

# Keeping Your Finance Operation Legal

*And Avoiding Employee Lawsuits!*

MICHIGAN

FLORIDA

ILLINOIS

MASSACHUSETTS

NEW YORK

CANADA

POLAND

*Presented by*

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**MILLER  
CANFIELD**

# Today's Agenda

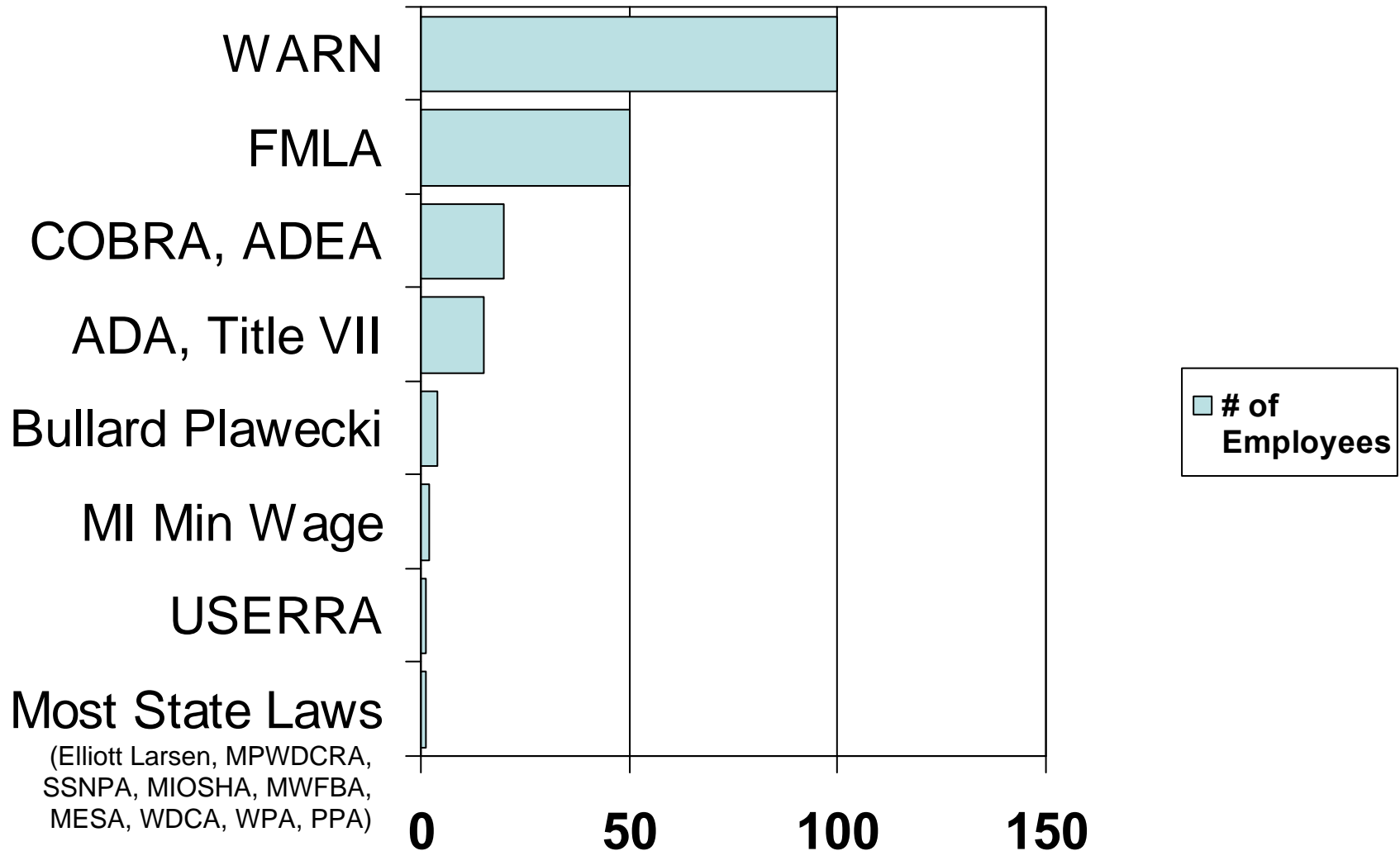
*Know these issues ... or risk employee lawsuits!*

