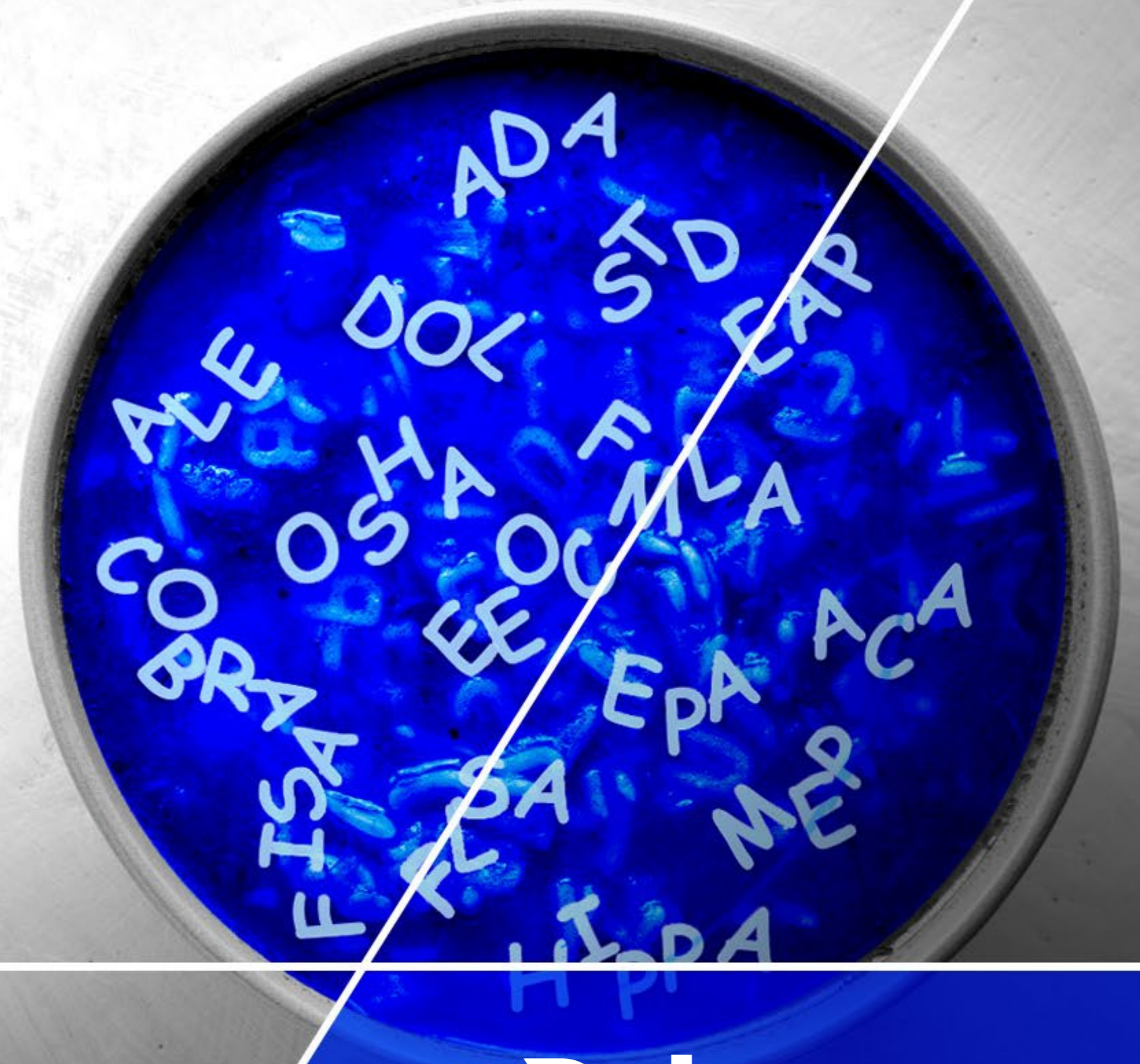


# Alphabet Soup – How to make sense of HR compliance







The focus of today's agenda is to educate business leaders about laws, regulations, and best practices governing the employee life cycle from recruitment to offboarding, to best navigate HR compliance and mitigate risk.

