

What Employers Need to Know to Prepare for 2023

FLSA, Wage & Hour Laws & Minimum Wage
Talent Recruitment and Retention Policies
Compliance and Regulation Issues
Workers' Compensation
Labor Law & Rapid Fire Look at DEI

Fair Labor Standards Act Compliance Issues

Karl W. Butterer

616.726.2212

kbutterer@fosterswift.com

What I will cover today

- FLSA Basic Refresher
- Weather Report – Current FLSA Conditions and Forecast
- Common FLSA Mistakes
- Hot Topics

FLSA Refresher

- Federal law which generally requires that employers pay **non-exempt employees**
 - At least **minimum wage** for all hours worked
 - Plus an **overtime premium** for all hours worked in excess of 40 hours in a workweek
- Must keep basic records of pay rates, hours worked each day and workweek, and earnings per workweek
- **FLSA DOES NOT APPLY TO WORKERS PROPERLY CLASSIFIED AS INDEPENDENT CONTACTORS**

FLSA Refresher

- FLSA enforced by federal Department of Labor
- Similar laws enforced by SOM Department of Labor and Economic Opportunity
- Government investigates potential violations and may file civil lawsuit
- Employees can file private lawsuits as well

Potential Employer Misclassification Penalties

- Three years back wages
- Equal amount additional penalty
- Attorney fees (may exceed back wage amount)
- Related IRS penalties on back wages
 - 100% employer's unpaid FICA
 - 40% employee's unpaid FICA
 - 3% unpaid wages
- Criminal penalties for intentional violations
- *FLSA suits not covered by EPLI insurance policies*

FLSA National Weather Report – Current Conditions

- 2012 to 2020 - relatively high tide for filed federal FLSA lawsuits *compared to prior periods*
- 2022 – Seventh year of decreasing filings
 - Down about 35% from 2015 highwater mark
 - Fewest FLSA civil lawsuits filed since at least 2009
- 2021 – DOL enforcement report of “cases with violations”
 - Down about 40% from 2012 highwater mark
 - Lowest since at least 2009
- Will the FLSA tide continue to go out?

FLSA National Weather Report - Forecast

- 2022 addition of 100 new DOL investigators
- 2022 DOL poised to propose new regulation to make it **more difficult for businesses to classify workers as independent contractors** rather than employees
- 2022 DOL joined with Federal Trade Commission to enhance sharing of misclassification information between agencies
- 2022 DOL joined with National Labor Relations Board to enhance sharing of misclassification information between agencies
- Forecast: Cases will not continue to fall

FLSA Local Weather Report

- The federal Sixth Circuit (includes Michigan) is one of three “epi-centers of wage & hour **class actions** and **collective actions**” in whole country
- Plaintiff’s bar currently enjoying high rate of success in getting conditional W & H **class** certifications
- Plaintiff’s bar becoming more selective seeking certification, and concentrating cases in “**magnet**” jurisdictions like 6th Circuit

January 12, 2022, Seyfarth Shaw LLP

Class Certification Trends

FLSA Local Weather Report

- 2019 State of Michigan launched Payroll Fraud Enforcement Unit
 - Website
 - Tip line
- “Most complaints involve misclassification of workers”
 - *Michigan Attorney Generals’ Office, July 2, 2019*

Common Mistakes: Easiest Ways to Get Caught in an FLSA Storm

- Misclassify worker as independent contractor
 - The “economic realities test”
- Misclassify employee as “exempt” from minimum wage or OT rules
- **These rules can be tricky!**
- Not keeping proper pay and hour records
- Not paying for all hours worked, including
 - Travel time between job sites
 - Travel time to first job site after performing work from home
 - Meal breaks *if* employee performing some job duties

Storm Watch (What to keep an eye on)

- Increased attention on misclassification of **Gig Economy Workers**
- Gig workers (per the Bureau of Labor Statistics)
 - Work on single project or task
 - Often through digital marketplace
 - On demand
- 16% adults have earned money through online gig platform
 - *State of Gig Work, Dec. 8, 2021, Pew Research Center*
- “[A] lot of gig workers should be classified as employees”
 - *DOL Secretary of Labor, April 29, 2021*
- 2022 likely new regulation on classification which will affect gig workers
- Stay tuned

This just in . . .

