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## Backlash

Avoiding & Responding to  
Discrimination, Retaliation  
& Whistleblowing Claims

Presented by  
**Theresa Smith Lloyd**  
**Carolyn M. Jereck**

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## Today's Presenters



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- **Michigan's economy has resulted in a massive escalation of employment claims, including claims for discrimination, retaliation and whistleblowing**

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▪ **These cases are expensive to defend; expensive to resolve and have high verdict potential**

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**In Most Cases, Plaintiffs can Claim**

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- Back pay damages through trial (all compensation and benefits from date of termination)
- If plaintiff has not found comparable employment, he/she can claim future lost wages and benefits
- Mental anxiety and distress
- Attorneys fees

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**Jury Awards**

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- In 2008, median award for all types of U.S. employment-related claims rose 60 percent from \$204,000 to \$326,640, and discrimination verdicts rose 16 percent from \$208,000 to \$241,119.
- Median jury award for employment practice cases has increased significantly during period studied (2002-2008), according to *Employment Practice Liability: Jury Award Trends and Statistics 2009 Edition*, a report by Jury Verdict Research, a national database of verdicts and settlements.

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"Juries know how hard it is to find a job and may put a heavier burden on employers because the cost of being let go or harassed is greater when other options aren't as available. Until the economy improves, you're going to see more claims and higher verdicts."

- Segal from SHRM online

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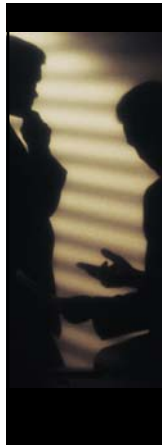
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## Possible Employment Claims Growing all the Time

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## Discrimination, Retaliation & Harassment Laws

### Federal Law

- Title VII of the Civil Rights Act of 1964 prohibits discrimination and harassment on basis of sex, race, color, national origin and religion.

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## Discrimination, Retaliation & Harassment Laws

- Title VII also protects employees who have made complaints of discrimination or who otherwise opposed unlawful discrimination from retaliation.
- Pregnancy Discrimination Act (PDA) prohibits discrimination on the basis of pregnancy

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## Discrimination & Harassment Laws

- Age Discrimination in Employment Act (ADEA) protects employees over 40-years-of-age from age discrimination.

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## Discrimination & Harassment Laws

- Equal Pay Act makes it unlawful to pay employees different compensation because of their gender for equal work on jobs of equal skill, effort, responsibility and working conditions in the same establishment.
- Americans With Disabilities Act (ADA) prohibits discrimination on basis of an individual's disability.

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## Discrimination & Harassment Laws

### State Law

- Elliot-Larsen Civil Right Act (Elliott-Larsen) prohibits discrimination on the basis of sex, race, color, national origin and religion, as well as marital status, familial status, weight and age. This includes sexual harassment and harassment against other protected groups.

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## Discrimination & Harassment Laws

- ELCRA also protects employees who have made complaints of discrimination or otherwise opposed unlawful discrimination from retaliation.
- Michigan Persons With Disabilities Civil Rights Act (MPWDCRA)

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## Discrimination & Harassment Laws

- Michigan Whistleblowers Protection Act (WPA) protects employees who report a violation or suspected violation of any local, state or federal law, as well as those who are about to, but who have not completed their report, and those who participate in hearings, investigations, legislative inquiries or court cases.

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## Discrimination Claims

- Intentional Discrimination – Having a predisposition to discriminate against a protected class and acting on that predisposition (i.e., women are lazy, tall people can never get the job done)
- Disparate Treatment - Treating similarly situated employees differently based upon their protected class (sex, race, national origin, etc.)

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## Discrimination Claims

- Disparate Impact – Using a neutral policy or criteria that has an adverse impact on a protected group (i.e., tests that, historically, African Americans do much better on than Caucasians, Hispanics, etc. to determine hiring criteria, promotions, etc.)

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## Discrimination Claims

### Individual Liability

- Under both federal and state law, an employee's agent, (i.e., supervisor, manager, etc.), may be sued and can be held individually liable under any of these theories.

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## Starting at the Beginning: Best Hiring Practices

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## Hiring Documents, Employee Manual, Application, Interview Evaluation

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## At-Will Status of Employment Statement

Employment with \_\_\_\_\_ is "at-will." This means that either employee or \_\_\_\_\_ may terminate employment relationship at any time, with or without cause, and with or without notice. No representative of \_\_\_\_\_ has authority to enter into any agreement for employment for any specified period of time or to make any agreement contrary to foregoing, with exception of an agreement in writing, signed by the President of \_\_\_\_\_ .

