



Liability & Property Pool Workers' Compensation Fund

RISK CONTROL SOLUTIONS

A Service of the Michigan Municipal League Liability and Property Pool and
the Michigan Municipal League Workers' Compensation Fund

AN OVERVIEW OF FEDERAL AND STATE LAWS THAT AFFECT EMPLOYMENT

Organizations are increasingly evaluating managers and supervisors on their ability to maintain effective employee relations. This is not surprising given the enormous monetary risks of failing to treat employees fairly and legally. Both the federal and Michigan legislatures have enacted a variety of fair employment practice statutes that, among other things, restrict the circumstances under which employers may hire, discharge or discipline their employees. Below are summaries of some of the major federal and state laws with which your managers and supervisors should be familiar. This list is not intended to be all-inclusive.

FEDERAL EMPLOYMENT LAWS

The **Civil Rights Act of 1868**, enacted during the Reconstruction era, was largely ignored until 1968 when the United States Supreme Court declared it valid. Section 1981 of the Act offers the same "Equal Rights Under the Law" to all persons "as is enjoyed by white citizens" and states that all persons "shall have the same right to make and enforce contracts" as "white citizens." In 1975, the Supreme Court ruled that Section 1981 prohibits racial discrimination in employment. A year later, the Court ruled that the Section applies to all discrimination, including discrimination against people of Arabic and Hispanic descent. Section 1981 applies to all employers regardless of size, has no specified deadline for filing a complaint, and allows money damages.



Title VII of the Civil Rights Act of 1964, Civil Rights Act of 1991, codified as 42 U.S.C.A. 2000-e, et seq prohibits employers with 15 or more employees from discriminating against individuals because of their race, color, religion, sex or national origin. Employers who discharge or otherwise discriminate against an employee based on one of these protected characteristics have engaged in illegal discrimination.

Employees can establish a violation of Title VII through one of two distinct legal theories:

- **Disparate Treatment:** Employees can claim they are the victims of intentional discrimination because of a protected characteristic. They must offer direct or circumstantial proof of discriminatory intent. Employees may accuse their employers who treat them differently because of their race, color, religion, sex, or national origin of disparate treatment.
- **Adverse Impact:** Employees can also establish a violation by showing that, although an employer's practice may not seem to discriminate, it nonetheless adversely affects employees in a protected class. For example, employees have established a violation by showing that a specific employment requirement -- such as a minimum weight of 165 pounds -- denies employment opportunities to a disproportionately high number of women or other minority employees.

Title VII influences every aspect of employment from the initial job posting to promotions and training. Under Title VII, if an employee claims discrimination, the employer must prove it has not violated the law. This includes Sexual Harassment, Hostile Work Environment, Whistleblowers and Retaliation. The court may remedy violations by ordering reinstatement, with or without back pay, and may grant any other equitable relief it feels is appropriate. With the passage of the Civil Rights Act of 1991, monetary damages are available for intentional discrimination.

A 1978 amendment to Title VII provides in part that the term "because of sex" includes "because of or on the basis of pregnancy, childbirth or related medical conditions." **The Pregnancy Discrimination Act** specifically prohibits employers from discriminating against women based upon the fact that they are pregnant. This includes recruitment, hiring, promotion, discipline, discharge and training.

Affirmative action programs permit employers to engage in limited preferences based upon race or sex. The programs must meet certain criteria to be lawful. This issue is currently under increased scrutiny. We, therefore, suggest that employers, who have an affirmative action plan or wish to establish one, confer their employment attorney, the EEOC, and the Michigan Department of Civil Rights.

The Equal Pay Act of 1963 requires equal pay for equal work within the same establishment regardless of the employee's gender. The Equal Pay Act prohibits employers and unions from paying a different pay rate based on the employee's sex. It provides for workers who perform equal work in jobs calling for the same skill, effort, responsibility and performed under comparable working conditions must receive equal pay.

The Act permits exceptions where unequal pay for equal work is legitimately based on a seniority system or a merit system; when earnings are based on quantity or quality of production; or where a differential based on any other factor than sex exists.

