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# HR FOCUS

**HUMAN RESOURCES NEWSLETTER** SUMMER 2018

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# Pay Equity is Becoming a Priority

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"Equal pay" is a simple concept: people should be paid equally for equal work. If a male and a female nurse both perform the same work in the same hospital on the same shift, for instance, "equal pay" suggests that they should be paid the same amount. Yet determining equal pay can be complicated.

The federal Equal Pay Act (EPA) prohibits discrimination on account of sex in the payment of wages by employers. *Equal work* is work that requires substantially equal responsibility, effort and skill performed under similar working conditions. The EPA recognizes, however, that differences in pay can be legal. Individuals working in similar jobs may be paid differently based on merit or seniority, for example. Differences in pay based on education level or experience are also allowed. Yet differences in pay based on sex are not.

The Equal Employment Opportunity Commission (EEOC) identified pay equity as one of its six strategic areas of focus for 2018–2021. Under the Obama administration, the EEOC published new reporting requirements for employers with more than 100 employees. These requirements would have provided the EEOC with information about the race, ethnicity and sex of an organization's employees within certain pay ranges. However, under the Trump administration, the EEOC rolled back these requirements.

Nevertheless, the EEOC continues to file equal pay lawsuits. For example, the University of Denver recently paid

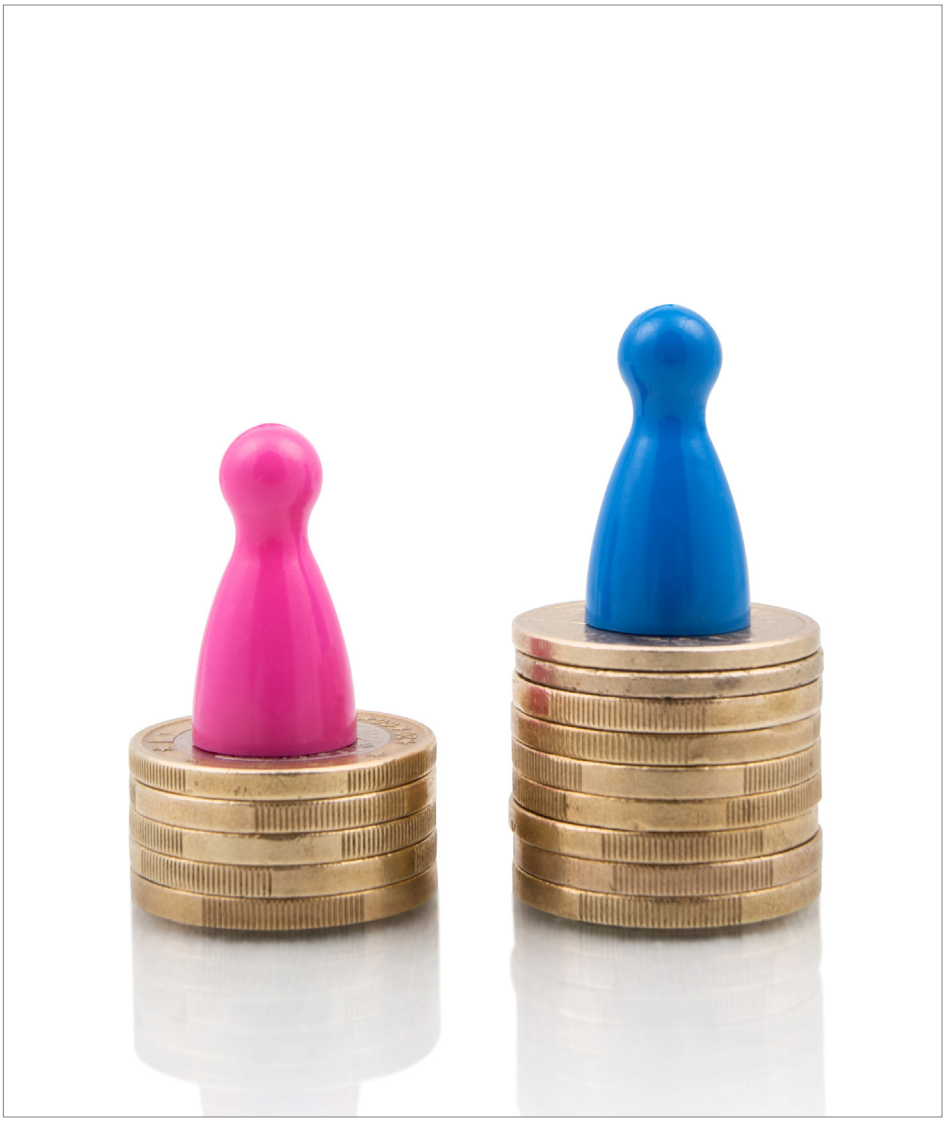
$2.66 million to settle an equal pay claim brought by the EEOC on behalf of female salaried professors. Such lawsuits are certainly a warning for employers that are not monitoring their pay practices.

