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# HR Trivial Pursuit Webinar

## Employment Law Edition

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## Important Note:

The content of the "HR Trivial Pursuit – Employment Law Edition" webinar was intended to provide general information about legal issues and should not be taken as legal advice in any specific instance.

The information presented in this webinar was current at the time of the original presentation on March 13, 2014.

Information can become outdated or inaccurate as a result of subsequent amendments to laws or the issuance of new regulations or court decisions interpreting the laws differently.

When legal advice is needed, always consult an attorney experienced in the relevant area of law.

# HR Trivial Pursuit – Employment Law Edition

1. **If you work an employee for 10 hours, you must provide the employee with a lunch, or at least, a break period.**

   False. Not unless the employee is a minor covered under Michigan's Youth Employment Standards, which requires a minimum of 30 minutes for a meal/rest period after five hours of continuous work. For all others you could work them two days straight without any breaks, but you would have a difficult time staffing under those conditions!

2. **The Youth Employment Standards Act applies to all workers under the age of 18.**

   False. The law does not apply to a minor 16 years or older who has completed the requirements for high school graduation, a minor 17 years or older who has passed the GED test or to a minor who is emancipated under state law.

3. **Under state and federal law, national origin means the country where the employee was born or grew up.**

   False. It is the country from which his/her ancestors originated.

4. **Under both state and federal law, management can be held personally liable for acts of discrimination or retaliation.**

   False. There is no personal liability for management under federal law for unlawful discrimination or retaliation.

5. **Under state law it is unlawful for an employer to discriminate on the basis of familial status and marital status.**

   False. Just marital status. Familial status is a protected status for housing.

6. **Both state and federal law prohibit discrimination based on weight.**

   False. Only state law, except when weight is a disability and then the ADA would prohibit discrimination.

7. **Under state law, there are times when an employer can refuse to hire someone for a job because of their sex or age.**

   True. If it is a bona fide occupational qualification. And the same is true based on religion, national origin, marital status, height and weight.

**8. Under state law there is a protected status that is never a bona fide occupational qualification.**

True. Race. However, state law recognizes that religion, national origin, marital status, height and weight (in addition to sex and age) could be a bona fide occupational qualification. However, never race.

**9. Under both state and federal law, you can provide light duty positions to employees with workers' compensation injuries and deny light duty positions to all others.**

False. While under federal law, this would not violate the Pregnancy Discrimination Act, it would violate the state Elliott-Larsen Civil Rights Act. In 2009, Elliott-Larsen was amended to prohibit treating "an individual affected by pregnancy, childbirth, or a related medical condition differently for any employment-related purpose from another individual who is not so affected but similar in ability or inability to work, **without regard to the source of any condition affecting the other individual's ability or inability to work."** It is that last part that differs from federal law and would make it unlawful to treat workers' compensation injuries different than pregnancy.

**10. Only the state civil rights law has a separate prohibition of sexual harassment.**

True. However, federal courts have recognized that sexual harassment is a form of sex discrimination.

**11. If a patient at a hospital or nursing home has expressed a preference for an employee of a specific race or sex to attend to them, the employer can honor that request as a bona fide occupational qualification.**

False. It would be illegal to honor that request. So, what do you do if, for example, an Alzheimer patient is calling a nursing assistant the "n-word" and refusing to allow the employee to touch them? Generally, you should not reassign the employee, but if practical, allow the employee to opt out of that patient's care to protect them from the harassment. In addition, tell the family that the patient is making an unlawful request that you cannot honor.

**12. Under state law, an employer can refuse to hire someone because of either a misdemeanor or felony arrest.**

False. State law specifically prohibits such action for misdemeanor arrests, but does not prohibit it for pending felony charges. However, the EEOC takes the position that a no felon rule is unlawful and that employers must look at the type of convictions, when they occurred, how many, etc. and determine whether the criminal record should exclude an individual from consideration for the specific job at issue. For example, you could refuse to hire the embezzler for your CFO or the pedophile for the child daycare, but both may be acceptable for a construction position.

**13. The state civil rights law makes it unlawful to grant time off to a man for prostate surgery or vasectomy, but deny time off to a woman who is undergoing fertility treatment or who is recovering from a nontherapeutic abortion not intended to save the life of the mother.**

False. A nontherapeutic abortion where the mother's life was not in danger is expressly exempted from the act. Therefore, you could refuse time off for that reason under state law.