- DOL proposing **new classification rule** for independent contractors vs employees
- Published to public tomorrow
- 45 day public comment (11/28)
- DOL will issue final rule

Current Economic Realities Test

- **Control over manner in which work performed (core factor)**
- **Worker's opportunity for profit or loss (core factor)**
- Worker's investment in equipment and materials for work
- Special skills needed for work
- Degree of permanence
- Whether work is integral to employer's business

Proposed Economic Realities Test

No Core Factors

- Control over manner in which work performed
- Worker's opportunity for profit or loss
- Worker's investment in equipment and materials for work
- Special skills needed for work
- Degree of permanence
- Whether work is integral to employer's business

Likely Result if Proposed Rule Adopted

More difficult for some workers to be properly classified as independent contractors



Karl Butterer

616.726.2212

kbutterer@fosterswift.com

Minimum Wage & Paid Sick Leave

Anthony Dalimonte

248.785.4733

adalimonte@fosterswift.com

Big Changes to Minimum Wage and Paid Sick Leave

- Michigan Court of Claims reinstated Michigan's original Improved Workforce Opportunity Act (IWOWA) and Earned Sick Time Act (ESTA)
- Minimum wage and paid sick leave laws to significantly change
- Court of Appeals issued stay until February 20, 2023
- Unless the Court of Appeals rules otherwise, employers will be required to *immediately* comply with 2018 laws

How did we get here?

- In 2018, ESTA and IWOWA put on ballot after gaining enough signatures
- Legislature chose to adopt the proposals, then amend
- “Adopt – and – Amend” strategy deemed unconstitutional
- Paid Medical Leave Act now void

Minimum Wage Changes

- New standard minimum wage: **\$12.00/hour**
- Adjustment to the minimum wage rate every year
- Increase in minimum wage for *tipped* employees:
 - 2022 → 80% of minimum wage
 - 2023 → 90% of minimum wage
 - 2024 → 100% of minimum wage

Paid Sick Leave Changes

Paid Medical Leave Act

- Employers with 50+ employees
- Maximum 40 hours paid sick leave
- 1 hour accrued for every 40 hours worked
- Frontloading



Earned Sick Time Act

- Applies to virtually all employers
- “Small employers” = 40 hours paid sick leave and 72 hours unpaid sick leave
- “Large employers” = 72 hours paid sick leave
- 1 hour accrued for every 30 hours worked
- No frontloading

Paid Sick Leave Changes

Paid Medical Leave Act

- Ineligible: part-time employees, exempt employees (FLSA), temporary employees
- No private right of action



Earned Sick Time Act

- Ineligible: only federal government employees
- Private right of action
- Presumption of retaliation
- Limits on requesting supporting documentation

Takeaways

- Must be prepared to comply by **February 20, 2023**
- Must pay new minimum wage
- Ensure compliance with Earned Sick Time Act



Anthony Dalimonte

248.785.4733

adalimonte@fosterswift.com

Talent Recruitment and Retention Policies



How to attract and retain talent

Matthew Fedor

248.785.4734

mfedor@fosterswift.com

Today's Topics

- ☐ Employer's New Offerings
- ☐ Ghost Postings
- ☐ Non-competition Agreements
- ☐ Corporate Transparency Act

Employer's New Offerings

- ☐ Flexible work arrangements (hours, environment)
- ☐ Professional development opportunities/personal career growth plan
- ☐ Company Culture/Values that focus on diversity, equity, and inclusion (“DE&I”)
- ☐ Relationships with Co-Workers

Employer's New Offerings

- ❑ How Employers Can Implement
 - ❑ Look for ways to build flexibility into work schedules
 - ❑ Survey employees to understand what benefits are of value to workers
 - ❑ Invest in a range of opportunities for skill development and provide greater access to mentoring and coaching opportunities
 - ❑ Have regular check-ins or “stay interviews” with employees

Ghost Postings

- ❑ Term Coined 2013 by Wall Street Journal
 - ❑ Referred to job notices posted so company could hire already known candidate
- ❑ 2020 – Forbes reported companies were posting for jobs while the company had hiring freezes because of uncertainty caused by the pandemic
- ❑ Reasons given by employers now –
 - ❑ Always open to new people
 - ❑ Impression that the company is growing
- ❑ Danger – Reputation/Goodwill, unintended discrimination

