Employment & Personnel

Employment relations audit

A proactive approach to employment related issues can pay substantial dividends in reduced legal challenges and associated costs. Municipalities should review the following ten potential problem areas:

1. *Pre-employment inquiries*. Whether in an interview or in an employment application, employers are prohibited from asking applicants particular questions. Application forms should be reviewed, and where necessary, revised. An employer should also ensure that all individuals responsible for interviewing applicants know what interview questions are prohibited.
2. *Separating medical and personnel records.* The municipality is required to keep the medical records of its employees separate from other personnel records. Employers should review personnel files and remove records relating to disabilities and accommodations, work-related injuries, fitness for duty examinations, physician notes or any other documents pertaining to an employee's medical condition. A separate file for each employee's medical records must be maintained.
3. *Employees with disabilities.* An employer is required to accommodate an employee's disability if it does not pose an undue hardship. An employer should ensure that it has, and follows, an appropriate policy that requires an interactive process with the employee to attempt to meet the employee's needs.
4. *Prohibition of harassment.* Ensure that an anti-harassment policy includes all forms of harassment, not just sexual harassment and that the policy contains effective reporting procedures. The policy should be distributed to all employees and posted in prominent places.
5. *Overtime compensation.* Paying an employee a salary is not, in itself, enough to meet the exempt status tests. The municipality should review the actual duties of all salaried employees to determine whether they meet the statutory requirements for exempt employees.
6. *Independent contractors.* Merely paying an individual on a contractual basis does not make him/her an independent contractor. The IRS or the Department of Labor may determine that an "independent contractor" is actually an employee. The municipality should, therefore, review the actual services rendered by independent contractors under established criteria.
7. *Employment related documents*. All employment related documents, including employment contracts, employee handbooks and employment policies should be reviewed and updated to deal with changing business practices, technology, means of communication and employment-related laws.
8. *Posters.* Both federal and state labor regulations require employers to post notices in conspicuous places with respect to a wide variety of state and federal laws. The municipality should ensure that the proper notices are posted.
9. *FMLA*. An employer's obligations under the federal Family and Medical Leave Act of 1990, begin before a leave commences and continue after an employee returns to work. The municipality should ensure that it has a proper FMLA policy and understands and implements the corresponding procedural requirements.
10. *Document, document, document.* Too often employers cannot establish the appropriateness of an adverse employment action that is challenged by an employee because of a failure to either candidly evaluate an employee or document

instances of misconduct or poor job performance. Candid and proper documentation should be emphasized.

Pre-employment inquiries

While most employment disputes involve current or former employees, the municipality must be aware of issues related to applicants as well. The following guidelines apply to both pre-employment interviews and information requested on an application form:

- *Protected classification.* An employer should not ask for information concerning the religion, race, color, national origin, age, sex, disability, height, weight or marital status of a prospective employee.
- *Disabilities and medical history.* An employer generally may not ask an applicant if he or she needs an accommodation to perform the job. An exception to this rule is that an employer may ask about the type of accommodation needed if the applicant has an obvious disability or reveals the existence of a disability, or an employer reasonably believes the applicant will need an accommodation to perform specific job functions. Similarly, an employer should not ask medical history related questions.
- *Accommodating applicants.* An employer has a duty to accommodate a disabled applicant. This duty includes removing barriers in the application process to allow the individual to compete for jobs. For example, an employer may need to modify its application forms, testing procedures and facilities to allow disabled applicants to participate in the process. As a consequence, an employer may ask applicants if they need an accommodation for the application process.
- *Arrest and conviction records.* The Equal Employment Opportunity Commission and the Michigan Department of Civil Rights take the position that an employer should not ask for information concerning arrests. Questions relating to criminal convictions are permissible when they are job-related.
- *Physical and medical examinations.* An employer cannot require that an applicant take a physical or medical exam before an offer of employment has been made. After an offer has been made, an employer can require such an exam, but only if the exam is required of all entering employees in the same job category and the exam is job-related. An employer can deny employment to an applicant based on exam results only if the applicant cannot perform the essential functions of the job, with or without an accommodation.
- *Drug testing.* Tests for illegal drug use are not considered medical examinations under the federal Americans with Disabilities Act. Therefore, an employer's ability to require a drug test is not affected by the act.
- *Background checks.* The federal Fair Credit Reporting Act requires an employer who contracts with a third party to obtain information about an applicant (e.g., motor vehicle record, criminal record, credit standing, general reputation, etc.) to notify the applicant in writing and obtain the applicant's written authorization. The notice and authorization must be provided on forms separate from the application form. Before taking adverse action against an applicant based in whole or in part on information received, the employer must provide the applicant with a copy of the information received and a "summary of rights" as provided under the act.

Personnel files

If a current or former employee requests a copy of his or her personnel file, an employer must supply it – upon written request and at reasonable intervals. The Bullard-Plawecki Employee Right to Know Act (1978 PA 397) permits a current or former employee the opportunity to review and obtain a copy of his or her personnel records. Generally, an employee's review is limited

to not more than twice a year unless otherwise provided by law or a collective bargaining agreement. An employer may charge a fee for copying the personnel records, which is limited to the actual incremental cost of duplicating the information.