Some states have imposed additional responsibilities on employers beyond those in the federal EPA. One state law approach to pay equity is "banning the question." "Banning the question" means that an employer may not ask an applicant about salary history. Massachusetts, along with a handful of other states, follows this approach.

There is a growing trend towards a "*comparable worth*" approach. *Comparable worth* means paying employees equally for jobs of *similar* skill and responsibility. *Comparable worth* focuses on narrowing the gaps in pay between traditionally male and traditionally female-dominated fields.

Under an *equal pay* analysis, the question is whether there is a justification for two employees in the same job (for example, two nurses) to be paid differently. Under a *comparable worth* analysis, the question is whether two employees in different jobs (e.g., an electrician and a nurse) are providing comparable value but are paid differently. For example, California has taken a step towards *comparable worth* by requiring equal pay for "substantially similar work," taking into account "skill, effort and responsibility."

Federal law currently focuses on *equal pay,* not *comparable worth*. Federal law also does not "ban the question." Michigan currently does not have a law "banning the question." Nor does Michigan have a current *comparable worth* law. Indeed, Michigan has a law that prohibits local governments from passing ordinances that would "ban the question" or impose comparable worth. *But Michigan employers with employees in other states need to be mindful of the laws in those other states relating to "banning the question" and pay equity.*



Many employers are now starting to focus on pay equity issues for a number of reasons. One reason is legal compliance. However, another reason is to be able to attract and retain good talent, especially in a strong economy.

Some employers conduct internal pay equity studies. These studies seek to identify pay inequities that may indicate pay discrimination based on gender, race, national origin or other protected status. It may be useful to engage your attorney at the outset of a pay equity study. An attorney's counsel can be privileged and confidential. If an employer does the study on its own, however, the study may be discoverable in a future lawsuit.

*Collaboration credit: Malaina Weldy, Notre Dame Law School 2019*

# Financial Wellness—Good for the Employee *and* Employer

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## WHY OFFER A FINANCIAL WELLNESS PROGRAM?

Over the last several decades, employers have shifted from providing traditional pension plans to offering 401(k) plans. Although theoretical calculations show that employees who stay the course with their 401(k) plan contributions can accumulate sufficient account balances, most employees do not stay the course. As a result, many Americans are becoming increasingly anxious about their retirement and overall financial wellbeing. Employers are starting to become aware of their employees' money stresses and want to help, but are not sure how.

Multiple surveys indicate that financial stress and anxiety translates into distracted workers, increased absences and even health issues. Companies have started to recognize that all this worrying about money takes a toll on employee productivity and health in the workplace. To address this, companies are adding financial wellness to their existing employee wellness offerings. Financial wellness is an important aspect of an employee's overall wellbeing.

Now is the right time to focus on employee financial wellness. Employees are increasingly paying more out of their own pockets for health care expenses and, with the shift to 401(k) plans, they have assumed the risk and responsibility for their own retirement. However, not everyone can afford to hire a financial planner for guidance. With financial wellness programs, employers have an opportunity to step in and offer much-needed assistance.

## FINANCIAL WELLNESS DEFINED

There is no single definition of what employers mean when they talk about financial wellness programs, but there are some common characteristics. Generally, financial wellness is a comprehensive approach that supports an employee's complete financial picture by looking at how all the pieces of an individual's financial life fit together.

The goal of a financial wellness program is to enhance the employee's overall financial wellbeing. To accomplish this, the program ideally should include two steps: (1) creating a workable financial plan (for both the short and long term) and (2) enabling employees to make decisions to manage that plan over time.

