the basis of weight or height.

x. The Michigan Persons With Disabilities Civil Rights Act ("PDCRA") also addresses discrimination against individuals with disabilities. While the ADA differs from the PDCRA, both place similar demands upon employers to reasonably accommodate a disabled applicant or employee. However, one important distinction between the statutes is that in order for an employee or applicant to request an accommodation pursuant to the PDCRA, the employee must provide written notice of the need for accommodation within 182 days after the date the handicapper knew or reasonably should have known that an accommodation was needed.

xi. Although this article does not specifically address an employer's obligations in a union setting, it is interesting to note that an employer's duty to bargain in good faith as defined by Section 8(a)(5) and 8(d) of the National Labor Relations Act forbids an employer to change working conditions of employees represented by a union without first giving the union notice of the proposed change and an opportunity to bargain. If an employer unilaterally implements a "reasonable accommodation" for a disabled employee, its actions may give rise to a Section 8(a)(5) charge. The ADA is unclear

as to whether an employer may plead a collective bargaining agreement as a defense to a request for a reasonable accommodation.

xii. Although the ADA officially takes a neutral position on drug testing, it actually facilitates drug testing and the employer's right to discipline employees who use alcohol or illegal drugs. The PDCRA, like the ADA, does not specifically authorize or prohibit drug or alcohol testing. The PDCRA similarly permits employers to establish policies, programs, procedures, or work rules regarding the use of alcoholic liquor or illegal drugs.

xiii. During the past several years, several statutory and regulatory developments at the federal level have also impacted on drug testing programs in the work place. For example, the Drug-Free Work Place Act of 1988 requires certain federal contractors and all recipients of federal grants to certify to the government that they will provide a drug-free work place. The Drug-Free Work Place Act, however, does not require employers to conduct drug tests or to discharge employees who use illegal drugs. In addition, the Department of Transportation has promulgated regulations mandating drug testing in certain safety-sensitive positions.

xiv. The EEOC defines sexual harassment to include unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

xv. A work place harassment policy need not be limited to sexual harassment. A policy statement prohibiting verbal, physical or visual conduct that belittles or demeans any individual on the basis of race, religion, national origin, gender, age, disability or other similar characteristic or circumstance can easily be incorporated into a harassment policy. These type of statements reaffirm an employer's commitment to equal opportunity.