**14. "Citizenship" is not a status protected under Title VII or the Elliott-Larsen Civil Rights Act.**

True. It is not protected under either law.

**15. In order to conduct a full pre-hire background screening, it is permissible to ask for a woman's maiden name.**

False. That would disclose the woman's marital status. You may ask all applicants whether they have ever been known by any other name.

**16. You should never ask applicants for employment whether they are U.S. citizens.**

True. Federal *immigration* laws forbid discrimination based on citizenship. Therefore, you should only ask whether the applicant is able to lawfully work in the United States.

**17. You should not ask an employee, who is on FMLA leave, about their disability even when the employee tells you that he needs leave extended beyond the 12 weeks because of a disability.**

True. You must wait until the FMLA leave ends before you ask such questions because FMLA limits the information an employer can seek. At the intersection of FMLA and ADA are some of the most complicated legal issues facing employers. Legal advice is suggested.

**18. It is okay to make a quick call to an employee who is on a FMLA leave to ask about a project the employee was working on when the leave started.**

False. This could give rise to an interference claim under FMLA.

**19. When an employee loses the company cellphone, the employer can deduct the cost of the phone from the employee's next two or three pay checks provided the employee signed a form agreeing to be held responsible for the cost when he was issued the phone.**

False. To make these deductions, an employee must sign a separate authorization for each pay period that will be subject to the deduction and each authorization must identify which pay period and the amount of the deduction. It should also indicate that the authorization was given willingly and without coercion or duress.

**20. When you hire an employee, you should place the employment references and educational records obtained during the background check in the individual's personnel file for future reference.**

False. Under the Bullard-Plawecki Right to Know Act, employment references must be excluded, if the source of the reference can be identified and educational records are not to be included ever.

**21. There are times when you are required to give more than dates of employment and position held in response to an inquiry for an employment reference.**

True. For example, when an elementary school calls for a reference. Other exceptions exist as well.

**22. Because there is no immunity defense, employers should generally only provide dates of employment and position held in response to a reference request.**

False. There is a Michigan statute that provides employers with qualified immunity from claims, provided false information is not knowingly given. However, given the cost of defending against claims, it is still wise to provide only dates of employment and position held unless there is some overriding reason (for example, the former employee had violent propensities and may pose a threat). You should always seek legal advice before disclosing more information.

**23. In response to an employment verification from a mortgage company, the employer is obligated to indicate the employee's prospects for continued employment (not only to assist the employee in obtaining financing when prospects are good, but also when the mortgage company should be warned that termination is imminent).**

False. Just say "all employment is at-will" and dodge the question. Saying prospects are good may be used against you by both the mortgage company and employee in a lawsuit after you fire them.

**24. Your employee handbook should place the responsibility for references in the hands of one or two positions, and indicate any other employee who provides references has done so without authority and may be discharged.**

True. Not only to prevent a favorable reference from being used by the former employee/plaintiff as an exhibit at trial, this language will be useful in arguing that the individual who provided the reference (even if high ranking management) did not speak on behalf of the company and the company is not bound by the "admission."

**25. When you suspect an employee has stolen company property, and he volunteers for a polygraph, you should arrange for the examination and/or request the results.**

False. Between the Michigan Polygraph Protection Act and the federal Employee Polygraph Protection Act, an employer cannot request or cause an employee (or prospective employee) to take a test; use, refer to *or even accept the results* of such tests; or take any action against the individual based on the results of the test. So, what's the point? Just say "no" to polygraphs!

**26. All non-exempt employees must be paid time and a half their regular rate of pay for time actually worked over 40 hours in a work week.**

False. Some non-exempt employees can be paid under different rules (for example, the 8/80 rule, which can be utilized for employees in the health care industry). It is always best to seek legal advice before you become "creative."

**27. Under the Fair Labor Standards Act, a private employer can provide compensatory time off in a different work week in lieu of overtime pay as long as the employee receives 1-1/2 times the number of hours worked over 40 in a work week.**

False. However, this is true for public employers.

**28. Any employee who received healthcare coverage through the employer is able to receive continuation coverage under COBRA.**

False. Employees who are discharged for gross misconduct or employees who work for a private employer having fewer than 20 employees are not eligible under COBRA.

**29. Employees working for an employer with 20 or more employees and who have a reduction in their hours to part time status are eligible for continuation coverage under COBRA.**

True (likely). Once an employee becomes ineligible under the definition of the group in the plan, the employee is eligible for COBRA coverage. So, the answer will depend on the definition in the specific plan.