The Age Discrimination in Employment Act of 1967 (ADEA) forbids employment discrimination against employees and job applicants who are forty years of age or older. Covered employers may not discriminate against protected employees solely because of their age in respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training. The ADEA permits employers to favor older workers based on age even when doing so adversely affects a younger worker who is 40 or older. It is unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.

The ADEA does not protect certain types of employees, such as high-level managers, public safety personnel, and tenured college professors and other jobs where a bona fide occupational qualification (BFOQ) is reasonably necessary to the normal operation of the business.

The best defense against charges of age discrimination is proving that age is a BFOQ for a particular job. For example, airlines have successfully argued that mandatory retirement at age sixty for pilots is a BFOQ because of concerns about safety. An employer can also defend against ADEA suits by showing that he or she dismissed the employee for reasons unrelated to his/her age. If, however, age was a factor that made a difference in the employer's decision to discharge, an ADEA violation still exists.

The Occupational Safety and Health Act (OSHA) of 1970 prohibits employers from discharging employees solely because they file complaints or institute proceedings under OSHA. Section 18 of OSHA permits states to create and enforce their own health and safety plans.

Section 504 of the Vocational Rehabilitation Act of 1973 prohibits employers who receive federal funds from discriminating against employees with disabilities who possess the necessary qualifications for particular positions. Employers must provide these employees with "reasonable accommodations" to allow them to hold a job that they might otherwise be unable to perform. Under Section 504, employers may not dismiss employees solely because they have disabilities. Employers may dismiss employees if their disabilities affect job performance and there are no reasonable measures the employer can take to accommodate the disabilities.

The Employment Retirement Security Act of 1970 (ERISA) protects the assets of millions of Americans so that funds placed in retirement plans during their working lives will be there when they retire. The Act also states that it is unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan.

The National Labor Relations Act encourages workers to organize and engage in collective bargaining. It also prohibits discrimination in employment as a means of encouraging or discouraging membership or

participation in any labor organization. It protects employees who either choose or refuse to engage in labor activity.

The Immigration Reform and Control Act of 1986 forbids discrimination based on citizenship and national origin. It also prohibits the hiring, recruiting, or referring for a fee for employment the following individuals:

- (a) Aliens, knowing they are not legally entitled to work or are not lawfully admitted for permanent residence.
- (b) Any individual, without complying with the verification procedures the Act requires.

The Act also provides sanctions for knowingly hiring an employee who is not legally authorized to work. It requires employers and states to check work authorization documents for every new employee or benefit applicant, including U.S. citizens, and to complete Form I-9.

The Drug-Free Workplace Act of 1988 provides that recipients of federal grants must institute a drug-free workplace program to help curb workplace drug abuse. Specific requirements include:

- The creation of drug-free workplace statement,
- Establishment of a drug-free awareness program,
- Notification to all employees that adherence to workplace drug restrictions is a condition of employment, and
- A good faith effort to maintain a drug-free workplace by implementing all the requirements of the Act.

Although the Act does not apply to private sector employers, it has created widespread acceptance of drug testing. As a result, employers must be sensitive to issues of privacy and fairness if they institute a drug-testing requirement. Federal laws may require employees who drive company vehicles to comply with DOT and CDL requirements that include random drug testing.

The Americans with Disabilities Act (ADA), enacted in 1990 and amended in 2008 and 2010, (ADA) provides that employers may not discriminate against individuals with disabilities who have the qualifications to perform the essential functions of the job. The ADA touches all stages of the employment process from recruitment to termination. For more information regarding the ADA, see the *Risk Control Solution* entitled “The Americans with Disabilities Act and Michigan Handicappers’ Civil Rights Act Employment Issues.”