Current Landscape of Non-Competition Agreements

- ❑ President Biden Executive Order July 2021
 - ❑ Encouraged FTC “to curtail the unfair use of non-compete clauses . . . That may unfairly limit worker mobility.”
- ❑ Michigan HB No. 6031 – Rep. Mari Manoogian January 2022
 - ❑ Employers must provide applicants with written notice of the requirements for enforceable noncompete agreements
 - ❑ Disclose the terms of the noncompete prior to hiring
 - ❑ Post a copy of the Antitrust Reform Act at the worksite

Current Landscape of Non-Competition Agreements

- ❑ Michigan HB No. 6031 – Rep. Mari Manoogian
 - ❑ Prohibition on employers entering into noncompete agreements with employees considered under the Act to be “low-wage” employees (making less than 138% of the federal poverty line – approx. \$38K in 2022 family of 4)
 - ❑ Violators may be fined \$5,000 for each applicant

Does Michigan Law Enforce Non-Competition Agreements?

- ☐ YES!
- ☐ MCL 445.774a
- ☐ “Protects an employer’s reasonable competitive business interests”
- ☐ “Reasonable as to its duration, geographical area, and type of employment or line of business””

“An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.”

What is **REASONABLE** when it comes to non-competition agreements?

- ❑ **DURATION:** How long is the non-competition period?
 - ❑ Not indefinite
 - ❑ Typically 1-2 years (employees)
 - ❑ Longer if selling business (5-10 yrs)

What is **REASONABLE** when it comes to non-competition agreements?

- ❑ GEOGRAPHIC AREA: Where is employee restricted from competing?
 - ❑ Area necessary to protect employer from unfair competition
 - ❑ “Anywhere” is too broad
 - ❑ Typically a mile radius around employer’s place of business

What is **REASONABLE** when it comes to non-competition agreements?

- ❑ **LINE OF BUSINESS:** What is employee prohibited from doing?
 - ❑ May prohibit from working in a specific subset of an industry doing the same work
 - ❑ May be unreasonable to restrict employee from working for a competitor in any capacity
 - ❑ More narrowly tailored = more likely to be enforced

What is **REASONABLE** when it comes to non-competition agreements?

- ❑ COMPETITIVE BUSINESS INTEREST BEING PROTECTED:
What is employer safeguarding?
 - ❑ Must be trying to safeguard against any unfair advantage the employee would have over employer
 - ❑ Specialized training, knowledge of existing customers, pricing, confidential information
 - ❑ More narrowly tailored = more likely to be enforced



Matthew Fedor

248.785.4734

mfedor@fosterswift.com

Corporate Transparency Act

Robert A. Hamor

248.785.4737

rhamor@fosterswift.com

Corporate Transparency Act

- Overview of the Corporate Transparency Act
- What is a reporting company
- Beneficial Owners
- Company Applicants
- Reporting Requirements
- Next Steps

CORPORATE TRANSPARENCY ACT

Overview

- Passed on January 1, 2021 and codified in 31 U.S. Code § 5336. Culmination of years of other attempts to aggregate beneficial owner information into a database (Beneficial Ownership Secure System (“BOSS”)).
- The purpose of the CTA is to (1) set federal standards for incorporation, (2) protect U.S. national security and commerce including with respect to money laundering, terrorism financing and other illegal activities; and (3) comply with international standards with respect to money laundering and anti-terror financing.

CORPORATE TRANSPARENCY ACT

Overview

- Some estimates indicate more than 90% of U.S. Companies must file; FinCEN has proffered its belief that companies with “simple management and ownership structures” will spend \$85 to prepare and submit an initial report.
- On April 1, 2021, FinCEN released an initial Advance Notice of Proposed Rulemaking and, on December 8, 2021, the agency published its proposed rules in the Federal Register.

CORPORATE TRANSPARENCY ACT

Overview

- On September 30, 2022, FinCEN issued its final rule with respect to the reporting of Beneficial Ownership Information.
- Additional rulemaking is contemplated with respect to:
 - Who may access beneficial ownership information, and
 - FinCEN's customer due diligence rules.

CORPORATE TRANSPARENCY ACT

Reporting Companies

- Subject to exclusions (which we will discuss next), the term “reporting company”:
 - Means a corporation, limited liability company, or other similar entity that is—(i) created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe; or
 - Is formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe.