## ELEMENTS OF A FINANCIAL WELLNESS PROGRAM

Historically, employers have focused on 401(k) plan education and saving for retirement. Financial wellness programs are more holistic, focusing on:

- Budgeting
- Getting out of debt
- Setting aside money for emergencies
- Saving for a home
- Saving for children's college tuition
- PLUS retirement planning

An effective financial wellness program is not a one-size-fits-all. Programs can include group educational sessions, individualized online learning and individual meetings with a financial professional (in person or by telephone).

It is also important to combine financial wellness with 401(k) plan education and design. Employees who do not know how to create a budget cannot understand how to manage and invest their 401(k) plan accounts. The best financial wellness programs include enhancements to the employer's 401(k) plan, adding features that encourage participation and increased savings, such as auto enrollment and auto escalation.

## EMPLOYER CONSIDERATIONS

- **Get Management Buy-In Up Front:** More employees will participate if senior management is actively involved in promoting the program. This will go a long way in showing employees that the company cares about and is interested in their financial wellbeing.
- **Take Surveys to Measure Outcomes:** Employers should take a before and after survey. The questions for both surveys should be the same, however, to better compare the results. In addition, for privacy reasons, the data collected must be anonymous or completely screened from the employer.
- **Offer Both Web-Based and In-Person Training:** Although web-based programs may be more easily accessible and provide greater flexibility, such programs, offered

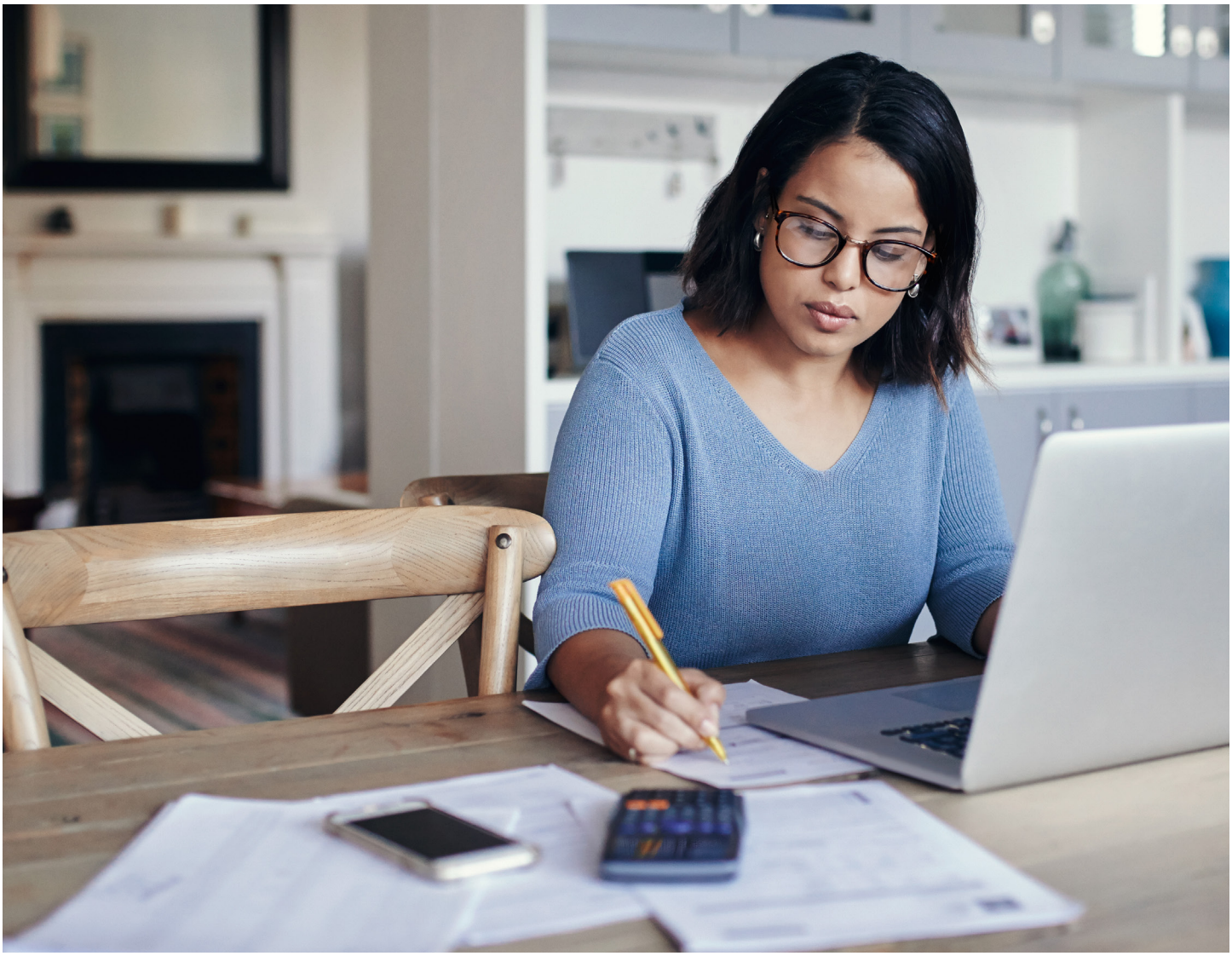
by themselves, may not be enough to lead employees to take action. Combining a web-based program with in-person and/or telephone meetings with financial experts who can address each employee's unique situation and goals tend to be more successful.