- 1. Basic EEO Issues**
- 2. Family and Medical Leave Act Issues  
(FMLA)**
- 3. Americans with Disabilities Act Issues  
(ADA)**
- 4. Wage and Hour Issues**

# Basic EEO Issues

- Overview of EEO coverage and protected categories
- Protections against retaliation/whistle-blowing
- Public policy issues
- Harassment overview

# Basic EEO Issues



# Basic EEO Issues

- Overview of EEO protected categories
  - Age (ADEA/Elliott Larsen)
  - Disability (ADA/MPWDCRA) or FMLA
  - Religion (Title VII/Elliott Larsen)
  - Gender (Title VII/Elliott Larsen)
  - Race/Color (Title VII/Elliott Larsen)
  - Nat'l Origin/Ethnicity (Title VII/Elliott Larsen/IRCA)
  - Pregnancy (PDA)
  - Marital/Familial Status (ADA, Elliott Larsen)
  - Veteran Status (USERRA)
  - Genetic Info (GINA/MPWDCRA)
  - Local ordinance (in Lansing, ancestry, student status, veteran status, political affiliation or belief, sexual orientation, gender identity or expression, mental or physical limitation and source of income).

# Basic EEO Issues

- Protections against retaliation/whistleblowing
  - Most EEO laws include retaliation protection for:
    - Making a complaint alleging a violation of that law
    - Participating in an investigation of such a complaint
  - State/federal whistleblower laws for reporting alleged violation of law to a public body

# Basic EEO Issues

- Public policy issues
  - Unlawful to discipline or terminate employees
    - Who refuse to violate the law
    - Who refuse to submit fraudulent reports to governmental bodies

# Basic EEO Issues

- Harassment overview
  - Generic harassment not unlawful
  - Gender-based sexual harassment gets the focus, but other forms unlawful too (most commonly race or ethnic-based)

# Two Types of Harassment

- Quid Pro Quo
- Hostile Environment

# Quid Pro Quo Harassment

- Taking any tangible employment action based on an agreement or refusal to engage in sex, dating, etc.
- Typically involves a threat or promise of a benefit linked to sex

# Quid Pro Quo Harassment

- *Always* involves an employee with supervisory authority over other employee ...
- ... using his or her control, authority or influence over the employee's employment ...
- ... to get sex

# Liability for *Quid Pro Quo* Harassment

- ➡ Involves supervisors only

*Strict liability* for *any* gender-based harassment by a supervisor that results in a “*tangible employment action*”

# Hostile Environment Harassment

- Effect of interfering with person's work, c
- Creating an intimidating, hostile, or offensive working *environmen*
- Notice issues

# How Do “Supervisors” Get Into Trouble?

- Engage in inappropriate conduct
- Fail to monitor inappropriate conduct
- Fail to respond to complaints
- Engage in workplace romance
- Fail to appreciate scope of *perceived* or *apparent* authority

# Workplace Romance

Realistically can't be prevented

## Biggest Risk Factor:

Supervisors dating subordinates, especially those who report directly to them

# Workplace Romance

## Other Risks:

- ➡ Effect of public displays of affection
- ➡ Favoritism (even if just perceived)
- ➡ Retaliation to other problems when a romance breaks up
- ➡ Ongoing pursuit by one when the other no longer wishes to continue

# Can a single incident be enough?

- Yes

- No

# How Much is Too Much?

Jokes

+

Gestures

+

Emails, posters

+

Physical contact or  
confrontation

# 3 Tests for Spotting Hostile Environment Harassment

**1. Child/Spouse Test**

**2. Parent Test**

**3. The Newspaper Test**

# Who Can Be a Harasser

- Any supervisor
- Coworker
- Visitor, delivery person, repair person, member of the public, some other non-employee