CORPORATE TRANSPARENCY ACT

Reporting Companies

- Who is excluded. There are a few general categories of excluded entities:
 - Companies who already report their beneficial ownership,
 - Certain service providers,
 - Certain large operating companies (more than 20 full time employees with more than \$5,000,000 in gross receipts and a physical office within the United States),
 - Inactive businesses, and
 - Certain tax-except entitles.

CORPORATE TRANSPARENCY ACT

Reporting Companies

Examples of exempt entities

Securities issuers	Certain governmental authorities
Certain banks and credit unions	Money transmitting businesses
Securities broker-dealers	Certain tax exempt entities
Venture capital funds	Certain insurance companies
Inactive businesses	Large operating companies

CORPORATE TRANSPARENCY ACT

Beneficial Owners

- Subject to certain exceptions, a beneficial owner is an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise:
 - Exercises substantial control over the entity, or
 - Owns or controls not less than 25 percent of the ownership interests of the entity. (Final rule provides guidance as to how this is calculated).

CORPORATE TRANSPARENCY ACT

Beneficial Owners

- Substantial control includes any of the following individuals:
 - Those who serve as senior officers of the reporting company,
 - Those who have authority over the appointment or removal of senior officer or a majority of the board of directors (or similar body), or

CORPORATE TRANSPARENCY ACT

Beneficial Owners

- Those who direct, determine or have substantial influence over important decisions made by the reporting company such as:
 - The nature, scope, and attributes of the business of the reporting company,
 - The reorganization, dissolution, or merger of the reporting company,
 - Major expenditures or investments, any significant debt, or approval of the operating budget,
 - The selection or termination of business lines or ventures or geographic focus,
 - Compensation schemes and incentive programs for senior officers,
 - The entry into or termination, or the fulfillment or non-fulfillment of significant contracts,
 - Amendments of any substantial governance documents of the reporting company.
- Any other form of substantial control over the reporting company.

CORPORATE TRANSPARENCY ACT

Beneficial Owners

- Exclusions:
 - Minor children.
 - Employees if their substantial control or economic benefits are derived solely from the employment status of the employee so long as they are not a senior officer.
 - Certain intermediaries.
 - Certain creditors.

CORPORATE TRANSPARENCY ACT

Company Applicants

- The rule also requires the reporting of company applicants.
- The Final Rule contemplates that Companies formed before January 1, 2024, do not need to report their company applicants.
- This exclusion was likely prompted by comments illustrating how difficult it may be to track down applicant information for legacy entities.

CORPORATE TRANSPARENCY ACT

Company Applicants

- A Company Applicant is:
 - For a domestic reporting company, the individual who files the document that creates the company.
 - For foreign Reporting Companies, the individual who files the document which first registers the foreign reporting company.
 - If there is more than one individual, the Company Applicant is the “individual who is primarily responsible for directing or controlling such filing...”

CORPORATE TRANSPARENCY ACT

Reporting Requirements

- The following information must be reported with respect to all Reporting Companies:
 - Legal name, including all DBAs/assumed names,
 - Street address of principal place of business,
 - Jurisdiction of formation and registration, and
 - TIN or, if no TIN, a Dun & Bradstreet Data Universal Numbering System (DUNS) or Legal Entity Identifier (“LEI”).

CORPORATE TRANSPARENCY ACT

Reporting Requirements

- The following information must be reported with respect to all beneficial owners:
 - Owner's full legal name,
 - Date of birth,
 - Current address, and
 - A unique identifying number from a nonexpired: US passport; state, local or tribal ID; driver's license; or, if none of the foregoing, a foreign passport. An image of the document must be uploaded as well.

CORPORATE TRANSPARENCY ACT

Next Steps

- Prepare for 2024 reporting requirements.
- Assess the identity of potential beneficial owners.
- Assess stock options, plans, and incentives (both exercised and not exercised).
- Set a deadline for beneficial owners to submit reporting information to the company.
- Don't forget subsidiaries/holding companies.