We'll cover:

- New and proposed legal updates about changes in laws and regulations
- Awareness, correction and prevention of compliance risks

**ADA** **ERISA** **HIPAA**  
**GINA** **COBRA** **EEOC**  
**FLSA** **OSHA**  
**FMLA** **DOL**





# New Laws Enacted



# Elliott-Larsen Civil Rights Act (ELCRA)

On March 16, 2023, Governor Whitmer signed the bill adding the following additional protected classes:

- Sexual Orientation
- Gender Identity
- Gender Expression

Title VII of the Civil Rights Act of 1964's ("Title VII") prohibits sex discrimination and includes discrimination on the basis of sexual orientation and transgender status.

- Title VII applies to employers with 15 or more employees
- ELCRA applies to employers with one or more employees

Employers should consider whether changes to their internal policies and employee handbooks will need to be made. Employers may want to consider whether their management teams will need training on the topic as well.

# Repeal of the Right-to-Work Law

On March 24, 2023, Governor Whitmer signed legislation repealing Michigan's right-to-work law, which prohibited union security agreements. The repeal becomes effective in March 2024.

Paying union dues or service fees as a condition of obtaining or continuing employment in unionized workplaces is now enforceable again.

If you are in a unionized company, check your collective bargaining agreements (CBAs) for any language stating that should a right-to-work law be repealed, the union security agreement provision automatically goes into effect.

What does this mean for union and nonunion workforces?

It's possible union members not wanting to pay dues may move to decertify.

It's also possible that activity to organize may increase. Pay attention to your workforce and assess your organization's work conditions, wages, benefits, and equitable treatment to uphold the best possible offerings you can provide to your employees.



## ***Providing Urgent Maternal Protections for Nursing Mother's Act (PUMP Act)***

- *Impacts all employers with 50 or more employees*
- This coverage has been effective since January 2023
- Requires all nursing mothers be provided a private space and certain breaks times to express breast milk
- Prior federal law allowed for coverage only for employees covered by overtime by the Fair Labor Standards Act (FLSA). Salary, Exempt employees are now also included in coverage

## ***Pregnant Worker's Fairness Act (PWFA)***

- *Impacting all employers with 15 or more employees*
- This coverage is in effect starting June 27, 2023
- Employers are required to grant reasonable accommodations for pregnant workers & applicants
- Discrimination against pregnant workers or applicants is prohibited because of the need for an accommodation
- Protects applicants/employee similar to the ADA's "interactive process".
- Prior legislation did not expressly guarantee a reasonable accommodation unless it was related to a religious belief or on account of a disability

Impacted employers may want to review their current policies, accommodation processes and lactation processes to ensure compliance with the new legislation.





# EEOC and DOL Claims



# EEOC Discrimination Claims



## Protected Classifications Under Federal Law Title VII

- Race (all races)
- Color
- Religion or Creed
- National Origin, Ancestry, and Citizenship
- Sex (including pregnancy, sexual orientation, and gender identity)
- Age (40 and older)
- Physical or Mental Disability (**Brain fog, depression**)
- Military & Veteran Status
- Genetic Information (including family medical history)

## Additional Protected Classifications Under Michigan Law

- Height
- Weight
- Sexual Orientation
- Gender Identity & Expression
- Misdemeanor Arrest Record
- Marital Status
- Family Status



# FLSA Wage and Hour Audits

DOL audits are on the rise

Appropriations to the Payroll Fraud Unit

The unit investigates the misclassification of employees as independent contractors.

\$5 million is being invested into the unit with the purpose of hiring 25 full-time equivalent employees, signaling a desire to increase investigations and enforcement.





