

# SPECIAL REPORT

## RISK MANAGEMENT TECHNIQUES TO MINIMIZE THE EMPLOYMENT PRACTICES EXPOSURE

(04-04-14)

---

This Special Report was written by Daniel P. Hale, J.D., CPCU, ARM, CRM, LIC, AIC, AIS, API of Marsh & McLennan Agency LLC. Mr. Dan Hale can be contacted at 734-525-2429 or dhale@mma-mi.com. More Special Reports are available at [www.mma-mi.com](http://www.mma-mi.com).

---

### **WHAT IS MY EXPOSURE TO EMPLOYMENT PRACTICES LIABILITY?**

Today, organizations employing anyone are at risk for lawsuits, claims or government investigations for wrongful termination, discrimination, harassment, failure to correspond to handicapper's rights, and other claims. Plaintiffs' attorneys, who have been limited by broad sweeping tort reform measures in recent years, are turning to employment lawsuits to supplement their practices.

The following are some types of legal action which can be taken against employers arising out of the employment relationship:

#### **A. Private Causes of Action Against Employers**

There are a number of different types of claims that can be filed against an employer alleging improper employment practices.

First, an employee can claim that an employer has condoned or failed to prevent sexual harassment in the workplace. Such suits can be based on "quid pro quo" (sexual acts as a condition for employment) or "hostile work environment" (environment of sexual nature such as posting of comics, telling of dirty jokes, etc). Implementing effective policies and procedures prohibiting sexual harassment can minimize these claims.

The second type of suit is for wrongful discharge or breach of contract. In this claim, the employee asserts that he or she had a reasonable expectation of future employment or employment benefits which he or she was denied. These types of claims can be minimized through having

a consistently applied “at-will” employment policy that denies the existence of a contractual relationship with the employee.

The third type of private employment claim is violation of state or federal law prohibiting discrimination. The Michigan Elliott-Larsen Civil Rights Act is frequently cited by employment lawyers. This law provides for a broad group of protected classes including weight and height.

State law also prohibits retaliation or discrimination against an employee for reporting an employer to a governmental authority, such as OSHA, which is referred to in the law as a “whistle-blowers” claim.

## **B. Governmental Actions**

Aside from private lawsuits, governmental authorities also have the right to investigate certain employment complaints. In Michigan, the Michigan Department of Civil Rights can open a file on an employer and demand written answers to questions, take interviews, and require the production of documents to ascertain whether discrimination or another violation of the law has occurred.

The Michigan Wage and Hour Division also has the ability to investigate concerns involving violation of compensation regulations.

The Equal Opportunity Employment Commission (EEOC) of the federal government has the right to undertake similar investigative activities on behalf of employees or at their own initiative.

Both federal and state agencies have broad sweeping powers to sanction employers and to take other remedial action to prevent illegal policies and practices of an employer.

## **RISK MANAGEMENT TECHNIQUES**

Although the exposure to Employment Practices liability is something that always exists, there are many steps any employer can take to minimize such risks.

The following 16 tips stem from the experience of Cambridge attorneys in defending and prosecuting employment litigation and representing employers in Department of Civil Rights and EEOC investigations:

**1. Utilize arbitration or facilitation agreements signed by the employee to reduce the risk of high jury awards.**

Recent Michigan law benefits employers by stating that where consistently applied, arbitration agreements can be enforced. Such agreements must be treated like any other contract and the appropriate consideration must be paid to the employee.

One draw back with arbitration is that it is final and generally not subject to appeal rights. Another alternative is to require facilitation which is having a neutral mediator try to resolve any issues prior to a case going to court.

Utilizing these types of agreements can significantly reduce the employers' exposure to large jury verdicts in employment lawsuits.

**2. Utilize abbreviated statutes of limitation.**

An employee generally has up to three years to file a lawsuit against an employer for a wrongful act such as harassment. However, courts have allowed employers to amend the statute of limitations to 180 days in certain situations. This can be easily incorporated into the job application.

However, it is important to have carefully drafted language as some claims such as a whistle-blowers claim would generally only have 90 days and a statement making the statute of limitations 180 days would actually broaden the rights of the employee.

**3. Implement updated and consistent employment policies.**

One of the first exhibits to be marked in employment litigation is the employer's personnel policy manual. Attorneys specializing in employment law should regularly update such a manual. These policies should usually confirm the existence of an "at-will" employment

arrangement so as to guard against suits alleging wrongful discharge and breach of contract.