Robert A. Hamor

248.785.4737

rhamor@fosterswift.com

Compliance and Regulation Issues: FMLA and ADA

Mark Koerner

517.371.8226

mkoerner@fosterswift.com

Family and Medical Leave Act – FMLA

Statutory Purposes

- To balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
- To entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;
- To, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimize the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and
- To promote the goal of equal employment opportunity for women and men, pursuant to such clause.

FMLA Eligibility

- Eligible employees:
 - Must have worked for 12 months; and
 - Worked 1,250 hours in the preceding 12-month period; and
 - Employed at a worksite where 50 or more employees are employed within 75 mile radius.
 - Eligibility is determined as of the date leave is to begin.
 - Can become eligible while on an approved leave.

FMLA Benefits

- Provides for 12 weeks unpaid leave in any 12 month period;
- 26 weeks for servicemember caregiver in any 12 month period.
- Leave for serious medical condition may be taken in blocks or as reduced schedule or intermittent leave.
- The 12 month period can be:
 1. The calendar year;
 2. Any fixed 12 month “leave year”;
 3. the 12 month period measured forward from the date of the employee’s first FMLA leave; OR
 4. a “rolling” 12 month period measured backward from the date an employee uses any FMLA leave.

Leave Availability

Leave available due to:

- birth/adoption or placement of child in foster care;
- serious health condition affecting an employee or an employee's spouse, parent, child (can be intermittent/reduced schedule);
- a qualifying exigency related to service of spouse, parent, son or daughter in National Guard, Reserves, active duty; or
- servicemember caregiver leave for spouse, parent, son, daughter, next of kin.

FMLA Protections

- Job Protection:
 - Return employee to same position and pay, or position of equal responsibilities and pay.
- Benefits Protection:
 - Health insurance continuation;
 - Resume other benefits at same level.

WHAT QUALIFIES AS A SERIOUS HEALTH CONDITION

Serious Health Condition

- Inpatient Care
- Continuing Treatment:
 - More than 3 consecutive days and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
 - treatment 2 or more times for the injury or illness by a health care provider;
 - treatment on at least 1 occasion that results in a regimen of continuing treatment under the supervision of the health care provider.

Serious Health Condition

- Pregnancy or for prenatal care.
- Chronic serious health condition that:
 - requires periodic visits for treatment;
 - continues over an extended period of time; and
 - could result in episodes of incapacity rather than a continuing period (e.g., asthma, diabetes, epilepsy).
- A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective.
- Any period of absence to receive multiple treatments for restorative surgery or a serious medical condition.

US Department of Labor – Wage and Hour Division – Fact Sheet #208 – Mental Health Conditions and the FMLA

- Issued May 2022;
- Mental Health Conditions are considered serious health conditions under the FMLA if they require inpatient care or continuing treatment.
 - A serious mental health condition that requires inpatient care includes:
 - An overnight stay in a hospital or other medical care facility, such as a treatment center for addiction or eating disorders;

FMLA and Mental Health

- A serious mental health condition that requires continuing treatment includes:
 - A condition that incapacitates an individual for more than three consecutive days and require ongoing medical treatment, either multiple appointments with a health care provider or a single appointment and follow-up care.
 - Chronic Conditions – e.g. anxiety, depression, or dissociative disorders, that cause occasional periods when an individual is incapacitated and requires treatment by a health care provider at least twice a year.
- Employer may require an employee to submit a certification from a health care provider.

FMLA and Mental Health

- FMLA leave may be taken to care for family members with mental health condition.
 - Providing care includes providing psychological comfort and reassurance that would be beneficial to a family member with a serious mental health condition who is receiving inpatient or home care.
 - Generally limited to providing care for a child under the age of 18 but can be extended to an adult child over the age of 18 if the individual is in need of care due to a serious mental health condition and is incapable of self-care because of the mental or physical disability.

FMLA and Mental Health

- Provides up to 26 workweeks of military caregiver leave in a single 12-month period to care for a covered servicemember and certain veterans with serious mental health conditions.
- Available to a current servicemember that is suffering a serious mental condition that was incurred by the servicemember in the line of duty.
- A serious mental health condition may also result from the aggravation of in the line of duty on active duty of a condition that existed before the servicemember began service.

FMLA – Paid or Unpaid

- Leave is unpaid.
 - but, employer can run FMLA concurrent with sick time and/or vacation time; and
 - employer can run FMLA concurrent with worker's compensation.