# FLSA Wage and Hour Audits

DOL letters initiated for a variety of reasons

- Disgruntled former or current employee or independent contractor
- Alleged wage complaint or rights violated
- Competitor contacted the DOL
- Cracking down on an industry, usually manufacturing-based
- Rarely a luck of the draw random selection

General potential issues at hand

- Overtime pay not paid correctly
- Misclassification as independent contractor vs. Employee
- Employee rights allegedly violated



# DOL Demand Letter

- (6) Records demonstrating your gross annual dollar volume of sales. Please provide these records for the past three years (2021, 2022, & 2023)
- (7) A list of all employees with their address, hourly rate or salary, descriptive job title, phone numbers, email addresses, and whether you consider that employee exempt from overtime for all current and former employees for the past two years (Records might be requested in excel format on a later date);
- (8) Time records for the past two years **May 2021 until May 2023**, time records should have employees' name, pay period ending, daily clock in & out, total daily hours worked, & total weekly hours worked.
- (9) Payroll records for the past two years **May 2021 until May 2023**, Payroll records should have at least the following information: employees' name, pay period ending, hours worked, overtime paid, rate paid, gross wages, any deductions taken, and net wages (Records might be requested in excel format on a later date)
- (10) Birth dates for all employees under age 18 who worked during the past 24 months. Please provide age verification documents for the minor.

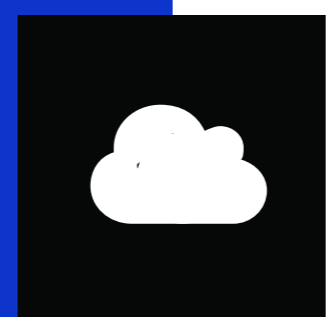


# What to do when the DOL contacts you

## Special Note:

You can ask for a postponement of the onsite visit and data remittance for up to 30 days. It's a lot of data to organize. They must grant it.

Working with a third party such as Rehmann and an employment attorney will create efficiencies and assured cooperation with the DOL auditor.



**Don't panic. Breathe.**



**Get HR involved Immediately**



**Contact your Business Advisor at Rehmann**



**Contact your Employment Attorney**



# Remote Workers Wage & Hour Issues

- If the company is in one state and remote workers are in another, different minimum wage rates may apply.
- State laws may vary when it comes to overtime pay obligations and they exceed federal requirements.
- Payroll and employment laws requirements vary by state.





# Employee Life Cycle





# EEO Statement on Job Postings and Applications

"ABC Company provides equal employment opportunities to all employees and applicants for employment and prohibits discrimination and harassment of any type without regard to race, color, religion, age, sex, national origin, disability status, genetics, protected veteran status, sexual orientation, gender identity or expression, or any other characteristic protected by federal, state or local laws."





# EEO Guidelines for Interview Questions

Acceptable and Unacceptable Inquiries for Interviews and Employment Applications			
<i>Topic</i>	<i>Acceptable</i>	<i>Unacceptable</i>	<i>If Unacceptable, What Is the Reason?</i>
Age	If age is a legal requirement, can ask "If hired, can you furnish proof of age?" or a statement that hire is subject to age verification.	What is your date of birth?	Could be viewed as age discrimination
Attendance/reliability	What hours and days can you work?	How many children do you have?	Could be viewed as discriminatory toward females
Attendance/reliability	Are there specific times that you cannot work?	What religion are you?	Could be viewed as religious discrimination



# Hiring

**Have a solid, well-crafted offer letter and be clear that it is not a contract; use At-Will clause.**



**Determine if an employment agreement is necessary, and enforceable. (non-compete clause)**



**Background checks and drug screening, if you use them, are processed post-offer, as a contingency for the job.**



**Credit history checks, post-offer, may apply for finance and executive roles, however, proposed law in MI may prohibit it.**





# Onboarding

Complete the Form I-9 timely and accurately.

It's the #1 most noncompliant form.

Do not file the I-9 form in personnel files. Keep in a separate binder, for active and termed employees, or use E-Verify.

Note: conduct an I-9 audit, especially with the new regulations forthcoming.