**30. If, in the employee handbook, an employer defines full time and benefit eligible as employees who are regularly scheduled to work 32 or more hours in a work week, the employee who is regularly scheduled to work 30 hours is not eligible for benefits, including health insurance.**

True/false. It depends on the definition of the group in the summary plan description and plan documents. The definition in the employee handbook does not control ERISA benefits. This is very important. If an employer excludes an employee from the group because he is viewed as ineligible for benefits according to the employee handbook, but the employee "fits" within the definition of the group in plan documents, the employer may be on the hook for all medical expenses incurred by the employee because it wrongfully excluded the employee from coverage.

**31. Any employer that provides employee benefits after the 90 day probationary period, and then extends the employee's probation due to performance, may also delay all employee benefits, including health insurance.**

False. For employers subject to the Affordable Healthcare Act (or "Obama-care"), health insurance must be provided within 90 days of employment and cannot be delayed because the employee remains on probation. For smaller employers not subject to this law, you need to follow the time period in the summary plan description and other plan documents. For example, if the plan documents define the group as all employees who are regularly scheduled to work 30 or more hours a week, and who have worked for the employer for 60 or more days, the employer must follow the plan and provide insurance after 60 days. If it does not, it can be potentially liable for the employee's medical expenses. Plans not subject to Obama-care can be written to exclude groups of employees (such as contract employees, temporary employees, contingent employees, etc.) or to delay coverage until the employee successfully passes the probationary period. But whatever is written in the plan must be followed.

**32. Only union employees have the right to have representation in an investigatory meeting that could result in disciplinary action.**

Currently true. However, as the composition of the NLRB has changed over the years with appointments, the board has gone back and forth on this issue.

**33. Union employees have the right to have representation at all disciplinary meetings.**

False. If the decision to discipline has been made, and the purpose of the meeting is to issue or deliver the discipline, there is no right to representation.

**34. It is lawful for an employee to secretly record a meeting with management without first disclosing to the participants that he is recording it.**

True. However, if the equipment is sending it in real time to a third party not in the room, it is unlawful. Also, there is some authority suggesting that, if it is later shared with a third party, it may be unlawful. Employers should have a policy prohibiting secret recordings.

**35. All employees must be paid at or above the lowest of the state/federal minimum wage.**

False. There are exceptions such as the seasonal/recreation employee exception. But, before you pay a worker less than minimum wage, you should seek legal advice.

**36. Under both state and federal wage laws, employees are entitled to receive unused vacation, sick and/or PTO at termination.**

False. Under Michigan law, an employer is only required to pay out fringe benefits at termination if it has committed to do so in writing. Therefore, all employee handbooks should say something to the effect of "only those employees who provide a two-week notice and work during the notice period may be considered eligible for unused vacation/sick/PTO, at the employer's sole discretion and in exchange for a release." Federal law is silent on this issue.

**37. Under state law, both commissions and bonuses must be paid out at termination.**

False. Under Michigan Wages and Fringe Benefits Act, commissions are wages and all earned wages must be paid out at termination. However, bonuses are a fringe benefit and those (like vacation/sick/PTO) must be paid out at termination only if the employer promised to do so in writing. Under the Sales Representatives Act, when the employee has earned commissions for selling "products" (as opposed to services), the employer can be liable for the amount, plus twice the amount and attorney's fees if it fails to pay out the amount owed within 45 days of termination. To fall within this Act, the payment must be a commission. Therefore, employers should consider structuring the incentive plan in a way that will create a bonus plan, and not a commission plan.

**38. But for the Americans with Disabilities Act (and the state counterpart), an employer could prohibit all of its employees from taking any time off for medical reasons.**

False. A policy that prohibits time off for medical reasons would have a disparate impact on women since only women can get pregnant and need time off for that reason.

**39. An employee who takes 181 days of military leave is entitled to just cause employment for a full year following their return to the workplace.**

True. And, if the employee takes as little as 30-180 days of military leave, the Uniformed Services Employment and Re-employment Act provides for 180 days of just cause employment upon their return to the workplace.

**40. Under Right to Work legislation, an employer should never collect union dues from employees who opt out of the union.**

False. Employees who opt out must still pay union dues until their authorization card expires.

**41. Employers that are not subject to the National Labor Relations Act should require employees to sign a document agreeing that they will not disclose their wage rate to co-workers or competitors.**

False. The policy would violate the Michigan Wages and Fringe Benefits Act, and as suggested by the question, it would also violate labor laws.

