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HEALTH CARE RECRUITMENT**

**HEALTH CARE RECRUITERS
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LEGAL ISSUES IN THE PRE-EMPLOYMENT PROCESS

Presented By:

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LEGAL ISSUES IN THE PRE-EMPLOYMENT PROCESS

I. INTRODUCTION

A variety of legal issues impact the pre-employment process, including issues of employment discrimination, drug testing, background investigations, common law torts, and criminal records checks.

II. STATUTES RELATING TO PROTECTED CLASSIFICATIONS

A. The following "civil rights" laws prohibit employment discrimination on the basis of certain "protected classifications." Pre-employment inquiries that seek to elicit information relative to these protected classifications are unlawful.

1. Michigan Elliott-Larsen Civil Rights Act prohibits discrimination on the basis of religion, race, color, national origin, age, sex, height, weight and marital status.
2. Michigan Persons With Disabilities Civil Rights Act prohibits discrimination on the basis of disability.
3. Federal Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of religion, race, color, national origin and sex.
4. Federal Age Discrimination in Employment Act of 1967 prohibits age discrimination.
5. Federal Americans With Disabilities Act (ADA) prohibits discrimination on the basis of disability.
 - a. An employer may not ask a job applicant about the existence, nature, or severity of a disability. However, applicants may be asked about their ability to perform specific job functions.
 - b. An employer may not make medical inquiries or conduct a medical examination until after a job offer has been made. A job offer may be conditioned on the results of a medical examination or inquiry, but only if this is required for all entering employees in similar jobs.

B. The "adverse impact" theory of employment discrimination can be applicable to situations where an employer uses personality or competency testing as part of its pre-employment processes. Generally, this theory is used when such tests result in a statistically significant number of members of a protected classification being excluded from consideration for employment. The employer normally seeks to defeat such a claim on the bases (a) that the

test has been “validated” to be an accurate predictor of satisfactory performance on the job, and (b) that there exists no other reasonable means to predict such performance in the absence of these statistical disparities.

III. PRE-EMPLOYMENT DRUG TESTING

A. Section 104 of the ADA provides:

"(d) Drug Testing --

- (1) In general. -- For purposes of this title, a test to determine the illegal use of drugs shall not be considered a medical examination.
- (2) Construction. -- Nothing in this title shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such tests."

Similarly, Section 103 of the Michigan Persons With Disabilities Civil Rights Act provides:

"(f) For purposes of article 2, disability does not include either of the following:

- (i) A determinable physical or medical characteristic caused by the current illegal use of a controlled substance by that individual.
- (ii) A determinable physical or mental characteristic caused by the use of an alcoholic liquor by that individual, if that physical or mental characteristic prevents that individual from performing the duties of his or her job."

B. In Middlebrooks v. Wayne County, 446 Mich 151, 521 NW2d 774 (1994), the Michigan Supreme Court held that the job applicant in that case had not suffered a violation of his Constitutional right to be free from “unreasonable searches and seizures” when the employer subjected him to a pre-employment drug test before hiring him for a position, in which the responsibilities included the operation of lawn mowers, front end loaders, trucks and other equipment. The Court also noted that the applicant had been placed on notice of the fact that such a test could be conducted.

IV. RELEASING INFORMATION

A. Defamation --

1. The elements of defamation are:
 - a) a false statement;
 - b) concerning the plaintiff;
 - c) unprivileged publication to a third party;
 - d) with fault amounting to at least negligence; and
 - e) harm to the plaintiff.
2. Truth is a defense.
3. A qualified privilege exists when providing a reference to a prospective employer.

B. Invasion of Privacy --

1. Generally, this tort can be applicable where disclosure is made of a fact which the plaintiff had a right to keep private.
2. Truth is not a defense.
3. The importance of "waivers" -- employment applications.

V. REFERENCE AND BACKGROUND CHECKS

A. While public employers enjoy the protection of the Michigan Governmental Immunity Statute, MCLA 691.1401, et. seq., state law does continue to recognize the tort of "negligent hiring." An employer has a duty to its customers, patrons and business invitees to exercise reasonable care for the safety of those individuals.

B. Nonetheless, in Moore v. St. Joseph Nursing Home, Inc., 184 Mich App 766, 459 NW2d 100, 102 (1990), the Michigan Court of Appeals held as follows regarding an employer's obligation to release information regarding a current or former employee:

"We agree that Michigan law recognizes an employer's qualified privilege to divulge information about a former employee to a prospective employer (citations omitted). There is, however, nothing about the conditional privilege which magically transposes it into a legal obligation requiring employers to disclose adverse information concerning a former employee. Rather, it is quite clear that in Michigan, a former

employer's duty to release information about a past employee is an imperfect obligation of a moral or social character."

