


HR 101


An Overview of Employment Law Issues Affecting Business

Presented by
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Today's Presenters



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Overview of Laws Classifications


- Wage, hour and fringe benefits
- Leaves of absences
- Civil rights laws
- Miscellaneous laws

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Wage, Hour & Fringe Benefits

- **Primary federal laws**
 - Fair Labor Standards Act (FLSA), 29 USC 201, *et seq.*
 - Employee Retirement Income Security Act (ERISA), 29 USC 1001, *et seq.*
- **Primary Michigan laws**
 - Minimum Wage Law, MCL 408.381, *et seq.*
 - Wages and Fringe Benefits Act, MCL 408.471, *et seq.*
 - Michigan Sales Representatives Act, MCL 600.2961


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Wage Laws

FLSA & Mich. Min. Wage Law

- **Minimum Wage Rates**
 - FLSA - \$7.25/hr (effective July 24, 2009)
 - Mich. Min. Wage Law- \$8.50/hr (effective Jan. 1, 2016)
- **Exempt vs Non-Exempt** (from overtime/min. wage requirements)
 - *Generally*, both federal and Michigan laws are same, but there are some differences concerning specific jobs.

Continued


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Wage Laws

FLSA & Mich. Min. Wage Law

- **Non-exempt**
 - This is the presumption.
 - Paid hourly and receives time and one-half the regular rate of pay for all hours *actually worked* over 40 in a workweek (or 8/80 rule for certain healthcare). **Must keep accurate time records.**


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Wage Laws
FLSA & Mich. Min. Wage Law

- Cannot substitute "Comp Time Off" unless public employer
- Time not worked (i.e., vacation) does not count toward overtime.
- "Regular rate" of pay does not include shift premiums, Sundays, etc., but may change if bonuses are paid.

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Wage Laws
FLSA & Mich. Min. Wage Law

- **Exempt**
 - Employee is "exempt" from the overtime requirements and sometimes minimum wage rate (i.e., attorneys).
 - Test – Based on both duties *and* manner of pay. In U.S. Court of Appeals for Sixth Circuit, employer's burden of proof by more than preponderance of evidence. Always safer to classify as non-exempt.

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Wage Laws
FLSA & Mich. Min. Wage Law

- Primary exemptions – Professional, administrative, executive, outside sales, high level computer employees, highly compensated employee
- Numerous miscellaneous exemptions, including amusement or recreational, agricultural, newspapers, switchboard operators, domestic service, criminal investigators, fishing industries, etc.

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Wage Laws
FLSA & Mich. Min. Wage Law


- **Violation of Wage Laws**
 - Employer’s burden to prove employee was properly compensated (by showing exempt status or by use of time records for non-exempt)
 - Amount owed for up to two years (limitations period)

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Wage Laws
FLSA & Mich. Min. Wage Law


- If willful (generally) – Amount owed for up to three years and that amount again (i.e., doubled) as liquidated damages
- Your attorney’s fees and for successful plaintiff
- Collective actions (i.e., class actions) becoming common
- EPLI does not cover damages for wage lawsuits.

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Wage Laws

- **Michigan’s Wages and Fringe Benefits Act**
 - Allows employer to recoup amount paid in error within six months of error. There is a formula and notice required.
 - Permits deductions from wages (i.e., for damaged or lost company equipment), but requires separate slip for each pay period subject to deduction, indicating how much, which pay period and that it was freely and voluntarily given without duress or coercion

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Wage Laws


- **Michigan Sales Representatives Act**
 - Applies to sales representatives selling goods (as opposed to services), whether employee or independent contractor
 - Requires payment of all commissions due within 45 days after relationship terminates

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Wage Laws

- Commissions are amount paid in compensation expressed "as a percentage" of amount of order, sales or profits.
- Failure to pay all amounts due (even if good faith dispute) results in actual damages and additional 2x the amount of actual damages (up to \$100K).
- Prevailing party receives attorney's fees.

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Benefits Laws

- **ERISA:**
 - Controls and regulates employee retirement plans (such as 401K and traditional pension) and group health insurance benefits
 - COBRA (continuation of group health insurance) and HIPAA (i.e., privacy of health information) are amendments to ERISA.

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Benefits Laws


- **Mich. Wages & Fringe Benefits Act :**
 - Controls other benefits such as vacation and sick time
 - Any unused time only needs to be paid at termination *if* promised in writing.