# Verifying an employee's authorization to work in the US

During the Pandemic, USCIS allowed for remote verification of employee identification required for Form I-9 completion. It continued in limited use for employers that were operating in a remote-only capacity.

The deadline has been set for 8/30/23, to physically examine all of your remote-verified Form I-9s for employees hired on or after March 20, 2020, and who have only received a virtual or remote examination under the prior flexibilities.

- For remote or out of area employees, if a manager is not present to conduct the physical review, you may utilize a notary.
- For future or out of state remote new hires, utilizing a notary is a solution.

Full details: <https://www.ice.gov/news/releases/ice-updates-form-i-9-requirement-flexibility-grant-employers-more-time-comply>

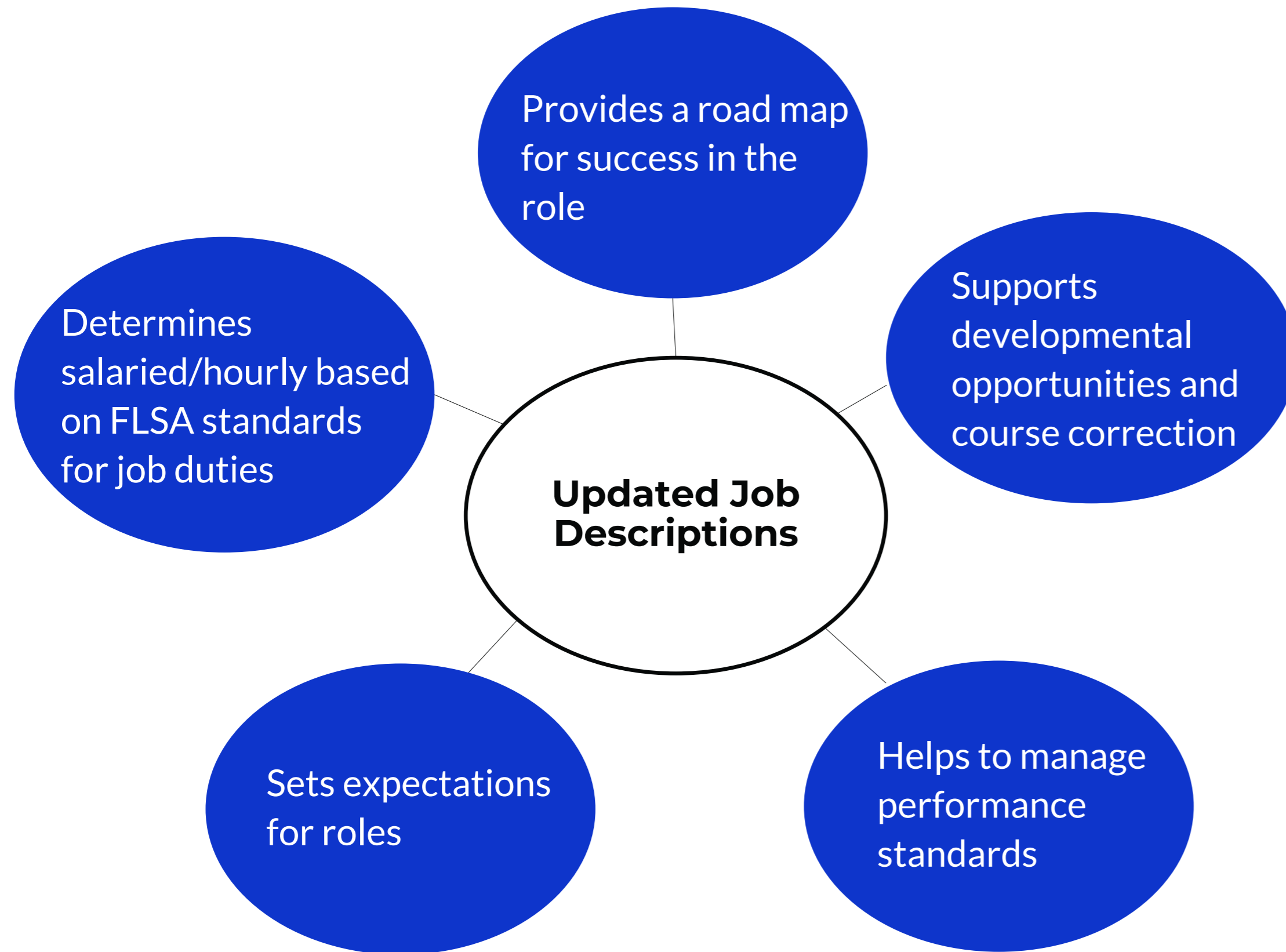
Note, the most update to date Form I-9 with the expiry date of 10/21/19 is still in force; it has not been updated yet and is still eligible for use until a new version is released.