The Family and Medical Leave Act (1993) requires employers to provide an employee with up to 12 weeks of unpaid leave under specific conditions. These include for a child at birth, adoption, foster care placement or serious illness; to care for a spouse or dependent parent; or for an employee’s illness. New in 2010 is leave for qualifying exigencies arising out of the employee’s spouse, son, daughter, or parent is on active duty or call to active duty status as a member of the National Guard or Reserves in support of a contingency operation. In addition, leave must be granted if an employee’s has a spouse, child, parent, or is the next of kin of a current member of the Armed Forces, including a member of the National Guard or Reserves, with a serious injury or illness. The law requires employers to balance their interests with the legitimate needs of employees.

As a means of making non-custodial parents pay child support payments, **The Personal Responsibility and Work Opportunity Act of 1996 (Welfare Reform)** requires organizations to report certain information regarding newly hired employees. The law requires employers to report the name, address and social security number of every new employee, which is the information, required on a Form W-4. The law requires that New Hire information be filed within 20 days of the date of hire. In Michigan, the information is sent to the Michigan New Hires Operation Center.

The Health Insurance Portability and Accountability Act (HIPAA, 1996) is how Congress addressed concerns about employees who change jobs and might not qualify for health care coverage as a result of preexisting conditions. HIPAA creates standards for medical privacy, portability, disclosure, medical savings accounts, and COBRA. The Act also establishes strict requirements for “covered entities” to protect a persons privacy rights and to control of how their health information is used.

HIPAA prohibits discrimination against employees and their dependent family members based on any health factors they may have, including prior medical conditions, previous claims experience, and genetic information.

Human resource officials should review their organization's measures for protecting medical information, the individuals who have access to such information, as well as the policies and procedures in place for providing necessary medical information. This includes public safety departments handling of medical patient information or that found during investigations. Employers should always require employees to provide written authorization for the release of medical information prior to all disclosures. HIPAA allows criminal prosecution for violations of the privacy provision.

The portability provision limits the length of any preexisting condition exclusions that an employer may impose. Parts of this provision require the tracking of information beginning in 1996.

Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits discrimination by health insurers and employers based on any individual's "genetic information". This information includes the results of genetic tests to determine whether someone is at increased risk of acquiring a condition in the future, as well as an individual's family medical history. GINA protections include information about an applicant, employee or family member, family medical history in general and requests for or receipt of genetic services by applicants, employees or their family members.

As with other laws prohibiting discrimination, genetic information cannot be a factor in employer decisions about hiring, termination or referral or in other decisions regarding compensation, terms, conditions, or privileges of employment. It is illegal to harass a person because of his or her genetic information. Harassment can include, for example, making offensive or derogatory remarks about an applicant or employee's genetic information, or about the genetic information of a relative of the applicant or employee. Retaliation for exercising a right, reporting an improper act or practice made prohibited by GINA is barred. Covered entities must keep genetic information confidential and in a separate medical file.

Fair Labor Standards Act (FLSA) is intended to maintain a minimum standard of living for the well-being of workers. Provisions of the FLSA cover minimum wages, employment relationships, child labor laws, overtime calculations, wage recordkeeping requirements, required postings, as well as determining compensation for hours worked. Special rules apply to State and local government employment involving fire protection and law enforcement activities, volunteer services, and compensatory time off instead of cash overtime pay.

Employers should review the various "tests" in the law to determine if they are "covered employers" and which employees are "exempt" or "nonexempt" from the Act. Generally, the Michigan Minimum Wage Act covers employers to whom the FLSA does not apply.

The courts may sometimes require employers to garnish employee wages and to direct funds to a prescribed destination. Laws protect the affected employee's right to privacy. The federal **Consumer Credit Protection Act** and state guidelines regulate and limit wages that are subject to garnishment.

The **Fair Credit Reporting Act (FCRA)** regulates the use of credit checks for employment purposes. The Act allows credit checks for positions that involve financial responsibility or the handling of large sums of money. When conducting credit checks, you should:

- ♦ Consider carefully before checking credit history unless the position requires financial responsibility or the handling of large sums of money. You must inform potential employees that you will check their credit and must obtain their written permission before doing so.
- ♦ Inform the candidate if you denied him or her employment based on factors in a credit report. The law requires you to provide the candidate with the name of the credit agency that issued the report. You must allow the candidate to discuss any problems in the report with you.
- ♦ If from a standard employment related authorized credit background investigation an adverse action is taken against an employee based on factors in a credit report, the law requires you provide a pre-adverse action disclosure and after the action is taken, the employee must be given an adverse

action notice. The employee has a right to dispute the accuracy or completeness of any information in the report that caused the action.