- **Return on Investment (ROI) is Not the Best Measure of Success:** It is virtually impossible to prove the ROI of a financial wellness program. Employers are better served by focusing on the purpose of their investment—reducing stress and boosting employee morale—which can ultimately improve the bottom line for both employees and the company.

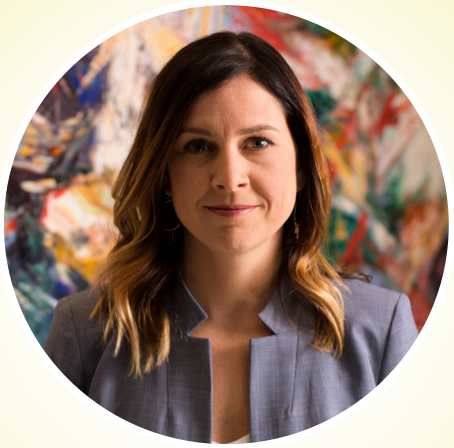
## WHERE TO FIND FINANCIAL WELLNESS SERVICES

A good place to start searching for a financial wellness provider may be with the recordkeeper for the company's 401(k) plan. There are also companies who specialize in providing financial wellness programs for employers.

Because the financial wellness provider will have access to employees' personal financial information, it is extremely important to follow a thoughtful and thorough vetting process. In selecting a financial wellness provider, it is a best practice to complete a request for proposal (RFP), having all the candidates provide written responses to the same carefully crafted questions, along with in-person interviews of the top candidates. Employers should look at no less than three service providers, thoroughly reviewing their services, contracts and costs before selecting their provider. The employer's benefits counsel is well situated to assist throughout this entire process.



# Attorney Spotlight: Amanda Fielder on Retaliation Claims



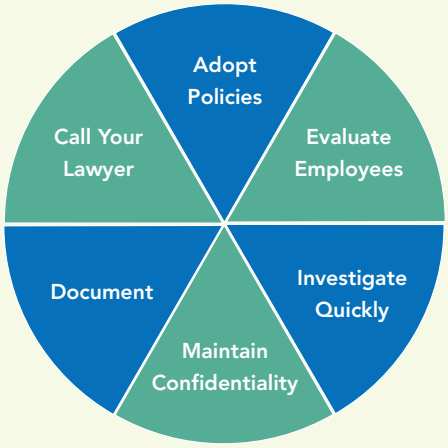
Amanda Fielder is an employment law litigator. She has successfully defended employers against claims of discrimination, harassment, retaliation and wrongful discharge. Amanda's no-nonsense approach and fierce advocacy have earned her recognition as a "Rising Star" by the *Michigan Super Lawyer* publication for the past four years. This year, Amanda has been selected for the 2018 class of the *Grand Rapids Business Journal's* 40 Under 40. She is also a member of the Firm's Management Committee.

### We often hear the term "retaliation" in employment litigation. How often do you see those claims in litigation?

Nearly every federal and state employment law contains anti-retaliation language. Consequently, retaliation claims are very common in employment disputes. Over the last 10 years, the number of charges filed with the EEOC alleging retaliation have almost doubled. In 2007, there were 26,663 retaliation claims filed with the EEOC. In 2017, that number rose to 41,097. The most common claim filed with the EEOC is retaliation. In the law suits I defend for employers, a retaliation claim is very common.