Current Form I-9: <https://www.uscis.gov/i-9>.

On Aug. 18, 2022, DHS issued a [proposed rule](#) that would allow alternative procedures for the examination of identity and employment eligibility documents. DHS is currently reviewing public comments and plans to issue a final rule later this year.



# Create and Maintain Updated Job Descriptions



Special note: If navigating stress is part of a role, list it as an essential function

A well-defined job description will help with:

- Identifying performance gaps for a performance improvement plan or corrective action plan,
- Assessing essential duties for a role that a person may or may not need accommodations for, in order to fulfill the essential job duties.



# FLSA Classifications

Salaried vs. Hourly Duties test

Exemption from Overtime for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)

Generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$684 per week.

Employers may use nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis, to satisfy up to 10 percent of the standard salary level.

Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

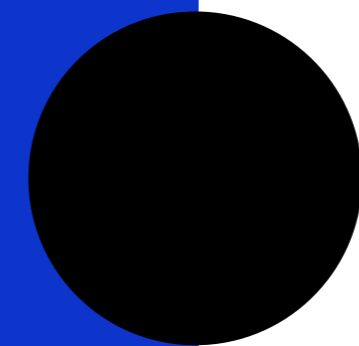




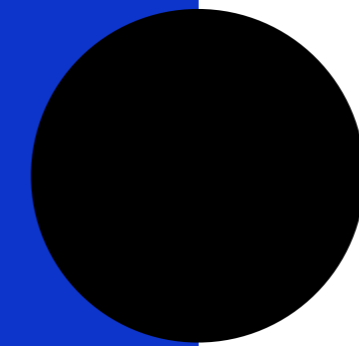
# Employee Classification vs. Independent Contractor classification

IRS 20-point Checklist for Independent Contractors

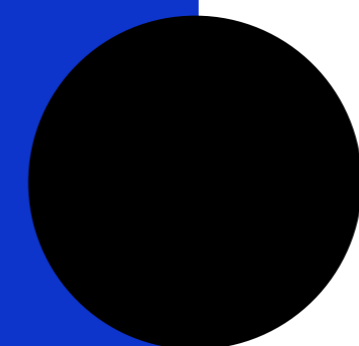
Examples of I/C vs. EE misclassifications