**42. An employee who complains to a customer about his employer's poor treatment of employees should always be fired.**

False. The employee's complaint to the customer may be "concerted activity" under the National Labor Relations Act, and if it is, termination would be unlawful retaliation.

**43. In order to have a valid retaliation claim under federal civil rights laws, the employee must have previously exercised rights under one of those laws.**

False. It may also be unlawful to fire an employee who has a close relationship with the employee who exercised such rights (within the "zone of interest").

**44. Under both state and federal civil rights laws, the employee must first begin by filing a charge with the Equal Employment Opportunity Commission or the Michigan Department of Civil Rights.**

False. There is no such requirement before filing a complaint in court under state law.

**45. In order to require employees to arbitrate claims (as opposed to bringing claims in court), the best place to put the arbitration agreement is in the employee handbook as an arbitration policy.**

False. Employee handbooks should say "nothing in this handbook creates contractual rights." Therefore, an arbitration policy in the employee handbook would be unenforceable.

**46. Employers with contractual limitations periods on their employment applications may require employees to bring claims in as little time as 180 days.**

True. But the limitations agreement must be properly written or it may not be enforceable.

**47. A contractual limitations period cannot apply to claims under the Fair Labor Standards Act.**

True. A 2013 Sixth Circuit opinion held that this would equate to requiring employees to waive rights under the FLSA, which is not allowed.

**48. A properly worded release agreement will be effective to prevent the employee from bringing any more claims against an employer.**

False. Some claims cannot be "released" by agreement, such as worker's disability compensation claims and claims under the Fair Labor Standards Act (unless the release agreement is actually settling this claim).

**49. Following the trial of a civil rights claim, it is legal for the employer to refuse to re-hire the employee because of the long contentious court battle.**

False. The refusal would be unlawful retaliation. That is why employers put a do not reapply provision in settlement agreements.

**50. Under both state and federal civil rights laws, an employer who purposefully violated an employee's civil rights can be held liable for punitive damages (designed to punish).**

False. Only under federal civil rights statutes can punitive damages be awarded.

**51. An employer that made an honest mistake and mis-classified an employee as exempt, therefore, failing to pay overtime, is only responsible for the employee's unpaid wages and attorney's fees.**

False. Unless the employer can establish a "good faith" defense, the employer will also be liable for liquidated damages (which is twice the amount of damages) under the Fair Labor Standards Act. Good faith is more than an honest mistake. It is, for example, the reliance on an attorney's legal opinion, or an opinion letter from the Department of Labor.

**52. It is lawful to terminate an employee when the employer discovers that the employee is gay.**

True. However, the laws in many states would prohibit this act, and it is likely only a matter of time before federal law prohibits discrimination based on sexual orientation.

**53. It is lawful to terminate a male employee because the employee is not acting "masculine" enough.**

False. Gender stereotyping is unlawful. This is often the theory used by someone who is gay to state a claim under civil rights laws.

**54. It is lawful for a manager to treat all of his employees badly, even if it results in a hostile work environment for all.**

True. This is the SOB defense. As long as the manager is not treating employees poorly because of their protected status, but rather is just a bad manager, it is legal.

**55. Under both Elliott-Larsen Civil Rights Act and Title VII, an employer can discriminate against its independent contractors based on their protected statuses.**

True. Only "employees" are protected under these laws. However, if the worker is not truly an independent contractor, but an employee, he or she will have a claim. Also, a claim may be brought under another federal statute, if the company is discriminating in contracts based on race.

**56. Under the state Whistleblower's Protection Act, an employee must be motivated by the public good when "blowing the whistle" rather than doing so to obtain some job security as a whistleblower.**

False. Until a Michigan Supreme Court decision in 2013, this would have been true. Now, however, it only matters that the whistle was blown, and not the motivation behind it.

**57. An employee who complains to his boss about an OSHA violation is a whistleblower under state law.**

False. The complaint must be made to a public agency.

**58. An employer may be liable if its employees shun a co-worker for complaining of sexual harassment by a popular supervisor.**

True. The shunning would be unlawful retaliation under state and federal civil rights laws, and the employer needs to put an end to it.

**59. Once the 12 weeks of leave ends under the Family and Medical Leave Act, the employee should never be permitted to take more leave since granting extra leave to some, but not all employees, can result in a discrimination claim.**

False. If the employee has a disability, the employer may need to provide additional leave as a reasonable accommodation under the Americans with Disabilities Act.