- ♦ If the adverse action is related to misconduct and a third party is hired by the employer to investigate, only an adverse action notice need be provided after the adverse action is taken.

Under the provisions of the **Bankruptcy Act**, it may be unlawful to terminate an employee or to refuse employment to a candidate solely because the individual has sought protection under the act.

Employers are encouraged to consult an HR Professional or Legal Counsel when dealing with employment issues regarding background, internal misconduct and/or criminal investigations.

Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is intended to ensure that persons who serve or have served in the Armed Forces, Reserves, National Guard or other “uniformed services. Employers must ensure employees; (1) are not disadvantaged in their civilian careers because of their service; (2) are promptly reemployed in their civilian jobs upon their return from duty; and (3) are not discriminated or retaliated against in employment based on past, present, or future military service.

MICHIGAN LAWS THAT AFFECT EMPLOYMENT

Persons with Disabilities Civil Rights Act of 1976 provides that employers may not discriminate against an individual with a disability or genetic information who is otherwise qualified to perform the essential functions of the job. The law affects all stages of employment and requires the employer to make reasonable accommodations for employees with disabilities. In addition, the Act prohibits an employer from directly or indirectly acquiring or have access to any genetic information concerning an employee or applicant for employment, or a member of the employee's or applicant's family.

Under **The Michigan Occupational Safety and Health Act (MIOSHA)**, employers must protect their employees by providing a safe workplace. The Act also prohibits employers from discharging employees because they have filed or intend to file a complaint about unsafe working conditions.

Michigan's **Elliot-Larsen Civil Rights Act** prohibits discrimination in any employment based on an individual's race, age, color, religion, national origin, sex, height, weight, familial status, or marital status. There is no age limit in the Michigan law.

The Michigan Department of Labor enforces Michigan's **Payment of Wages and Fringe Benefits Act of 1978**. The Act regulates the time and manner of the payment of wages and fringe benefits.

The Michigan Minimum Wage Law of 1964 sets the minimum wage for employers who employ 2 or more employees 16 years of age or older. These employers are not covered by the FLSA. It also requires the payment of overtime for employees and prohibits discrimination based on sex.

The Michigan Youth Employment Standards Act (1978) covers every organization that employs minors. Generally, “minors” are individuals under the age of 18 unless they have graduated from high school or have passed the GED. The act does not affect specific occupations such as work at private residences, advertising, work at an organized youth group, and employment by a parent. The Michigan Act restricts the type of work minors may perform, the hours during which they may work and the number of hours they may work each week. Organizations that employ minors should review the wages paid to minors, number of breaks allowed, supervision provided, and records retained. Employers should not allow minors to perform work involving the distribution, sale or handling of alcoholic beverages or work involving hazardous conditions. With some exemptions, the law requires work permits of all minors. Violators may be charged with a misdemeanor resulting in up to a year's imprisonment and/or monetary fines. An illegally employed minor may be entitled to double workers compensation benefits.

Employee privacy should be a topic of concern for employers. Federal laws such as the ADA, HIPAA, GINA and FMLA protect the privacy rights of employees. In Michigan, the **Bullard-Plawewski Employee**

Right to Know Act also regulates issues affecting the employee's right to privacy. The law governs both what an employer may include in an employee's personnel record and the proper procedure for disclosing an employee's personnel file to a third party. In addition, recent changes to the **Freedom of Information Act (FOIA)** restrict the information that employers may release about their employees. Certain files, such as those belonging to police officers, may be exempt from release. Because various laws (Bullard-Plawecki, FOIA, and ADA) may affect how employers handle requests for information about employees, employers should review such requests with a competent human resource professional or attorney.