**Behavioral Control**



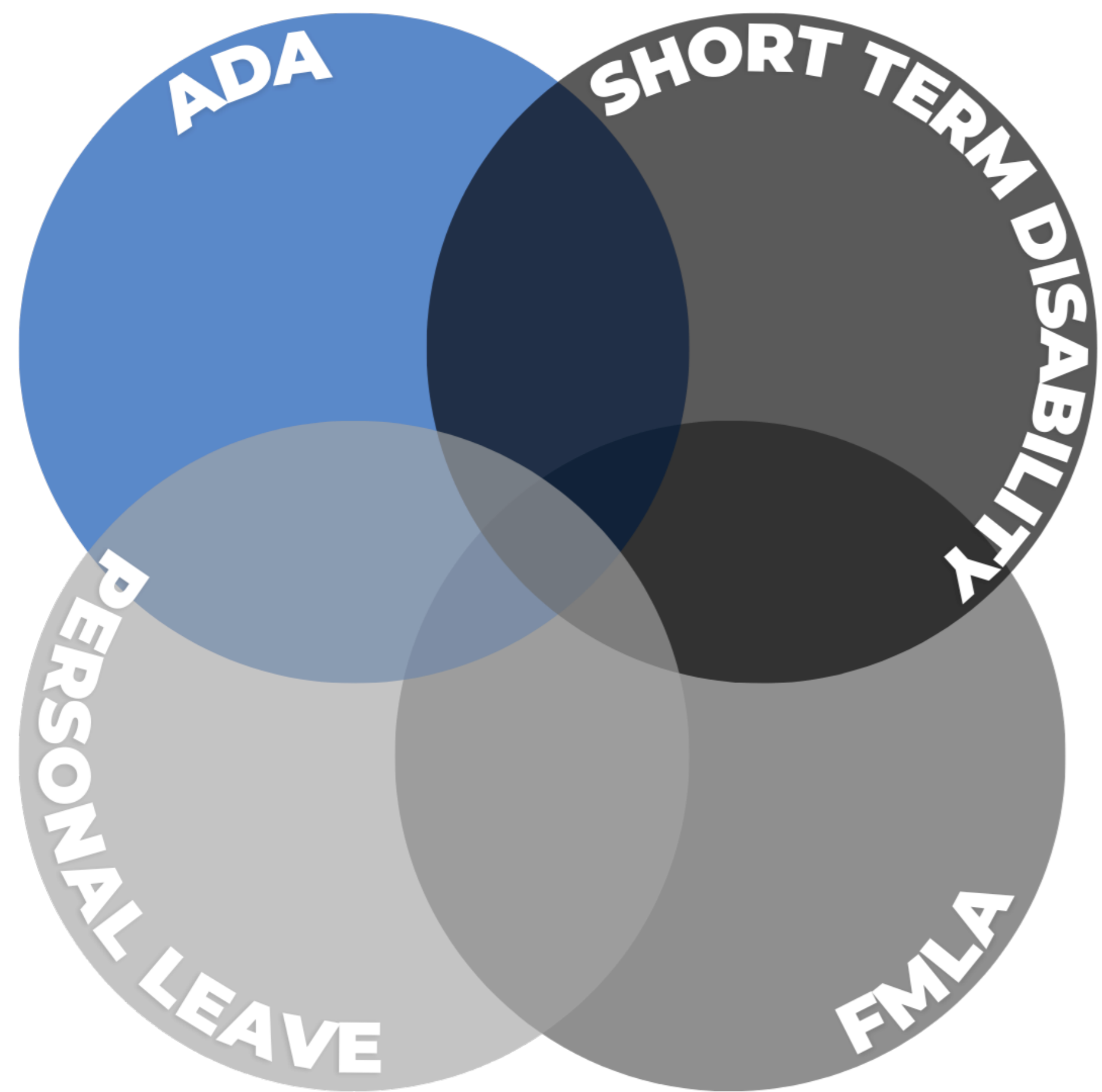
**Financial Control**



**Relationship of Parties**



# Leaves of Absence and Accommodations



Some states have Mandated paid disability leave (CA, HI, NJ, NY, RI, PR)

Take heed: Separation of employment before, during or after a leave may pose risks

Take note: Utilize the Interactive process

Take note: No-Fault Attendance Policy Updates can create unintended consequences

No-fault attendance policies can pose issues if they fail to differentiate between legally protected leave and other types of attendance-related issues.

# Benefits



- Keep tight controls. Audit your carrier bills for accuracy.
- Noncompliance with benefits can disqualify your entire plan
- Missing an enrollment or termination of benefits violate an employee's rights.
- COBRA rights in MI apply to employers with 20 or more employees.
- Have a third-party COBRA administrator to take the administrative burden off your plate.
- Know if you are subject to ACA. Average of 50 employees in a given year triggers compliance requirements.
- Hold open enrollment annually.
- Do not promise some employees early entry onto your health insurance plan.
- Offer to pay a new hire's COBRA under prior employer, through the form of a signing bonus instead.
- Term and offer COBRA as required under your plan, do not leave termed employees as active.
- Put a severed employee on COBRA and pay for their insurance at normal payroll deductions, covering the cost of their excess premium, arranged with your broker and third-party administrator.