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Benefits Laws

- States how often (weekly, monthly, etc.), how quickly after pay period ends, and in what manner (debit card, direct deposit, check) wages must be paid
- States to whom wages must be paid if employee dies
- Defines “bonuses” as fringe benefit (rather than wages) and is safer alternative than sales commissions for sale of products under Michigan Sales Representatives Act


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Leaves of Absences

- **Primary Laws – Federal**
 - Family and Medical Leave Act (FMLA), 29 USC 601, *et seq.*
 - Uniformed Services Employment & Re-Employment Rights Act (USERRA), 38 USC 4301, *et seq.*

[Note: Under Americans with Disabilities Act, leave of absence may be a reasonable accommodation.]


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Leaves of Absences

- FMLA
 - Eligible employee
 - Worked for employer 12 months (within last seven years)
 - Worked a minimum of 1,250 hours during previous 12 months
 - Has 50+ employees within 75 miles of worksite


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Leaves of Absences

- FMLA
 - During designated 12-month period (rolling, calendar) will get 12 weeks of leave for:
 - Employee's serious health condition
 - Serious health condition of family member (spouse, child, parent or *locos parentis*)
 - Birth or adoption of child
 - Placement of child with employee for foster care
 - Qualifying "exigency" related to military service


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Leaves of Absences

- FMLA
 - "Serious health condition" causes incapacitation and is
 - Chronic or permanent/long-term or requires multiple treatments
 - Lasts more than three days (may include days off) and employee sees healthcare provider 1x and receives continuing treatment or sees 2x
 - Admitted "inpatient" overnight at hospital

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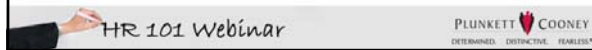
FMLA Leaves of Absences

- **Examples of qualifying exigency related to military service include:**
 - To address issues that arise from call to active duty in less than seven days
 - To provide child care on an urgent, immediate basis
 - To spend up to five days off when military member granted short-term leave
 - To address miscellaneous matters agreed upon by employer/employee



FMLA Leaves of Absences

- **During designated 12-month period (rolling, calendar) will get 26 weeks of leave to care for member or former member of military**
 - Who is spouse, child, parent or “next of kin” (blood relatives having legal custody, siblings, grandparents, aunts/uncles, first cousins, or person designated by military member)



FMLA Leaves of Absences

- **Miscellaneous**
 - Leave can be taken on intermittent or reduced leave basis (as little as hour) – Can reassign employees on reduced/intermittent leave.
 - Can prohibit employees from working elsewhere while on FMLA and other leaves
 - DOL has specific forms that must be used.
 - Time off for testing (before and after diagnosis) may be protected.

Continued



FMLA Leaves of Absences

- Medical appointments should be scheduled so they do not unduly disrupt work (i.e., days off or after hours when available).
- "Care" includes both physical and emotional support.
- Once leave approved, *do not* contact employee about work!!

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FMLA Leaves of Absences

- Special rules for "key employees" (top 10 percent compensated)
- Right to reinstatement to same or comparable job after leave
- Employers can be sued for interference with rights or retaliation.

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USERRA Leaves of Absences

- Grants leaves of absences for individuals in uniformed services, including active and reservists of Army, Navy, Marine Corp, Air Force, Coast Guard, Army and Air National Guards, Commissioned Corps of the Public Health Service
- Generally, cumulative leaves up to five years are protected.

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USERRA Leaves of Absences

- Numerous notices required by employers and employees
- Numerous additional rights, including reinstatement, “just cause” employment for limited periods, catch up on pension benefits, continuation of health insurance, etc.

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Civil Rights Laws

- **Primary federal laws**
 - Title VII of the Civil Rights Act of 1964 (Title VII), 42 USC 2000e, *et seq.*
 - Age Discrimination in Employment Act (ADEA), 29 USC 626, *et seq.*
 - Americans with Disabilities Act (ADA), 42 USC 12101, *et seq.*

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Civil Rights Laws

- Genetic Information Non-Discrimination Act of 2008 (GINA) (amended several laws)
- Pregnancy Discrimination Act (PDA), 42 USC 2000e(k) (amends Title VII)
- Equal Pay Act (EPA), 29 USC 206(d) (amends FLSA)

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Primary Michigan Laws

- Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101, *et seq.*
- Michigan Persons with Disabilities Civil Rights Act (MPDCRA), MCL 37.1101, *et seq.*

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Civil Rights Laws

- **Protected statuses in employment under federal and/or Michigan law**
 - Race, national origin, color, age, disability, sex (including pregnancy and conditions related to pregnancy), weight, height, genetic information, misdemeanor arrest record, marital or veteran status

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Civil Rights Laws

- EEOC takes position that sex discrimination includes sexual orientation and transgendered status.
- Immigration laws also prohibit discrimination based on citizenship.