### What actions by an employer can be considered retaliation?

To the employee, any action by the employer that the employee does not like is retaliatory. To a Court, however, the action must constitute an "adverse employment action." An adverse employment action is any act that might discourage a reasonable employee from engaging in protected activity. This could include termination, an unfavorable performance review, a demotion, a reduction in pay or benefits, a change in title or responsibilities or an exclusion from workplace activities.




### If an employee is performing poorly, but also has engaged in protected activity, can the employer do anything about the poor performance?

Absolutely. An employee cannot engage in protected activity as a way to shield himself from justified discipline. However, it is important that the employer promptly document performance problems and concerns. In addition, performance concerns should be communicated and addressed in writing with the employee during the performance review process, as well as during the course of the performance year. If this is done, the employee's personnel file and other related performance documents will support a discipline decision.

### If an employee makes a complaint that has no merit, is the employee still protected from retaliation for making an invalid complaint?

An employee is protected from retaliation even if the underlying complaint did not have merit. However, the underlying complaint must have been made in good faith. An employee can be disciplined for making a knowingly false complaint.

### What advice would you offer to avoid retaliation claims?

The best way to avoid a retaliation claim is to be proactive. First, implement anti-retaliation policies and follow them. Second, effectively and fairly evaluate employees regularly. Third, if an employee makes a claim of discrimination, harassment, retaliation or opposes a violation of a law, move quickly. Immediately respond and address the employee's concerns in writing. And the response should be consistent with the employer's policies. Four, maintain confidentiality when possible. Finally, if you are concerned about a potential retaliation claim, consult your attorney.

# NEWS DIGEST:

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## Recreational Marihuana and Mandatory Paid Sick Leave on Michigan Ballot

Employers should monitor these two initiatives:

**MI Time to Care (Paid Sick Leave)**

Employees would accrue one hour of paid sick time for every 30 hours worked. The leave can be used for self-care or care for family members, as well as by victims of domestic violence or sexual assault who miss work due to medical care, counseling, legal proceedings or relocation. Businesses with 10 or more workers would be required to provide at least 72 hours of earned sick time per year. Smaller employers would have to provide up to 40 hours. Michigan law currently does not require employers to provide paid sick leave to employees.

**Coalition to Regulate Marihuana Like Alcohol**

Michigan residents 21 and older could legally possess, use, grow and sell marihuana for recreational uses. If passed, there would be a 10% state excise tax on marihuana sold by retailers with revenues allocated to public schools, roads, municipalities and counties. Michigan law currently only allows marihuana for medicinal purposes.

## New NLRB Guidance Regarding Handbook Rules

The National Labor Relations Board (NLRB) General Counsel has issued guidance on employee handbook rules following a recent decision by the NLRB. The guidance seeks to balance the employer's interests against an employee's right to engage in protected, concerted activity under the National Labor Relations Act.

Rules now will be categorized as follows: (1) rules that are generally lawful to maintain; (2) rules that warrant individualized scrutiny; and (3) rules that are plainly unlawful to maintain. The guidance discusses a number of common workplace policies and puts them into the three groupings.

Under the new guidance and the recent NLRB decision, a rule is no longer unlawful merely because it could be interpreted as prohibiting protected activities. Employers may wish to review and revise their handbooks to take advantage of the NLRB's more employer-friendly position.

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## Can Employers Use the Insurer-Issued Certificate of Coverage Booklet as the Summary Plan Description?

Clients frequently ask us if the booklet their insurer or third party administrator (TPA) provides them that describes the client's benefit program can be used as the program's ERISA summary plan description (SPD). For example, the carrier that provides the client's insured health benefits typically provides a "certificate of coverage" that describes what the health plan does and does not cover. Much more often than not, the booklet usually cannot serve as the ERISA-required SPD on its own. ERISA requires that SPDs include certain specific information, and the insurer—or TPA—provided booklet usually does not contain all of the necessary details. Among the information ERISA requires to be in the SPD is plan-identifying information, descriptions of eligibility, benefits and circumstances causing loss of benefits, claims procedures and a statement of ERISA rights. The insurer or TPA-provided booklet is often missing meaningful details about eligibility or circumstances causing loss of benefits. Clients may want to consider using a separate "wrap" document that fills in the blanks, so that when the "wrap" document is combined with the insurer-provided booklet, all the ERISA SPD requirements are met.