C. Section 20175 of the Michigan Health Code provides, in pertinent part as follows:

"(5) A health facility or agency that employs, contracts with, or grants privileges to a health professional licensed or registered under article 15 shall report the following to the department not more than 30 days after it occurs:

(a) Disciplinary action taken by the health facility or agency against a health professional licensed or registered under article 15 based on the licensee's or registrant's professional competence, disciplinary action that results in a change of employment status, or disciplinary action based on conduct that adversely affects the licensee's or registrant's clinical privileges for a period of more than 15 days. As used in this subdivision, "adversely affects" means the reduction, restriction, suspension, revocation, denial, or failure to renew the clinical privileges of a licensee or registrant by a health facility or agency.

(b) Restriction or acceptance of the surrender of the clinical privileges of a licensee or registrant under either of the following circumstances:

(i) The licensee or registrant is under investigation by the health facility or agency.

(ii) There is an agreement in which the health facility or agency agrees not to conduct an investigation into the licensee's or registrant's alleged professional incompetence or improper professional conduct.

(c) A case in which a health professional resigns or terminates a contract or whose contract is not renewed instead of the health facility taking disciplinary action against the health professional.

(6) Upon request by another health facility or agency seeking a reference for purposes of changing or granting staff privileges, credentials, or employment, a health facility or agency that employs, contracts with, or grants privileges to health

professionals licensed or registered under article 15 shall notify the requesting health facility or agency of any disciplinary or other action reportable under subsection (5) that it has taken against a health professional licensed or registered under article 15 and employed by, under contract to, or granted privileges by the health facility or agency.

- (7) For the purpose of reporting disciplinary actions under this section, a health facility or agency shall include only the following in the information provided:
- (a) The name of the licensee or registrant against whom disciplinary action has been taken.
 - (b) A description of the disciplinary action taken.
 - (c) The specific grounds for the disciplinary action taken.
 - (d) The date of the incident that is the basis for the disciplinary action.”

D. The Bullard-Plawecki Right to Know Act, MCLA 423.501 et. seq., precludes the disclosure of disciplinary action to a third-party in the absence of written notice to the employee. However, such written notice is not necessary where:

1. The employee has specifically waived written notice as part of a written, signed employment application with another employer;
2. The disclosure is ordered in a legal action or arbitration to a party in that legal action or arbitration; or
3. Information is requested by a government agency as a result of a claim or complaint by an employee.

That statute also obligates an individual’s current or former employer to review the individual’s personnel record, and remove discipline more than four (4) years old before releasing any information to a third party (unless the disclosure is ordered in a legal action or arbitration).

E. Under the Fair Credit Reporting Act (FCRA), a consumer report is a report which contains information about an individual’s personal and credit characteristics, character, general reputation, and lifestyle. To be covered by the FCRA, a report must be prepared by a consumer reporting agency (CRA) -- a business that assembles such reports for other businesses.

The definition of consumer report is extremely broad, encompassing “any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of establishing the consumer’s eligibility for -- . . . employment purposes.”

“Consumer reporting agency” is similarly broadly defined to include “any person which, for a monetary fee . . . regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.”

Applicants are often asked to give references. Whether verifying such references is covered by the FCRA depends on who does the verification. A reference verified by the employer is *not* covered by the Act; a reference verified by an employment or reference checking agency (or other CRA) is covered.

Before an employer can get a consumer report for employment purposes, it must notify the individual in *writing* -- in a document consisting solely of this notice -- that a report may be used. An employer also must get the person’s *written authorization* before it asks a CRA for the report.

If an employer will rely on a consumer report for an “adverse action” -- denying a job application, reassigning or terminating an employee, or denying a promotion -- be aware that:

Step 1: *Before* the employer takes the adverse action, it must give the individual a *pre-adverse action disclosure* that includes a copy of the individual’s consumer report and a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act” -- a document prescribed by the Federal Trade Commission. The CRA that furnishes the individual’s report will supply the summary of consumer rights.

Step 2: *After* the employer has taken an adverse action, it must give the individual notice orally, in writing, or electronically -- that the action has been taken in an *adverse action notice*. It must include:

- the name, address, and phone number of the CRA that supplied the report;

- a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and
- a notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished, and his or her right to an additional free consumer report from the agency upon request within 60 days.