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Civil Rights Laws Prohibit

- Disparate treatment (treating similarly situated individuals differently because of protected status)
- Intentional discrimination (acting on an unlawful animus based on a protected status, often shown by comments of decision maker)
- Disparate impact (neutral policy that has adverse impact on protected status; i.e., a “no-felon” rule adversely impacts minorities)

Continued

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Civil Rights Laws Prohibit

- “Harassment” based on protected status
- “Retaliation” for asserting rights (objecting to unlawful acts or participating in an investigation)

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Two Types of Unlawful Harassment

- **Based on a protected status or sexual harassment, (i.e., “of a sexual nature”)**
 - Quid pro Quo (this for that)
 - Submission to such conduct or communication is made a term or condition, either explicitly or implicitly, to obtain employment.


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Two Types of Unlawful Harassment


- Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment.
- Hostile Work Environment
 - Such conduct or communication has purpose or effect of substantially interfering with individual's employment or creating intimidating, hostile or offensive employment environment.

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Miscellaneous Information

- Before bringing a claim under federal civil rights laws, charge must be filed with Equal Employment Opportunity Commission.
 - State law claims may be filed directly in court.
- Making decisions based on an immutable trait of protected status is unlawful (i.e., accent).


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Miscellaneous Information

- Decision makers (HR/managers) may be held personally liable for civil rights violations under Michigan law.
- Genetic Information (under GINA) – In general terms is family medical information (i.e., certain diseases run in families such as sickle cell anemia, early onset Alzheimer's).

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Miscellaneous Information

- Transgendered person has right to use restroom associated with his/her gender identity.
- Wage discrimination claims based on sex can compare wage rates of predecessors, successors, or individuals with "comparable jobs."

Continued

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Miscellaneous Information

- Wage discrimination claims can be brought years after discriminatory decision (i.e., failure to promote) was made and limitations period renews with each paycheck.
- Limitations periods can be limited to 180 days by agreement for state claims, and probably some federal claims.

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Civil Rights Laws

- **Pregnancy Discrimination**
 - If you offer light-duty work to employees with workplace injuries, you must offer it to pregnant workers with same inability to work.
 - You cannot force light duty or leave of absence on pregnant workers. Whether they can work is up to their healthcare provider.

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Civil Rights Laws

- Failure to congratulate pregnant worker has been viewed as evidence of unlawful animus based on pregnancy.
- **Lactation policy** – FLSA was amended in 2010 to provide rights to nursing mothers (break time, private space to express milk), 29 USC 207(r).

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Civil Rights Laws

- **Americans with Disabilities Act (ADA)**
 - Prohibits discrimination based on disability
 - Requires reasonable accommodation that permits disabled person to perform essential functions of job unless it causes employer an undue hardship

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Civil Rights Laws

[Note: Michigan Persons with Disabilities Civil Rights Act also prohibits discrimination and requires accommodation, but it lists those accommodations required based on number of employees working for employer. Because accommodations under it are more limited, claims are generally brought under federal law].



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ADA

- Since ADA was amended in 2008, it's easier for plaintiffs to demonstrate a "disability."
- Disability, is an impairment that:
 - Substantially interferes with a major life activity (i.e., walking, thinking, sitting, sleeping, working, hearing, standing, driving, lifting, etc.)



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ADA



- Interferes with major bodily functions (i.e., normal cell growth, digestive, bowel/bladder, brain, reproductive functions, etc.)
- Recent cases have held even temporary conditions can be a disability that must be accommodated.