FMLA - Certification

- Certification Forms:
 - Serious Health Conditions
 - of Employee
 - to care for family member
 - to care for servicemember
 - Qualifying Exigency
- Time Frames: 15 days unless reasonable excuse
 - 7 days for clarification
- Recertification: No more often than 30 days, although there are exceptions
- Fitness-For-Duty Certifications: Can enforce uniformly-applied policy requiring all employees on leave to provide a certification that they are able to resume work.

FMLA – Incomplete Certifications

- If certification is complete, do not request additional information from health care provider.
- If certification **insufficient** or **incomplete**, employer may request in writing additional information
 - Must give employee 7 days to cure.
 - If deficiency not cured, may deny FMLA leave.
- Employer may obtain second opinion if it has reason to doubt validity of health care provider's certification (need authorization).
- Third opinion by mutually agreeable health care provider at employer expense.

FMLA: Contacting Employee's Health Care Provider

- Employer may contact health care provider to authenticate (do not need authorization) and clarify (need authorization) the certification.
- Contact with employee health care provider must not be through direct supervisor.
- Contact may be through HR professional, leave administrator, management official or other health care provider.

Continuation of Benefits

- Employer must maintain health care benefits under same terms and conditions while employee on FMLA.
- Accrual of seniority and benefits not required while on FMLA leave.

Employee Health Insurance

- Employee must pay employee portion of health care premium.
- Health insurance may be cancelled if:
 - Employee is 30 days late on payment.
 - Employee fails to return from leave.
 - Employee would have been terminated.

FMLA – Employee Notification

- 30 days advanced notice for **foreseeable** leave.
- “As soon as practicable” when leave is **not foreseeable**:
 - It is generally “practicable” for the employee to provide notice within the time required by the employee’s usual and customary notice requirements
 - But, individual circumstances must be taken into consideration.

FMLA – Employee Notification

- If employee fails to comply with employer's call-in procedures, FMLA leave may be delayed or denied, and employee may be disciplined under employer policies.
- Calling in sick without providing more information is not sufficient notice to trigger FMLA protections.
- Employer's duty to inquire further if need additional information re: request.

The Americans With Disabilities Act

ADA – Who Is Protected?

- 15 or more employees
- Prohibits discrimination against a “qualified individual with a disability”
- Under 42 U.S.C.S. § 12131(2), a “disability” is defined as a “physical or mental impairment that substantially limits one or more major life activities.”
 - Does not apply if the impairment is not substantial – such as mild allergy to pollen.
 - Applies to people having a record of impairment – such as visible scars
 - Applies to perception of impairment.
- A physical or mental impairment includes any physiological disorder or condition affecting the neurological or musculoskeletal body systems. 28 C.F.R. § 35.104.

ADA – Major Life Activity

- Major life activities include, but are not limited to:
 - Seeing
 - Hearing
 - Speaking
 - Walking
 - Breathing
 - Performing manual tasks
 - Learning
 - Caring for oneself
 - Working.
- An individual with a minor, nonchronic condition of short duration, such as a sprain, infection, or broken limb, generally would not be covered.

ADA – Reasonable Accommodation

- A reasonable accommodation may include but is not limited to:
 - Making existing facilities used by employees readily accessible to and usable by persons with disabilities.
 - Job restructuring, modifying work schedules, reassignment to a vacant position.
 - Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

ADA – Reasonable Accommodation

- Employer does not have to provide accommodation of employee's choice or accommodation that imposes an "undue hardship" on the employer;
 - "Undue hardship" is defined as "an action requiring significant difficulty or expense" when considered in light of a number of factors.
- Requires an interactive process and be determined on a case by case basis with a fact specific analysis.
- Examples: Modifying job responsibilities; modifying policies; providing auxiliary aids; transferring to vacant position; providing time off work...

ADA – Reasonable Accommodation

- The interactive process requires communication and good-faith exploration of possible accommodations.
- The process is mandatory.
- An employer's failure to accommodate an employee's disability may result in a constructive discharge and liability under the ADA.