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## At-Will Status of Employment Statement

Furthermore, any claim or lawsuit relating to an employee's service with \_\_\_\_\_ must be filed no more than six (6) months after date of employment action that is subject of claim or lawsuit.

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## Equal Employment Opportunity Statement

\_\_\_\_\_ is an equal employment opportunity employer and provides employment and advancement opportunities to its employees without discrimination on basis of race, color, religion, sex, age, national origin, disability or any other protected characteristic as established by law. This policy of equal employment opportunity applies to all policies and procedures relating to recruitment and hiring, compensation, benefits, termination and all other terms and conditions of employment.

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## Equal Employment Opportunity Statement

If an employee believes that he/she has been the victim of discrimination, he/she should report that fact immediately to his/her supervisor, manager on duty, his/her district supervisor, regional supervisor up to and including the \_\_\_\_\_. After receiving such a complaint, \_\_\_\_\_ will undertake a full and complete investigation of the charges.

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and to release, on a confidential basis, any information they may have concerning me, including information in my personnel record or otherwise known to them, to \_\_\_\_\_ in connection with my application for employment with \_\_\_\_\_ I specifically release from liability any current or former employers, its agents, representatives, employees, officers, directors, etc., for or on account of their providing/accepting such information to \_\_\_\_\_

I understand and agree that my employment and compensation is for an definite period and may, regardless of the time and manner of payment of my wages and salary, be terminated at any time by me or the Company, with or without cause, and with or without any previous notice. I also understand and agree that the Company has the right to substantially modify and/or terminate any position, practices, procedures, and standards if they are adopted or implemented, to the extent not prohibited by law. I acknowledge that the Company's employee or representative, other than the President, has either the power or authority to enter into any agreement for employment for any specified period of time, or to make any representation or agreement contrary to any of the foregoing, unless that agreement is in writing and is signed by the President. I understand that any prior representations, promises, contracts, or statements made by or on behalf of the Company are expressly superseded by the foregoing.

I agree that any claim or lawsuit relating to my service with \_\_\_\_\_ must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary.

The Immigration Reform and Control Act of 1986 states that employers must require all persons hired to submit documents to the employer showing their identity and their right to be lawfully employed in the United States. It also requires that the employee complete and sign a government form to this effect. I understand that if hired by \_\_\_\_\_ I will timely furnish documents for inspection that verify my identity and that I am legally permitted to work in the United States. Furthermore, I understand that my employment will be terminated if I fail to timely provide the necessary documents.

Date: \_\_\_\_\_ Signature: \_\_\_\_\_  
(Applicant's name printed)

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## Interview Process

### What You Can & Cannot Ask

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## Do Not Ask

- Applicant's maiden name
- Birthplace of applicant, his or her relatives or spouse
- Applicant's age
- Applicant's religious denomination, religious affiliation or any other information regarding his/her religion

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## Do Not Ask

- Employer cannot require a photograph of applicant prior to hire
- Questions regarding applicant's height or weight
- Questions regarding marital status or children

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## Do Not Ask

- Questions regarding arrests that did not result in conviction (except for law enforcement agencies)
- Name and address of nearest relative to be notified in case of accident or emergency
- Names of all clubs, societies and lodges to which applicant belongs

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## Do Not Ask

- How many days applicant was absent from work because of illness last year.
- Pre-employment questions about illness may not be asked, because they may reveal existence of a disability.
- However, an employer may provide information on its attendance requirements and ask if applicant will be able to meet those requirements.

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## Do Not Ask

- Whether applicant is taking any prescribed drugs.
- Questions about use of prescription drugs are not permitted before a conditional job offer, because answers to such questions might reveal existence of certain disabilities that require prescribed medication.

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## Do Not Ask

- Whether applicant has ever been treated for drug addiction or alcoholism.
- Information may not be requested regarding treatment for drug or alcohol addiction, because ADA protects people addicted to drugs, who have been successfully rehabilitated or who are undergoing rehabilitation.

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## Do Not Ask

- Whether applicant has ever filed a claim for workers' compensation benefits.
- Employer may not ask about an applicant's workers' compensation history.
- Such questions are prohibited because they are likely to reveal the existence of a disability.
- It is also discriminatory under ADA to not hire an individual with a disability because of speculation that individual will cause increased workers' compensation costs.