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ADA


- "Disability" also includes:
 - Record of impairment
 - Being regarded as having impairment (when none exists)
- Disability is determined without regard to ameliorative effects of mitigating measures (i.e., hearing aids, prosthetics, medication).
- Can be condition that is in remission or is only episodic (and, therefore, no symptoms)

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ADA Accommodation Issues

- Employer can verify that disability exists (*should only do so with assistance of legal counsel!*).
- Engage in “interactive process” to determine accommodations.
- Need not grant accommodation preferred by employee, only one that is effective. If employee refuses and can’t perform job, not qualified.
- If no accommodation would permit employee to perform essential functions, then employee not qualified for job (i.e., legally blind driver).


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ADA Accommodation Issues

- If told, under Michigan law accommodations must be requested in writing within 182 days of day employee knew or should have known of need.


[Note: ADA issues are some of the most complex and legal counsel should always be consulted!!!]

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Miscellaneous Laws

- **Polygraph Protection Act**, 29 USC 2001, *et seq.* and MCL 37.201, *et seq.* – Between state and federal laws, employers may not request or suggest polygraph, make decisions based on test results, or even receive/review the results of a test.

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Miscellaneous Laws

- **Occupational Safety and Health Act (OSHA)**, 29 USC 651, *et seq.*, MCL 408.1001, *et seq.* - Establishes safety and health standards for workplace, requires monitoring and reporting of work-related injuries and illnesses, etc.


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Miscellaneous Laws

- **Medical Marihuana Act**, MCL 333.26421, *et seq.* - Does not affect employer's drug testing policy or prohibit disciplining employee with positive test result or who refused test.


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Miscellaneous Laws

- **Disclosure of Employee Job Performance**, MCL 423.451, *et seq.* - Employer that, in good faith, discloses to prospective employer information in personnel file concerning employee's performance is immune from civil liability.

Continued

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Miscellaneous Laws

- **Bullard-Plawecki Employee Right to Know Act**, MCL 423.501, *et seq.* – Controls what should and cannot be in personnel files, provides employees with access to their files (and copies thereof at reasonable cost), permits “rebuttals” by employees, and requires employers to give notice to employees if records of disciplinary nature are disclosed to third parties

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Miscellaneous Labor Laws

- **National Labor Relations Act**, 29 USC 151, *et seq.*, **Michigan Employment Relations Commission Act**, MCL 423.1, *et seq.*, and **Public Employment Relations Act**, MCL 423.201, *et seq.* (for public employees)
 - Provide for collective bargaining and other rights for employees
 - Right of “concerted activity” is very broad, protects non-union employees, and affects confidentiality policies, social media policies, etc.

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Miscellaneous Labor Laws

- **“Right to Work” Act**, MCL 423.14 (amended MERC, effective March 28, 2013) – Makes union membership and dues optional, eliminating “union shops” in Michigan.

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Miscellaneous Laws

- **Worker's Disability Compensation Act,** MCL 418.101, *et seq.*
 - Mandates insurance coverage for employee work injuries and illnesses
 - Benefits include medical care and some income replacement. Pain and suffering damages not available.

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Miscellaneous Laws

- Prohibits retaliation against employees who make claims, but does not, *per se*, provide right to leaves of absences.
- Protects employers from civil lawsuits for workplace injuries/illnesses, unless an intentional tort can be shown.
- Does not provide a right to leave of absence or reinstatement.

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Privacy & Protection Laws

- **Michigan Internet Privacy Protection Act,** MCL 37.271, *et seq.* – Prohibits employers from requesting access to social media pages, requesting passwords to access private pages or disciplining employees who refuses to provide access/passwords.

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Privacy & Protection Laws

- **Whistleblower's Protection Act, MCL 15.361, et seq.** – Protects employees from retaliation for reporting or threatening to report suspected unlawful activity to a public agency.

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Privacy & Protection Laws

- **Social Security Privacy Act, MCL 445.81, et seq.** – Makes it unlawful for employers to disclose social security numbers of employees, limits access to documents containing numbers and prohibits mailing documents containing more than four numbers (except as required by law; i.e., W-2s). Violations may result in misdemeanor charges.

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Questions?



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The Sophisticated Employer

Your legal resource for workforce management

Diversity in the Workplace and Specific Job Classifications Matter

POSTED BY CLAUDIA D. ORR
MARCH 23, 2016

Human resources must consider diversity within job classifications to help deter potential sex discrimination liability. Continue Reading »

TAGS: DIVERSITY, EMPLOYMENT DISCRIMINATION, EMPLOYMENT LIABILITY, HUMAN RESOURCES

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Thank You!



Goodbye

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