The Whistleblowers' Protection Act makes it illegal for employers to discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee or a person acting on behalf of the employee reports or is about to report a violation or a suspected violation of federal, state or local laws, rules or regulations to a public body. Retaliating against an employee who has exercised their rights under the Whistleblowers' Protection Act is strictly forbidden. Retaliation can be an adverse action such as termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities or other indices that might be unique to a particular situation.

The Act requires employers to post notices of protections and obligations and to use other appropriate means to inform employers of their protections and obligations under this act.

Veterans Preference Act in 1897 (MCLA 35.401 et seq) The Act establishes that an honorably discharged veteran who meets the outlined criteria shall be given preference for appointment and employment. The **Michigan Reemployment Protection Act 103 (1955)**, (MCL 32.273), was amended in 2008 to strengthen USERRA in Michigan. The Michigan Act requires the employer to reemploy the employee, without any exceptions. It also has criminal and civil penalties for violation of the act.

OTHER REQUIREMENTS

Recordkeeping

The MML has a Records Retention Handbook at www.mml.org/pdf/ebook_records.pdf. It has guidelines, approved record retention, and disposal schedule for Cities and Villages. Another source is Michigan Department of Management and Budget under Records Management at www.michigan.gov/dmb

Before discarding any records, always consult with your attorney.

For more information, contact MML Risk Management Services, the League's Loss Control Services or **the appropriate state or federal agency**. As with all employment issues, we encourage you to discuss your employment related concerns with an attorney.

Note: This document is not intended to be legal advice. It does not identify all the issues surrounding the particular topic. Public agencies are encouraged to review their procedures with an expert or a competent attorney who is knowledgeable about the topic.

Because the laws frequently change and organizations may have different posting requirements depending on their size, you should always verify accuracy with the state or federal agency responsible for compliance.



Important Telephone Numbers

MML Risk Management Services	734/662-3246 or 800/653-2483
Loss Control Services	800/482-2726 or losscontrol@mml.org
Michigan Department of Civil Rights	313/456-3700 or www.michigan.gov/mdcr
Michigan Dept. of Labor	517/3731820 or www.michigan.gov/dleg
Equal Employment Opportunity Commission	800/669-4000 or http://www.eeoc.gov/

Self Assessment -- Federal and State Employment Laws

Organizations should review their employment practices to assure that they are complying with all state and federal laws during any part of the employment process. Violation of these laws can range from monetary fines to extensive punitive damages determined by liberal juries. Aside from avoiding liability exposures, employers should also comply with laws because they make good business sense. Your human resource professional should review the following checklist and identify and correct any deficiencies as soon as possible:

<u>DOES YOUR ORGANIZATION:</u>	Yes	No
1. Establish the validity and job relatedness of all employment requirements such as minimum hiring prerequisites and screening measures? Are requirements necessary to perform the job?	<input type="checkbox"/>	<input type="checkbox"/>
2. Treat all candidates for employment equally and without regard to race, color, religion, sex, or national origin?	<input type="checkbox"/>	<input type="checkbox"/>
3. Comply with the ADA (Americans With Disabilities Act) and the HCRA (Michigan Handicappers Civil Rights Act) by considering all requests for accommodations, providing reasonable accommodations, establishing essential job functions and eliminating pre-employment medical inquiries?	<input type="checkbox"/>	<input type="checkbox"/>
4. Provide family and medical leave time as well as health care benefits for employees who qualify under the FMLA? Follow a written policy consistently?	<input type="checkbox"/>	<input type="checkbox"/>
5. Review issues relating to the Fair Labor Standards Act such as overtime, number of hours worked and exempt versus nonexempt status? Employers not covered by the FLSA should comply with the Michigan Minimum Wage Law.	<input type="checkbox"/>	<input type="checkbox"/>
6. Place only that information in personnel files that the Bullard-Plawecki Employee Right to Know Act and other state or federal laws permit?	<input type="checkbox"/>	<input type="checkbox"/>
7. When hiring minors, meet the state or federal child law requirements and require working papers when applicable?	<input type="checkbox"/>	<input type="checkbox"/>
8. Review all Affirmative Action Programs with an attorney, the EEOC, and the Michigan Department of Civil Rights?	<input type="checkbox"/>	<input type="checkbox"/>
9. Assure that female employees who perform jobs that are equal in required skills, effort, responsibility, and under similar working conditions to those of male employees receive the same pay?	<input type="checkbox"/>	<input type="checkbox"/>
10. Comply with the Immigration Reform and Control Act by requiring all all new employees to complete the I-9 form and produce a required document for verification of eligibility status?	<input type="checkbox"/>	<input type="checkbox"/>
11. Communicate retirement benefits to employees in compliance with the Employment Retirement Security Act?	<input type="checkbox"/>	<input type="checkbox"/>
12. Establish and communicate a written safety and health policy in compliance with Michigan Occupational Safety and Health Act?	<input type="checkbox"/>	<input type="checkbox"/>