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## You Can Ask

- Whether applicant has ever worked for the company under different name and any additional information necessary to check work record
- Whether applicant is 18 years of age or older when purpose of the question is to determine if they are of legal age for employment
- Whether applicant's spouse is employed by the company

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## You Can Ask

- Whether applicant can perform essential duties of job for which they are applying with or without reasonable accommodation
- All languages that applicant speaks and writes fluently, if it is job related
- Questions regarding academic, vocational and professional education of applicant

*Continued...*

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## You Can Ask

- Whether applicant has ever been convicted of a crime
- Whether there are any felony charges pending against applicant
- Name and address of person to be notified in case of accident or emergency
- Questions regarding organizations applicant is a member of, excluding any organizations which might indicate race, color, religion, national origin or ancestry of its members

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## Valuable Job Interview Questions

- Review application and make sure to fill in blanks, times not accounted for
- Work habits, attendance, managerial style, compatibility with managers with different styles
- What is the most fun you have in your current job?

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## Reference Check

- One source indicates that majority of people who sued their former employers had falsified information of some kind on the application form or in the resume.
- Release form for obtaining prior information

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## Reference Check

- Michigan statute provides employers a qualified immunity from defamation liability when they receive a request for information about former or current employees and they disclose, in good faith, "information relating to the individual's job performance that is documented in the individual's personnel file . . ."

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**INTERVIEW EVALUATION**

Name of Applicant: \_\_\_\_\_ Date: \_\_\_\_\_  
 Name of Interviewer: \_\_\_\_\_ Location: \_\_\_\_\_

	Excellent	Good	Above Average	Average	Poor/Inadequate
Appearance					
Maturity					
Job Knowledge					
Interpersonal Skills					
Education					
Work Experience					

COMMENTS: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

RECOMMENDATION:  
 Extend offer to hire \_\_\_\_\_  
 Reject (please make any special comments above) \_\_\_\_\_  
 2<sup>nd</sup> interview with additional staff \_\_\_\_\_

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## Best Practices

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## Training, Training, Training

- Train managers and supervisors on your equal employment, and discrimination policies, as well as on how to evaluate, discipline and manage.

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## Training, Training, Training

- Train all employees on company's EEOC and anti-harassment policies.

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## Employee Evaluations

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Employee evaluations can be your best friend or your worst enemy.

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Employee Evaluation  
Page 4

1   2   3   4   N/A

Goals (3-5 goals that specifically relate to the individual employee)

Goal Period: \_\_\_\_\_

1. \_\_\_\_\_

2. \_\_\_\_\_

3. \_\_\_\_\_

4. \_\_\_\_\_

5. \_\_\_\_\_

This evaluation has been reviewed and discussed.

Employee Signature \_\_\_\_\_ Supervisor Signature \_\_\_\_\_

Date \_\_\_\_\_ Date \_\_\_\_\_

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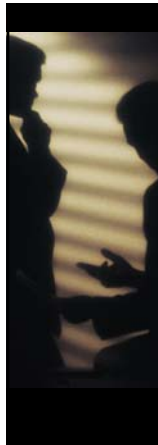
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## Employee Discipline

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## Disciplinary Policy

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- Have it in writing.
- Note that this is not an exception to your “at will” policy.

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**Employee Status Review Form** 1.10.2017

Employee: \_\_\_\_\_ Supervisor: \_\_\_\_\_

Position Title: \_\_\_\_\_ Department: \_\_\_\_\_ Reporting Line: \_\_\_\_\_

**Performance:** \_\_\_\_\_ (1-5) **Quality of Work:** \_\_\_\_\_ (1-5) **Attendance:** \_\_\_\_\_ (1-5)

**Areas for Improvement:** \_\_\_\_\_

**Strengths:** \_\_\_\_\_

**Comments:** \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Supervisor: \_\_\_\_\_ Date: \_\_\_\_\_

This form is to be used for all employees. It is not to be used for contractors or casual employees.

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## Employee Terminations

- Always have potential terminations reviewed by human resources.
- Follow your handbook and prior practice
- Make sure there is documentation

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## Termination Meeting

- Two heads are better than one
- Have a script
- Listen for “trigger words”

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## Do you use a Severance Agreement?

- If so, what should it include?

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## After the Termination

- How to deal with unemployment
- What do you do with the claim of discrimination/retaliation or whistleblowing after the fact?
- How to respond to the attorney demand letter

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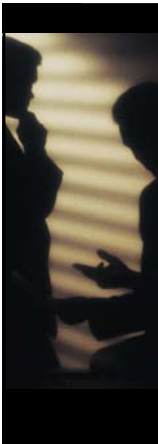
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## Questions & Answers

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## Contact Information



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## Thank You!

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