**60. Under both the Americans with Disabilities Act and the Michigan Persons with Disabilities Civil Rights Act, an employer may be required to provide employees with a leave of absence.**

False. Leaves of absences are not required by state law.

**61. An employer with less than 15 employees is not required to restructure or alter the schedule of an employee unless it is a minor or infrequent duty of that position and the amount of money that the employer needs to spend on an accommodation is also limited.**

True. Only the Michigan Persons with Disabilities Civil Rights Act applies to such small employers and the accommodations required under that law are significantly less required under the ADA.

**62. Allowing an employee to submit a resignation rather than discharging the employee will always make the employee ineligible for unemployment compensation benefits.**

False. If the employee can show he quit for "good cause attributable to the employer," he will still be eligible for benefits.

**63. Whenever an employer produces a document that is of a disciplinary nature to a third party, it is required to provide the employee at issue with notice of the disclosure.**

True. This is a requirement of the Bullard-Plawecki Right to Know Act. However, the employer may wish to weigh the limited damages for the violation against the disruption the notice may cause in the workplace.

**64. Just like an alcoholic, an employee who has an addiction to cocaine has a disability under the ADA.**

False. Addictions to illegal drugs are not a disability under the ADA.

**65. Testing for the presence of marijuana is a medical examination under the ADA, regardless of whether the employee has a card for the use of medical marijuana.**

False. Testing for any illegal drug is not a medical examination under the ADA. The issue of the medical marijuana card was thrown in to make this question tricky but it has no affect on federal laws!

**66. Whenever an employer announces at the beginning of the year that bonuses may be given out at the end of the year if the company is profitable, overtime pay for nonexempt employees should be recalculated for the entire year.**

True. The Department of Labor believes that even if the employer retains some discretion, it has received the consideration of harder work from its employees by the mere announcement. The bonus will affect the regular rate of pay for each week of the year.

**67. Generally, any document that should have been included in the Personnel File, but was intentionally omitted, may be excluded from a judicial proceeding.**

True. However, the judge has some discretion to still allow it to be introduced into evidence.

**68. Unless the employee is able to demonstrate that he is unable to review his personnel file, the employer can require a review before copying the file for the employee.**

True. However, employers often waive the requirement especially for former employees because they do not want the person back in company offices.

**69. An employer can require employees to review their personnel files on their own time, not on company time.**

True. Generally reviews are during normal business hours. However, if the company requires the employee to do so "on their own time," then the employer must provide another "reasonable time" for the review.

**70. When an employee disagrees with information in their personnel file, he can write a rebuttal up to 10 pages.**

False. Rebuttals are up to five sheets of 8-1/2 inch by 11 inch paper. The rebuttal must stay in the file as long as the document at issue.

**71. An employer that promises to not discharge an employee as long as his performance meets the satisfaction of the employer has employed the individual "at-will."**

False. The employer has created a "satisfaction" contract. "A satisfaction contract is not a just-cause or good-cause contract. An employer may discharge under a satisfaction contract as long as the employer *in good faith* is dissatisfied with the employee's performance or behavior." Thus, making such promises creates complications for the employer that are unnecessary and would be non-existent under at-will employment. To prevent the "accidental" creation of rights, the at-will policy should state that "the at-will employment can only be changed by the CEO *in a writing entitled "Employment Agreement*" and signed by both parties."

**72. In order to sue for age discrimination, the employee/plaintiff must be at least 40 years of age.**

False. Under the Elliott-Larsen Civil Rights Act, there is no such requirement. Thus, a plaintiff may argue that he was discriminated against because of his youthfulness. Under the Federal Age Discrimination in Employment Act, only individuals 40 and older are protected.

**73. An employer having fewer than 15 employees during the last two years can ignore verbal requests for disability accommodations.**

This is true *if* the employer informed its employees that requests must be placed in writing within 182 days of the day they knew, or should have known, of the need for an accommodation. Ideally, the notice should be placed on the employment application so even applicants will receive notice. The federal Americans with Disabilities Act has no requirement for the request to be put into writing, but that law is inapplicable to this small of an employer.

**74. All employees must be treated the same under the Family and Medical Leave Act.**

False. For example, there are special rules for "key employees" (those who are within the top 10 percent paid of employees within 75 miles of the employee's work site) and also spouses who work for the same employer.