ADA – Limitations on Inquiries/Examinations

- Limits circumstances under which you can require medical examinations of employees
 - Pre-Offer: No inquiries regarding nature, existence, or severity of a disability prior to conditional offer of employment
 - Post Conditional Offer: May make any inquiries and require medical examinations so long as consistent. May withdraw conditional offer only if the exclusion is job related and consistent with business necessity permitted
 - After Employment Begins: Inquiries must be job related and consistent with business necessity

ADA – Direct Threat to Health or Safety

- Employer may legally decide not to hire an individual with a disability if he or she poses a direct threat to health and safety.
- Risk of harm must not be speculative or based on stereotypes.
- Determination should be based on an evaluation of the individual's present ability to safely perform the job and a consideration of the following four factors: (i) the duration of the risk; (ii) the nature and severity of the potential harm; (iii) the likelihood that the potential harm will occur; and (iv) the imminence of the potential harm.

ADA – Medical Records

- Medical records are confidential. The basic rule is that, with limited exceptions, employers must keep confidential any medical information they learn about an applicant or employee. Information can be confidential even if it contains no medical diagnosis or treatment course and even if it is not generated by a health care professional.
 - Example: an employee's request for a reasonable accommodation would be considered medical information subject to the ADA's confidentiality requirements.

ADA – Drug and Alcohol Abuse

- Drug and Alcohol Abuse
 - Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA when an employer acts on the basis of such use.
 - Tests for illegal drugs are not subject to the ADA's restrictions on medical examinations.
 - Employers may hold illegal drug users and alcoholics to the same performance standards as other employees.

Questions?



Mark Koerner

517.371.8226

mkoerner@fosterswift.com

Introduction to Michigan Workers' Compensation

Alicia Birach

248.785.4721

abirach@fosterswift.com

Remote Work

- Remote work has become the new normal.
 - Has the employee's home become his or her worksite?
 - The quantity and regularity of the work performed at home.
 - The continuing presence of work equipment at home,
 - Whether special circumstances of the employment made it necessary, and not just personally convenient, for the employee to work at home.



Remote Work

- What happens when an employee's home is his or her worksite?
 - Risks associated with the home are now the risks associated with the worksite.
 - Reduces ability to implement safety measures at the worksite to mitigate risk and reduces the employer's ability to corroborate claims.



Remote Work

- What is and is not covered?
 - Activities incidental to the employment
 - Injuries occurring while mixing personal and business
 - How great is the deviation from the employment?
 - Did the injury occur in the pursuit of an activity the major purpose of which is social or recreational?
- What information is it important to gather to determine whether an injury occurring during remote work is compensable?



Remote Work

- Other factors to consider
 - Do you have the appropriate workers' compensation coverage in the states where your employees are working?



Workers' Compensation Premiums

- Who determines premiums?
 - The designated data collection organization in your state sets a manual rate for each job classification code.
 - The vast majority of states use the National Council on Compensation Insurance (“NCCI”) as their data collection organization.
 - There are eleven independent data collection organization states including, Michigan, Indiana, Wisconsin, Pennsylvania, Minnesota, California, Delaware, Massachusetts, North Carolina, New Jersey, and New York.
 - The Compensation Advisory Organization of Michigan is the data collection organization used here in Michigan.
 - Ohio, North Dakota, Wyoming⁹⁵, and Washington are monopolistic states.

Workers' Compensation Premiums

- NCCI has over 800 classification codes.
 - The manual rate for each classification code will vary by state because of the differences in laws and benefits.
- The manual rate is the specified rate established by the classification code for every \$100.00 of payroll.
- The manual rate is multiplied by the employer's annual payroll to establish the manual premium.
 - Example: If the manual rate for a framer is \$5.00 for every \$100.00 of payroll and the employer has \$100,000.00 in annual payroll the manual premium would be \$5,000.00.
- The manual premium is then adjusted by other factors including experience modification to determine the annual premium.
- The basic premise of experience modification is actual loss versus expected loss.
 - It is important to understand that primary loss has a bigger impact on experience modification than excess loss.



Alicia Birach

248.785.4721

abirach@fosterswift.com

LABOR DEVELOPMENTS

What Are Some Signs of Labor Activity

What are some subtle signs you may have never noticed without coming to this training

Michael Blum

248.785.4722
mblum@fosterswift.com

Clifford Hammond

248.538.6324
chammond@fosterswift.com

LABOR DEVELOPMENTS

- Signs of Labor Activity
 - Angry crowd outside demanding a union!