# Who Can Be Harassed?

- ➡ Male harasser, female recipient
- ➡ Female harasser, male recipient
- ➡ Harasser of the same sex
- ➡ Member of protected category: race, religion, nationality, weight, sexual orientation, etc

# Where Can Harassment Occur?

- In the workplace
- At work-related events (Board or Council mtg)
- At any other place if conduct is tied to work or spills over into the workplace at a later time
  - incident at the bar
  - out-of-town conference
  - coworker's apartment

# FMLA: Covered Employers

- In private sector, all employers > 50 employees
- Joint employer issues with contract employee providers
- Individuals (in other words, supervisors) can be personally liable

# **FMLA:**

## **Covered Employees**

### ***What's a year?***

- 12 months of employment
- 1250 hours in last year
- 12 weeks of leave in one year (26 weeks in military injury care-giving situations)
- When do you determine?

# FMLA: Covered Conditions

- Birth or adoption
- Employee's "Serious Health Condition" – what is, what isn't
- Employee caring for parent, spouse or child with SHC
- Military "Exigencies" related to family member call-up (new – on hold pending DOL regulations)
- Employee caring for parent, spouse or child with military injury (new – available now)

# FMLA: Entitlement

- 12 or 26 workweeks of leave – block or intermittent
- Substitution of Paid Leave – employer choice (or by CBA)
- Reinstatement after leave
- All pay increases, bonuses, etc. employee would have received but for leave

BUT ... taking leave does not protect employee from legitimate reorganization, layoff, etc.

# FMLA: Notice and Certification Issues

- Employee's request for leave
- Employer notice requirements
- Call-in policies/practices
- Certification form issues
- Challenges to certification
- Recertification issues/practices
- Return to Duty

# QUESTIONS on FMLA issues?

# ADA Issues

- Federal law applies to employers with >15 employees
- Michigan Persons with Disabilities Civil Rights Act provides similar protections
- Both:
  - Prohibit disability discrimination in 3 forms
  - Require reasonable accommodations
- MI law includes genetic info discrimination (as will federal law – GINA – as of Nov 2009)

# ADA Issues

- Which employees are protected?
  - “qualified” individual
  - with a “disability”
    - Physical or mental condition/impairment
    - Substantial effect
    - “Major Life Activity”
- When is a “reasonable accommodation” required?
  - When providing the accommodation would permit the employee to perform the essential functions of his job

# ADA Issues

- The reasonable accommodation process
  - Should be interactive
  - Should take into account appropriate medical information
  - Medical information needs to remain confidential
  - Employer decides, not the employee's doctor

# ADA Issues

- Examples of reasonable accommodations
  - Physical changes to facilities, work stations
  - Job restructuring
  - Part-time/modified work schedules
  - Reassignment to a vacant position
  - Leave of absence (temporary)
- No obligation to provide accommodations that cause “undue hardship”

# ADA Issues

- Pitfalls
  - Lax acceptance of doctor's notes
  - Coming down too hard on employees with legitimate accommodations
  - Taking accommodation issues into account in performance evaluations
  - Perceiving an employee as disabled

# ADA Amendments

- Amendments passed by Congress last month – Sept 11 by U.S. Senate, Sept 17 by U.S. House
- President Bush signed into law on Sept 25
- Becomes effective January 1, 2009



# ADA Amendments

- Clarifies the current requirement that impairment must substantially limit a major life activity, such as work, to be considered a disability.
- Prohibits consideration of mitigating measures in determining whether a person has a disability, with the exception of ordinary eyeglasses and contact lenses.
- Expands the definition of disability.
  - expanded definition covers many more major life activities and includes a new category of major bodily functions
- Retains the current law standard that the burden of proof remains with the employee for showing that he or she is a qualified employee with a disability.