**75. Because the federal Defense of Marriage Act was struck down, all same sex couples now have the right to take FMLA to care for their spouse.**

False. FMLA states that whether couples have this right depends on whether that state's law recognizes the couple as "married." Because Michigan does not recognize marriage between same sex couples or recognize "common law" marriages, neither couple would have the right to take time off under FMLA to care for their partner.

**76. Because FMLA looks to state law to determine whether the couple is married, an employee cannot take FMLA leave to care for their same sex partner's child that the couple is raising together.**

False. While a same sex couple in Michigan is not "married" for purposes of FMLA, the partner may be *in locos parentis* to their partner's child if he or she shares in day-to-day responsibilities to care for and financially support the child. No legal or biological relationship is required.

**77. An employer can not only require employees on FMLA to exhaust paid time off during their leave, it can also require an employee to utilize paid time off to supplement worker's disability or short-term disability benefits in order to bring compensation up to 100 percent pay.**

False. An employer can require employees to exhaust paid time off before workers' compensation or short-time disability benefits kick in. However, once the waiting period is over, the employer can either prohibit the use of paid time off or make it optional to the employee. But the employer cannot require its use.

**78. An employee who opts for healthcare coverage while on FMLA and then returns to work, but quits five weeks later, is not obligated to reimburse the employer for its share of premiums.**

True. The employee only had to return for 30 days to avoid reimbursing the employer. Moreover, if the employee fails to return to work because the health condition necessitating leave prevents it, the employee is off the hook as well.

**79. Employers can mail documents to employees without first redacting social security numbers, driver's license numbers and dates of birth, provided the employee requested the records under Bullard-Plawecki Right to Know Act.**

False. The Social Security Privacy Act requires the redaction of social security numbers (or all but the last four numbers) whenever documents are mailed, except as permitted or required by law (for example, the number would have to remain on the employee's W-2 tax form).

**80. Only the employer will need to hire an attorney at some point during the appeals process of an unemployment claim.**

True, provided the employer is incorporated. During the administrative hearings, advocates can be used by both sides. However, once the matter is appealed to the circuit court, the employee can no longer use an advocate, but can represent himself. The same is not true for a corporation, which must employ legal counsel in any and all court matters.

**81. An employer that choses between two African American candidates for a position cannot be held liable for discrimination.**

False. Discrimination can be based on another protected status, including color.

**82. An African American employee who is fired by an African American decision maker cannot state a race claim.**

False. Courts recognize that a person can discriminate against someone in their own protected status.

**83. A non-exempt (hourly) employee who normally works nine to five, Monday through Friday, must be compensated if Sunday evening he flies to a meeting in another city.**

False. Travel outside of an employee's normal work day is not time worked under the Fair Labor Standards Act. However, if the employee flew on Saturday or Sunday between the hours of 9 a.m. and 5 p.m., he must be paid. Whether travel needs to be paid depends on such factors as when the travel occurs, the mode of transportation, even whether the employee is the driver or passenger. Legal advice is recommended.

**84. A non-exempt employee does not have to be paid at an hourly rate.**

True. A non-exempt employee can also be paid at piece rates.

**85. Both lawyers and doctors are exempt from overtime pay, even if they are paid less than $455/week.**

True. Neither the general rule for the professional employee nor the salary requirements applies to legal/medical professionals.

**86. Employers may ask applicants with disabilities whether they will or will not need a reasonable accommodation to perform the essential functions of the position they seek, but may not inquire as to the specific accommodation needed.**

False. The employer can only ask "can you perform the essential functions of the position you seek with or without a reasonable accommodation." The employer is not permitted to know whether it is with, or without, an accommodation.

**87. Break periods longer than 20 minutes, but shorter than 30 minutes, do not need to be paid.**

This is a trick question. The regulations state that rest periods of short duration (generally five to 20 minutes) must be counted as hours worked and paid. The regulations also state that bona fide meal periods ("ordinarily" 30 minutes or longer) do not need to be paid, provided the employee is completely relieved of their duties. However, the regulations say only that a "shorter period may be long enough" to be a meal period (which is unpaid) "under special conditions."

**88. When an employee is on a meal period (i.e., unpaid), he or she can be told they must remain on the premises.**

True. The regulations state that "[i]t is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period."

**89. An employer can require an employee to eat their lunch at their desk or machine while on an unpaid meal period.**

False. In such circumstances, an employee is not completely relieved of their duties.