LABOR DEVELOPMENTS

- Signs of Labor Activity
 - Friendly employee or visitor talking with employees handing out a card or small flyer. Maybe exchanging text numbers.



LABOR DEVELOPMENTS

- The National Labor Relations Board (NLRB) is the private sector entity that oversees how employers, specifically managers treat employees.
- The Michigan Employment Relations Commission (MERC) covers public employers.
- From October 2021 through March 2022, unions filed 57% more petitions than the year before. (COVID restrictions had some impact on the increase, but that isn't the full story)
- Claims filed by unions at the NLRB increased by 14% in that period.

LABOR DEVELOPMENTS

- 54 Starbucks have been organized.
- There were actually 250 petitions to organize their stores.
- Amazon has been faced with unions for years, but finally had a warehouse organized in New York.
- Google Fiber contractors in Kansas City unionized in March.
- Union filed for the first unionized Home Depot store in September
- Recent polls show union's reputations have improved.
- 68% approved of unions in a Gallup poll late last year. That's the highest in over 50 years.

LABOR DEVELOPMENTS

- **Who cares?**

- I don't have a union and all the employees love us where I work?

LABOR DEVELOPMENTS

- The law applies to everyone;
- The General Counsel has said they will review non-union handbooks;
- The Rules are very strict.
- Examples of rules found unlawful:
 - Work rule prohibiting “lying”
 - "Never publish or disclose [the Employer's] or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer].“
 - "Sharing of [overheard conversations at the work site] with your co-workers, the public, or anyone outside of your immediate work group is strictly prohibited.“
 - Confidential Information is: "All information in which its [sic] loss, undue use or unauthorized disclosure could adversely affect the [Employer's] interests, image and reputation or compromise personal and private information of its members."

LABOR DEVELOPMENTS

- Examples of rules found unlawful:
 - "Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative."
 - "Chronic resistance to proper work-related orders or discipline, even though not overt insubordination" will result in discipline.
 - "[B]e respectful to the company, other employees, customers, partners, and competitors."
 - Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."
 - "Be respectful of others and the Company."
 - No "[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management."

LABOR DEVELOPMENTS



OR



LABOR DEVELOPMENTS

- MERC
 - Generally, but not always, MERC follows the NLRB.
 - Future of Right-to-Work on a federal level and in Michigan

LABOR DEVELOPMENTS

- Things to Watch For:
 - PRO Act
 - NLRB also announced they will partner with the DOJ and looking at such things as:
 - Misclassification (exempt/non-exempt)
 - Non-compete agreements

DEI AND EEO

- DEI And Diversity In the Work Place
 - What is it?
 - How is that Different from EEO?
 - What is an Affirmative Action Program?
 - How do you create one?
 - Considerations and what happens if you get it wrong.

Questions





Michael Blum

248.785.4722

mblum@fosterswift.com



Clifford Hammond

248.538.6324

chammond@fosterswift.com

Offices

|| Lansing



313 South Washington Square
Lansing, MI 48933-2114
T 517.371.8100
F 517.371.8200

|| Southfield



28411 Northwestern Highway
Suite 500
Southfield, MI 48034
T 248.539.9900

|| Grand Rapids



1700 East Beltline, N.E.
Suite 200
Grand Rapids, MI 49525-7044
T 616.726.2200

|| Detroit



333 W. Fort Street
Suite 1400
Detroit, MI 48226
T 248.785.4725

|| Holland



Central Avenue Financial Center
151 Central Avenue, Suite 260
Holland, MI 49423
T 616.796.2500

|| St. Joseph



800 Ship Street
Suite 105
St. Joseph, MI 49085
T 269.983.1400

Resources

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Contact Info for Employment Law Group

Attorney	Email	Phone
Alicia Birach	abirach@fosterswift.com	248.785.4721
Michael Blum	mblum@fosterswift.com	248.785.4722
Karl Butterer	kbutterer@fosterswift.com	616.726.2212
Anthony Dalimonte	adalimonte@fosterswift.com	248.785.4733
Matthew Fedor	mfedor@fosterswift.com	248.785.4734
Cliff Hammond	chammond@fosterswift.com	248.538.6324
Robert Hamor	rhamor@fosterswift.com	248.785.4737
Mark Koerner	mkoerner@fosterswift.com	517.371.8226

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