	Yes	No
13. Retain all employee and candidate information that state and federal laws require for the minimum retention period and make it available upon request of a state or federal official?	<input type="checkbox"/>	<input type="checkbox"/>
14. Keep information about employees confidential and accessible only to internal individuals who have a legitimate business reason to review it?	<input type="checkbox"/>	<input type="checkbox"/>
15. Retain a competent attorney when dealing with labor organizations?	<input type="checkbox"/>	<input type="checkbox"/>
16. Have policies and procedures in place to handle requests for information about employees?		
▪ Does a specific written policy govern the release of information to external individuals?	<input type="checkbox"/>	<input type="checkbox"/>
▪ Does the policy should comply with the Bullard-Plawecki Employee Right To Know Act as well as the Freedom of Information Act.	<input type="checkbox"/>	<input type="checkbox"/>
▪ Is the release documented with a signed employee release?	<input type="checkbox"/>	<input type="checkbox"/>
▪ Is all information accurate and factual?	<input type="checkbox"/>	<input type="checkbox"/>
▪ Do supervisory employees follow the release of information policy?	<input type="checkbox"/>	<input type="checkbox"/>
17. Post all required state and federal notices?		
<i>Federal Posting Requirements</i>		
Fair Labor Standard Act - Minimum Wage	<input type="checkbox"/>	<input type="checkbox"/>
Employee Polygraph Protection Act	<input type="checkbox"/>	<input type="checkbox"/>
Family and Medical Leave Act	<input type="checkbox"/>	<input type="checkbox"/>
Combined Equal Opportunity	<input type="checkbox"/>	<input type="checkbox"/>
OSHA	<input type="checkbox"/>	<input type="checkbox"/>
<i>Michigan Posting Requirements</i>		
Whistleblower's Protection Act	<input type="checkbox"/>	<input type="checkbox"/>
Michigan Wage and Hour - Minimum Wage	<input type="checkbox"/>	<input type="checkbox"/>
Civil Rights Act - HCRA	<input type="checkbox"/>	<input type="checkbox"/>
Michigan Occupational Health and Safety	<input type="checkbox"/>	<input type="checkbox"/>
Unemployment Insurance	<input type="checkbox"/>	<input type="checkbox"/>
Child Labor Law	<input type="checkbox"/>	<input type="checkbox"/>
MSDS/RIGHT TO KNOW	<input type="checkbox"/>	<input type="checkbox"/>

Conclusions



If you were able to honestly answer “yes” to all seventeen questions and your organization follows most or all of the suggested practices, then your organization has reduced its exposure to future employment claims. You should congratulate yourself.



If you were unable to answer “yes” to one or more of the seventeen questions, your organization may have an exposure to claims resulting from your employment practices. Missing components of one or more of the recommended practices may also indicate a deficiency in your current program. You should take one or more of the following actions:

- Correct any deficiency that may exist;
- Contact your attorney for advice;
- Contact MML Risk Management Services at 800/653-2483; or
- Contact the League’s Loss Control Services at 800/482-2726.



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Equal Employment Opportunity Commission	800/669-4000 or http://www.eeoc.gov/

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