# ICE Cracks Down on Immigration Violators


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Immigration and Customs Enforcement (ICE) has recently stepped up its efforts to enforce immigration laws in the workplace. From October 2017 through April 2018, ICE opened 5,792 worksite investigations/audits and made 594 criminal and 610 administrative arrests. These numbers dwarf ICE's activities in the previous fiscal year, where ICE opened 45% fewer worksite investigations/audits and made nearly 50% fewer arrests. This trend is expected to continue through the remainder of the fiscal year, if not throughout the tenure of the current Trump administration.

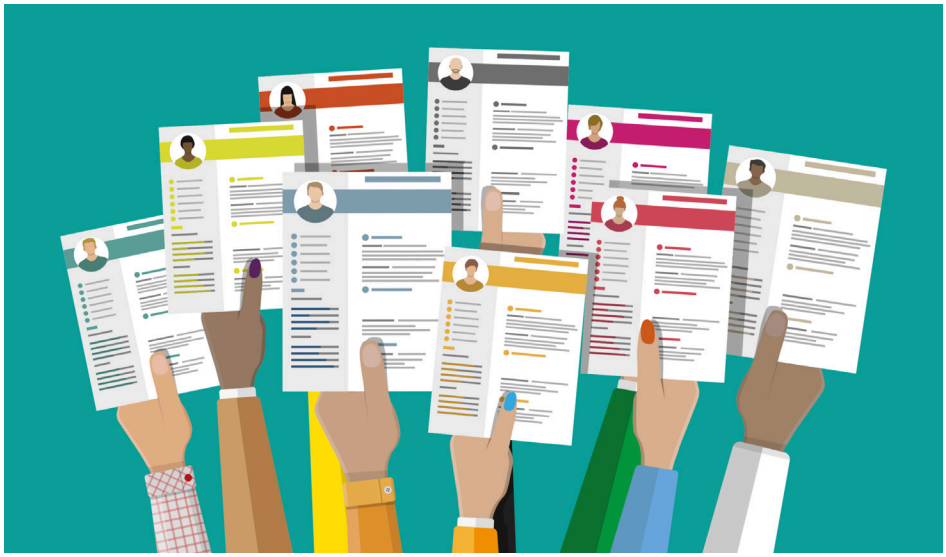
**Our state has seen its fair share of ICE enforcement activity and Michigan employers should be prepared for a potential audit with regard to their I-9 recordkeeping.**

Employers must complete the I-9 within three business days of the employee's hire date. The I-9 form requires an employer to verify that the employee has documentation proving the right to work in the United States. The employer can choose whether or not they want to keep copies of that documentation on record. If an employer chooses to do so, they must do so for all employees. The required documentation can vary depending on the employee's immigration status. Also, for some non-citizens, the employer is required to re-verify the employee's right to work if their employment authorization documents expire during their time as an employee.

Employers are required to keep an I-9 form on file for all employees who are currently working and for one year after they cease employment. At a minimum, all I-9s are required to be kept for at least three years. These documentation requirements, coupled with the fact that I-9s must be kept on file even for employees who are no longer working, can make I-9 recordkeeping a demanding and complex process.

When conducting an audit, ICE generally gives the employer three days to produce all I-9 documentation for every current and former employee. ICE prohibits employers from changing insufficient I-9 records during this three-day period. If there are errors or discrepancies in the I-9 records, ICE has the ability to impose fines, the severity of which varies depending upon the nature and number of the I-9 violations found in the audit. Large employers with thousands of employees and hundreds of I-9 violations can find themselves facing seven-figure fines. But even smaller employers with only dozens of employees can find themselves facing fines in the $100,000 range if there are multiple errors in their I-9 documentation. The fines are appealable, but are generally only reduced slightly—if at all—through the appeal process.

Employers should periodically review their I-9 practices to ensure that the proper documentation is on file for each employee. Additionally, HR personnel should be trained to understand what evidence is sufficient proof of an employee's right to work in the United States. Remember, once ICE shows up at an employer's door, it is too late to make changes to I-9 forms. Your employment attorney can assist you to determine if your I-9 practices are sufficient to withstand an ICE audit and can also assist in training HR personnel to properly maintain I-9 records.



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