**90. An employee needing to spend 10 minutes after his shift to remove protective equipment such as a respirator and harness must be paid for that time.**

True. This is not considered "donning and doffing" of clothing and the employee must be paid.

**91. Only after an employee makes a report of a suspected violation of the law to a public body will the employee be protected from retaliation under the Whistleblower's Protection Act.**

False. The employee may be protected under the act if he makes clear to his employer that he is "about to report" a suspected violation. However, if a lawsuit is filed under these circumstances, the employee will need to prove, by clear and convincing evidence, that he was about to report the violation or suspected violation.

**92. Because of the cost of training new workers, an employer can require the employee to pay back a portion of the training expense for training that is required for the position should the employee leave during his first year of employment.**

False. However, if the employer pays for training or education that is not a job requirement (and the employee is voluntarily participating in the program), the employer can require the employee to refund all or part of the expense if employment ends within "x" time.

**93. Even without a confidentiality agreement, an employee cannot use the employer's trade secrets to its detriment.**

True. There are federal laws protecting trade secrets.

**94. If the employer wants to impose a non-compete on an existing employee, the agreement must be supported by consideration.**

True. However, consideration may be simply allowing the employee to continue his at-will employment another day.

**95. Absent a signed statement by the employee given to his employer, a deceased employee's final wages should be paid out according to the employee's will.**

False. Michigan Wages and Fringe Benefits Act provides the following priority for the payment: spouse, children, mother or father, sister or brother. Payment made according to this priority list fully discharges the employer's obligation.

**96. If a new employee fails to return the form for direct deposit within 30 days, an employer may be able to default to a payroll debit card.**

True. However, under Michigan's Wages and Fringe Benefits Act, there are certain conditions that apply and specific notices are required. You should consult an attorney before implementing debit card payments.

**97. Employees who are "on call" must be paid for that duty.**

False. Whether an employer needs to compensate for on call time depends on whether the employee is relatively free to do whatever he wants. On call compensation was more common back when employees had to sit at home and wait for the employer to call. However, with cellphones, an employee can move about and still be within reach.

**98. A 55-year-old Michigan employee can state a claim under the federal age discrimination law by alleging that his 75-year-old boss chose a 50 year old instead of him, because of the age difference.**

False. While the Sixth Circuit would not have an issue with the 75-year-old boss being accused, it has a six year *per se* rule for age discrimination claims. *Grosjean v First Energy Corp*, 349 F3d 332, 340 (CA 6, 2003)(six years or less between an employee and a replacement is not significant).

**99. The Bullard-Plawecki Right to Know Act requires employers to maintain personnel files and other employment related records for four years after the employee separates from their employment.**

False. There is no such *per se* requirement under Bullard-Plawecki. However, there are retention requirements for specific kinds of information such as certain employee exposure and medical records must be maintained for the duration of employment plus 30 years under OSHA. I-9s must be maintained after employment terminates for the latter of three years from the date of hire or one year after employment ends. In addition, a general rule of thumb

is to maintain personnel files for the duration of statutory limitations periods so that the employer can defend claims. Six years may be a good rule of thumb for personnel files.

**100. A plaintiff may support a wage discrimination claim by pointing to the wage rates of predecessors and successors, provided that employee held the same position.**

False. Under the Equal Pay Act, it does not have to be the same position. Employers are prohibited from discriminating based on sex where the employee performed *equal work on jobs requiring equal skill, effort and responsibility, performed under similar working conditions*. While the EPA only applies to sex discrimination (and not any other status) it allows the plaintiff to compare themselves to both successors and predecessors.

## Bonus Question:

**1. Under the Fair Labor Standards Act, an employer must pay employees for donning protective clothing such as flame retardant coveralls.**

False. In January 2014, the U.S. Supreme Court ruled that the donning and doffing of clothes, including clothes that provide protection, is a matter of negotiation between the employer and the union.

It is the general understanding that non-unionized employees, who do not have a collective bargaining agreement, cannot bargain over whether this is paid or not… it just is. But there is a dearth of case law on the subject. What we do know is that where a union is involved, it is negotiable.

# About the Presenters

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With over 20 years of experience in employment law, Laura M. Dinon concentrates her practice on representing public and private employers in all aspects of employment law, including labor relations. She has a broad client base of small to medium size businesses, including healthcare practices, municipalities and large insurance companies. She handles cases in federal and state courts, as well as arbitrations and administrative agency hearings.

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