# ADA Amendments

- Expanded definition of disability would not apply to an impairment expected to last less than six months.
- Employers would not be required to provide a reasonable accommodation to individuals regarded as disabled.
- A person is regarded as having a disability if the employee establishes that he or she has been discriminated against because of an actual or perceived mental or physical impairment

# QUESTIONS on ADA issues?

# Wage and Hour Laws

- **Fair Labor Standards Act (FLSA)**
- **Michigan Wages and Fringe Benefits Act (MWFBA)**
- **Michigan Minimum Wage Law of 1964 (MMWL)**
- **Michigan Youth Employment Standards Act (MYESA)**

# A. Fair Labor Standards Act (FLSA)

## Includes:

1. Minimum wage (currently lower than MI law – \$6.55/hour, to \$7.25 7/24/09)
2. Overtime requirements ( $1\frac{1}{2}$  x “regular rate” > 40 hours worked)
3. Overtime exemptions (by regulation)
4. Various child/youth labor restrictions

# A. Fair Labor Standards Act (FLSA)

**Includes (con't):**

- 5. Administrative complaint procedures**
- 6. Private right to lawsuit**
- 7. Contracts beyond what law requires**

## **B. Michigan Wages and Fringe Benefits Act (MWFBA)**

**Applies to all employers provided at least 1 individual employed**

**Includes:**

- 1. Pay period requirements**
- 2. Pay at discharge requirements**
- 3. Consent for deductions (note Union issues)**
- 4. Provision of fringe benefits by policy**

## **B. Michigan Wages and Fringe Benefits Act (MWFBA)**

**Includes (con't):**

- 5. Overpayments correction allowance**
- 6. Administrative complaint procedures**
- 7. Retaliation prohibition**
- 8. Comp time permissible**
- 9. Criminal (misdemeanor) violations**
- 10. Employee wage disclosure protection**

# C. Michigan Minimum Wage Law of 1964 (MMWL)

**Covers all employers with at least two employees ( $\geq$  16 years old):**

- **if not covered by FLSA or**
- **if Michigan minimum wage  $>$  FLSA minimum wage**

**Includes:**

1. **Minimum wage requirements**
2. **Overtime requirements (FLSA generally trumps)**
3. **Wage discrimination prohibitions**

## C. Michigan Minimum Wage Law of 1964 (MMWL)

### Minimum wage requirements:

1. **Currently \$7.40/hour (↑ FLSA)**
2. **90-day “training wage” of \$4.25/hour for employees under 20**
3. **Employees under 18 may be paid 85% of minimum wage rate (currently \$6.29/hour)**

## **D. Michigan Youth Employment Standards Act (MYESA)**

**Covers any employer that employs a minor (person under 18)**

**Includes:**

- 1. Work permit requirements**
- 2. Age + hours worked restrictions**
- 3. Time record-keeping requirements**

# E. Back to the FLSA – Specific Issues

## A. Overtime Exemptions

1. new regulations in 2004
2. duties
3. salary pay
4. can still pay OT premium to exempt employees

## B. Salary Requirements

1. docking
2. improper deductions / “safe harbor” policy

# **E. Back to the FLSA – Specific Issues (con't)**

## **C. Calculating Hours Worked**

- 1. what is “work”**
- 2. travel time**
- 3. seminars/training**
- 4. meals/breaks**
- 5. prep/post times**

# E. Back to the FLSA – Specific Issues (con't)

## D. Calculating the “Regular Rate” for OT pay

1. include certain bonuses, shift premiums, longevity pay, etc.
2. exclude completely discretionary bonuses, severance pay, and vacation, holiday, or sick pay
3. OT paid based on “regular rate,” not necessarily wage or salary breakdown

## E. Back to the FLSA – Specific Issues (con't)

- E. A Common Problem – what to do with the employee who works off the clock, past quitting time, or before starting time**

# QUESTIONS on wage and hour issues?

# Thank you!

Bedankt

Gracias

THANK  
YOU

Merci

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