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EMPLOYER BULLETIN:

**ETHICAL AND
CONFIDENTIALITY ISSUES TO
BE AWARE OF!**

***The Attorney-Client Privilege and Attorney-Work Product:
Protecting Confidential Communications Between Clients and Attorneys***

WHAT IS THE ATTORNEY-CLIENT PRIVILEGE?

The attorney-client privilege is a law that protects communications between attorneys and their clients. This law enables these communications to remain confidential and encourages openness and honesty between the two. In order to either defend against or pursue claims on behalf of clients, attorneys must have complete knowledge of all facts surrounding the situation including any “bad” facts. As such, the attorney-client privilege was created to promote this free dissemination of information. Attorneys cannot disclose (or be forced to disclose) attorney-client communications.

The attorney-client privilege attaches to direct communication between a client and its attorney as well as communications made through their respective agents. The scope of the attorney-client privilege is narrow, attaching only to confidential communications by the client to his or her advisor that are made for the purpose of obtaining legal advice. Confidential client communications, along with opinions, conclusions, and recommendations based on those communications, are protected by the attorney-client privilege because they are at the core of what is covered by the privilege. Once otherwise privileged information is disclosed to a third party by the person who holds the privilege, or if an otherwise confidential communication is necessarily intended to be disclosed to a third party, the privilege disappears.

WHAT IS THE ATTORNEY-WORK PRODUCT DOCTRINE?

The work product doctrine privilege is separate from and broader than the attorney-client privilege because it protects materials prepared by the attorney, regardless of whether the material is disclosed to the client. It also protects materials prepared by agents for the attorney. Both the attorney and client can assert the work product doctrine privilege.

The attorney-work product doctrine was designed to protect the mental processes of the attorney. It is considered an independent source of immunity from discovery. Courts have expanded the definition to include material containing the thoughts, mental impressions, views, strategy, conclusions, opinions or legal theories of an attorney. Even though this material may be shielded from discovery as work product, it can be overcome by showing a substantial need for the materials and an undue hardship in obtaining the materials elsewhere.

However, opinion work product that includes the attorney's personal recollections, notes and memoranda is unconditionally protected from discovery. In asserting the work product doctrine protection, the party must show that material sought was prepared in anticipation of litigation or for trial.

WHAT CAN WE DO TO PROTECT OUR COMMUNICATIONS WITH OUR ATTORNEYS?

All communications which you send to your attorneys, including faxes, correspondence, documents, memos and even e-mail correspondence, which relate to pending litigation or which your attorney directs you to prepare, should be labeled “Attorney-Client Work Product”. All communications to your attorney, seeking legal advice, should be labeled “Attorney-Client Privileged.” When in doubt, you should label the communication with the “Attorney-Client Work Product” label and in the event this privilege is challenged, the adversarial party would have the burden of demonstrating that the privilege is inapplicable. At the very least, documents sent to legal counsel should be clearly marked “confidential”.

An Employer's Obligations When Producing Employees' Personnel Files to Third Parties

As an employer, you may have received a subpoena or a letter from an attorney requesting a copy of a former or current employee's personnel file pursuant to Michigan's Bullard-Plawecki Right to Know Act ("Bullard-Plawecki"). What do you do?

If you receive a subpoena, which is a court order, you are required to produce the file. However, if the request comes from an attorney representing the employee, Bullard-Plawecki is inapplicable to the situation. Bullard-Plawecki only applies to requests from employees to review or obtain a copy of their personnel records. As such, the attorney's request would be improper and the personnel file should not be produced. If the attorney's request is accompanied by a signed authorization from the employee directing the personnel file to be released to the attorney, the employer may produce the file.

LIMITATIONS ON DISCLOSING DISCIPLINARY ACTIONS: There are some limitations under Bullard-Plawecki with respect to divulging disciplinary actions that are contained in the personnel file regardless as to who issues the request for a copy of the file.

An employer must review a personnel record before releasing information to a third party. Except when the release is subject to an order in litigation or arbitration, the employer must delete any disciplinary reports, letters of reprimand, or other records of disciplinary action which are more than 4 years old.

WRITTEN NOTICE REQUIRED WHEN DISCLOSING DISCIPLINARY ACTION: Under Bullard-Plawecki, an employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer's organization, or to a party who is not a part of a labor organization representing the employee, without written notice to the employee. The written notice must be by first-class mail to the employee's last known address and shall be mailed on or before the day the information is divulged

from the personnel record. However, the notice requirement does not apply if:

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

HOW CAN EMPLOYERS ENSURE THEY ARE PROPERLY PRODUCING AND MAINTAINING PERSONNEL FILES? Federal and state laws require employers to maintain a variety of different records about employees. This may include basic information such as names, addresses, dependents, social security numbers, and information regarding medical conditions. Because some of this information is sensitive, employers should develop a comprehensive policy regarding access and production of personnel files that will preserve the integrity and confidentiality of personnel files. Because failure to respect the confidential nature of such information could expose employers to legal ramifications, ensure you have an updated record retention and production policy regarding the contents, maintenance, use and release of personnel files.

Any questions should be directed to Heather Ptasznik or John Below at (313) 259-8300.

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