**4. Be cognizant of pre-employment inquiries.**

In Michigan, like in most states, employers are limited in what they can ask at the time of considering a prospective employee. For example, the age or race of an applicant cannot be asked. There are other less obvious requirements. If you would like a list of prohibited questions, please call or write us.

**5. Ensure that your company is complying with wage and hour regulations.**

Employers are routinely faced with highly technical regulations on what they can and cannot do on the payment of overtime for nonexempt employees. If you would like additional information on what standards should be applied, please contact us.

**6. Obtain legal counsel if a lawyer calls you or if you question whether termination or disciplinary action is appropriate.**

There is no substitute for obtaining legal advice if presented with an employment situation that could give rise to a claim. Employers should avoid attempting to handle such matters on their own given the highly specialized regulations and laws which apply. Moreover, any statements made might be used against the employer at a later time.

**7. Be cognizant of the fact that personnel files of other employees may be the subject of review in litigation.**

Many plaintiffs' lawyers attempt to obtain documents from an employer before filing suit. If an employer is asked for documents, the request should be forwarded to legal counsel instead of simply producing the documents given the issues of confidentiality. In fact, this policy should be applied to all documents whether related to personnel files or not.

**8. E-mail is the plaintiffs' attorney's new best friend.**

Crafty plaintiffs' lawyers have wised up to the technological age where e-mail is in almost universal use. Specialized computer companies can obtain such e-mail and computer messages from an employer's computer system, even if such messages have previously been "erased." Employers should adopt a communication policy prohibiting non-business use of computers and phones.

**9. Documents can be an employer's best friend in employment litigation.**

One of the most effective tools in defending companies in litigation is documents, particularly those signed by the former employee plaintiff. Employers should use error-proof systems for obtaining signatures on acknowledgement forms and at-will policies, as well as other important documents.

**10. Implement an "iron-clad" harassment /sexual harassment policy that includes a "notice to employer" provision.**

All personnel manuals should include anti-sexual harassment policies which are carefully drafted by legal counsel.

**11. At-will policies should be the rule rather than the exception unless employment contracts are used.**

Although in Michigan the general rule is that an at-will employment arrangement is presumed, employers should take active steps to clearly solidify such policies for the sake of consistency.

**12. Avoid giving negative feedback to potential employers.**

Acknowledging employment dates should generally be the limit of what information is provided to terminated employees.

**13. Save all documents and notes, regardless of how trivial.**

At the time of a claim or suit, much emphasis will be placed on documentary evidence to show the scope of the employment

relationship and what was expected of the employee claimant. This underscores the need to maintain such documentation. One of the most powerful documents is one signed by an employee, such as an at-will policy or a sexual harassment policy.

**14. Utilize employee benefit plan systems and procedures to avoid COBRA and ERISA claims.**

Insurance coverage can be purchased for mistakes in administering employee benefit programs, and such coverage should be included in every commercial insurance program. The additional cost for such coverage, if any, is nominal.

**15. Be very cautious in dealing with Family Medical Leave Act Issues.**

The Family Medical Leave Act applies to employers with 50 or more employees and requires that an employee be offered up to 12 weeks of leave for certain situations and at the end of that time be returned to the same job. There are many cases being filed in this area and employers should take action to be certain they are carefully following the letter of the law when dealing with such employees.

**16. Purchase Employment Practices Liability insurance, which is less expensive than you might think.**

Employment Practices Liability coverages are widely available today. Such coverages may be as inexpensive as \$1,500 and can be purchased to cover defense costs and judgments for a host of employment claims. Such coverage should be included or at least considered as a staple to virtually every commercial insurance program.

*This Special Report is general in nature and is not designed to provide specific legal advice for any employer-employee situation or for your organization in particular. More specific advice should be obtained from legal counsel.*

*This document is not intended to be taken as advice regarding any individual situation and should not be relied upon as such. Marsh & McLennan Agency LLC shall have no obligation to update this publication and shall have no liability to you or any other party arising out of this publication or any matter contained herein. Any statements concerning actuarial, tax, accounting or legal matters are based solely on our experience as consultants and are not to be relied upon as actuarial, accounting, tax or legal advice, for which you should consult your own professional advisors. Any modeling analytics or projections are subject to inherent uncertainty and the analysis could be materially affected if any underlying assumptions, conditions, information or factors are inaccurate or incomplete or should change.*