# OSHA

## Occupational Safety and Health Administration

Employers must post a summary of workplace injuries and illnesses recorded the previous year.

OSHA 300 Logs must be posted conspicuously onsite February 1 through April 30 annually, specific to each location you have.

Not isolated to Manufacturing companies, though those are the most impacted by accidents and injuries in the workforce.

Set up a safety program with same-day reporting, to mitigate your worker's compensation costs and foster a culture of safety-first.

# Separations

Whether voluntary or involuntary, separations can come with their own unique set of complexities and risks to mitigate.

Know your potential risks when terminating employees.

<p><b>Be candid and clear of performance expectations with documenting issues</b></p>	<p><b>Provide training and coaching through performance improvement plans, corrective action plans, or progressive discipline.</b></p>	<p><b>A severance agreement may be helpful.</b></p>
<p><b>Handle unemployment claim responses responsibly</b></p>	<p><b>Be alert to employees quitting due to work conditions and adverse treatment - known as "constructive termination" (they felt they had no other alternative except to quit)</b></p>	<p><b>Always keep an individual's dignity top of mind, as their livelihood lies in the balance of your hands.</b></p>





# Michigan Legislature has proposed employee-friendly labor and employment laws

- Predictive Scheduling for employees
- Credit history ban
- Limiting the use of noncompete agreements
- Changes to Payment of Wages and Fringe Benefits Act (PWFBA)
- Bullard-Plawecki Act proposed amendment
- Whistleblowers' Protection Act proposed changes
- Enhanced penalties for misclassifying independent contractors
- Increasing government agents' ability to investigate alleged violations of labor & employment laws

# Predictive Scheduling

- When and how an employee can be scheduled
- Requires that an employee be given a written schedule upon hire or
- Give one-to-two-week's advanced notice of their schedule / changes
- Applies to retail, hospitality, and food services industries

If deviations are made to the schedule within a certain period

- the employee can decline to work the new shift without being subject to retaliation or
- the employer has to pay the employee a premium for working the deviation (overtime pay)
- prohibitions on scheduling an employee to close one night and open the very next morning and on working other close-in-time shifts

Several cities in different states have already enacted predictive scheduling laws (CA, IL, PA, WA)

Several more states have proposed similar law, and some states have banned this type of law

Employers in jurisdictions with predictive scheduling laws will need to ensure they are in compliance with these novel laws. Considerations include creating scheduling policies, conducting manager training, revising relevant handbook provisions, and auditing processes for compliance.



# Credit History Ban proposed



Would prohibit employers from making hiring decisions based on an applicant's credit history.

If passed, Michigan would join CA, CO, CT, HI, IL, MD, NV, OR, VT, WA, and Washington DC as well as many large municipalities in banning the use of credit history in the hiring process.



# Noncompete Agreements

Employers would not be able to enforce noncompete agreements from employees without satisfying various requirements

- Posting a summary of the noncompete agreement in a conspicuous place in the worksite.
- Under no circumstances would an employer be able to obtain a noncompete agreement from a “low-wage employee.”
  - A low-wage employee means either a minor or an employee who receives annual wages at a rate that is less than 138% of the federal poverty line for a family of three (3) individuals, which equates to \$34,307.00, or approximately \$16.00 an hour for a full-time employee.

## Fines and penalties if enacted and enforced:

- Ordered to pay a civil fine of not more than \$5,000.00 for each employee or applicant who is a subject of the violation.
- The court would *be required* to award to the employee both the actual costs of defending against enforcement of the agreement (including attorney’s fees) and all income lost as a result of actual or threatened enforcement of the agreement.
- The Federal Trade Commission (FTC) issued a proposed rule to prohibit employers from enforcing non-compete agreements against former employees, contractors, and other workers.



# Payment of Wages and Fringe Benefits Act Proposed Changes

The bill would make the misclassification of an employee as an independent contractor a standalone violation of the PWFBA. An employer:

- Could be assessed a civil fine of not more than \$10,000.00.
- Would be liable for wages due to the employee, fringe benefits, and a penalty of 100% of the wages and benefits due to the employee.
- Could be ordered to pay a penalty equal to the estimated federal taxes and Medicare payments it did not make based on the misclassification.
- Could be ordered to pay exemplary damages of up to three (3) times the amount of wages and benefits that were due to the employee if the violation is flagrant or repeated.

Pay transparency:

- Require employers to provide employees (within 30 days of their request) with wage information for similarly situated employees covering a period of not more than three (3) years before the date of the request.
- No employee names but required to provide sex and seniority of the similarly situated employees.
- Wage information would include salary/hourly wage information plus bonus pay, overtime pay, and other forms of compensation.

# Bullard-Plawecki Act Proposed Amendment

Would require Pay Transparency to applicants and current employees.

Would mandate that employers provide a job description to applicants for the position they are considering and to current employees for the positions that they currently hold.

Would require that those job descriptions include salary information and a pay scale, if one exists for the position.

Other states with similar laws: CA, CO, IL, MD, NV, NY



# The Whistleblowers' Protection Act Proposed Changes



Would expand protections under the Michigan Whistleblower's Protection Act ("WPA")

Independent Contractors and prospective employees could assert claims

Would expand what constitutes protected activity under the WPA to include participating in investigations, hearings, and inquiries held by a public body or a court, as well as an employee's protest or refusal to participate in planned or suspected violation of the WPA.

The bill also significantly increases the civil fine for a violation of the act from \$500.00 to \$10,000.00 for each violation.

Creates a bounty reward for the employee who reported the violation, allotting 30% of the money recovered to the person who reported the issue.





# Department of Labor’s Proposed Independent Contractor Rule

Enhanced penalties for misclassifying independent contractors

The U.S. Department of Labor (DOL) published a proposed rule to adopt a six (6) step economic realities test for determining whether a worker is an independent contractor or not.

Expected to significantly increase the number of workers considered employees vs. independent contractors

This new rule will:

- Expand the number of workers that employers will have to collect payroll taxes on
- Allow unions to organize more effectively



# Department of Labor's economic realities test

- 1 The extent to which the worker's services are an integral part of the employer's business
- 2 The permanency of the relationship
- 3 The amount of the worker's investment in facilities and equipment
- 4 The nature and degree of control by the principal
- 5 The worker's opportunities for profit and loss
- 6 The level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise



# Compliance Assessment Resources



We have created a Compliance Chart by employee headcount for specific laws and reporting you would be subject to.

We can also assess state by state laws for you.

Please send an email [HRsolutions@rehmann.com](mailto:HRsolutions@rehmann.com) to request a complimentary compliance review.

We can tell you within 30 minutes where you stand, compliance-wise. We are happy to walk through it with you and send your results to you.

We'll also send you the comprehensive list of EEO Guidelines for Interview Questions and the FMLA flowchart.



# Credits

For those eligible, use the activity ID to claim 1 hour of credit toward your SHRM and HRCI recertification requirements.

**HRCI Activity ID: 627699**  
**SHRM Activity ID: 23-M564R**



*“This Program, ID No. 627699, has been approved for 1.00 Webinar/Webcast/Podcast recertification credit hours toward aPHR™, aPHRi™, PHR®, PHRca®, SPHR®, GPHR®, PHRi™ and SPHRi™ recertification through HR Certification Institute® (HRCI®). “*



*Rehmann is recognized by SHRM to offer Professional Development Credits (PDCs) for SHRM-CP® or SHRM-SCP® recertification activities.*