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The Bullard-Plawecki Act defines *personnel record* as a record kept by the employer that identifies the employee and is used, has been used, or may affect or be used relative to an employee's qualifications for employment, promotion, transfer, additional compensation or disciplinary action. An employee is entitled to review his or her personnel records whether the information is kept in a single "personnel file" or in a number of files. Personnel records do not include:

1. employee references supplied to an employer if the identity of the person making the reference would be disclosed;
2. materials related to the employer's staff planning with respect to more than one employee, including salary increases, management bonus plan, promotions and job assignments;
3. medical records (Note: all medical-related information pertaining to an employee must be kept confidential, in a separate locked cabinet, apart from the location of an employee's personnel records);
4. information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy;
5. information that is kept separately from other records and relates to a criminal investigation;
6. records limited to grievance investigations which are kept separate from other records and not used for purposes of qualifications for employment, promotion, transfer, additional compensation or disciplinary action;
7. records maintained by an educational institute which are directly related to a student; and
8. records kept by an executive, administrative or professional employee that are kept in the sole possession of the maker of the record and are not accessible or shared with other persons.

Disagreement on contents

The Bullard-Plawecki Act allows for the employer and employee to mutually agree to remove or correct information contained in a personnel record. If a mutual agreement cannot be reached, an employee may submit a written statement explaining his or her position. The statement may not exceed five sheets of 8 ½ x 11 inch paper and shall be included when information is divulged to a third party as long as the original information is a part of the file.

Failure to supply copy

Under the Bullard-Plawecki Act, an employee may bring an action in circuit court to compel compliance. In addition to an order compelling the employer to provide the personnel records, the court is required to award actual damages plus costs or, in the case of a willful and knowing violation, $200.00 plus costs, reasonable attorney fees and actual damages. Further, personnel record information which was not included in the personnel records but should have been as required by the act, cannot be used by an employer in a judicial or quasi-judicial proceeding unless a) the employee agrees to its use, or b) the judge or hearing officer determines the information was not intentionally excluded and the employee has been given reasonable time to review the information.

The Bullard-Plawecki Act also addresses issues relating to the disclosure of disciplinary reports to a third party, information relating to an employee's non-employment activities, investigative information relating to suspected criminal activity of an employee, and an employee's arrest records.

Discrimination: Disability

Both the federal Americans with Disabilities Act (ADA) and the Michigan Persons With Disabilities Civil Rights Act, 1976 PA 220 (PWDCRA), prohibit an employer from discriminating against a qualified individual with a disability in regard to application procedures, hiring, promotion, termination, compensation, job training and other terms, conditions and privileges of employment if the applicant or employee can perform the essential functions of the position, with or without an accommodation. Reasonable accommodation is a key requirement of the ADA and the PWDCRA since many individuals may be excluded from jobs that they are qualified to perform because of unnecessary barriers in the workplace. This section briefly discusses some of the issues related to an employer's reasonable accommodation obligations.

Overview of legal obligation

The municipality must provide reasonable accommodations to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can demonstrate that the accommodation would impose an undue hardship. An employer's obligation, which applies to all aspects of employment, is ongoing and may arise at any time that an individual's disability or job function changes. An employer, however, does not have to provide an accommodation for an individual who is not otherwise qualified for a position. An employer is also not required to provide the best accommodation or an accommodation requested by the employee as long as the accommodation provided by the employer effectively allows the employee to perform the essential job functions. Furthermore, the municipality as the employer is not required to provide an accommodation that is primarily for an individual or an applicant's personal use.

Reasonable accommodation

Reasonable accommodation is a modification or adjustment to a job or work environment that enables a qualified individual with a disability to enjoy an equal employment opportunity. Examples of reasonable accommodations may, depending on the circumstances, include:

- making the facilities accessible,
- buying or modifying equipment,
- restructuring or modifying jobs,
- modifying work schedules,
- providing flexible leave policies, and
- reassigning to vacant positions.

An employer is obligated to make an accommodation only to *known* limitations. In general, it is the responsibility of the employee to inform the employer that an accommodation is necessary. The employer however, is responsible for notifying employees of its obligation to provide accommodations to employees with disabilities. Both statutes require an employer to post notices to this effect. If an employee with a known disability is having difficulty performing a job, the employer should assess whether this is due to a disability and may inquire whether the employee requires an accommodation.

Undue hardship limitation

An employer is not required to make a reasonable accommodation if it would impose an *undue hardship* on the employer's operation. However, if a particular accommodation would impose an undue hardship, the employer must consider whether there are alternative accommodations that would not impose such hardship. An undue hardship is an action that requires significant difficulty or expense in relation to the size of the employer, the resources available, and the nature of the operation. Whether a particular accommodation will impose an undue hardship must be determined on a case-by-case basis.

Workplace violence

Workplace violence continues to be a significant issue for employers. Violence in the workplace obviously affects employee safety, well-being and productivity. Subject to the provisions of the Michigan Governmental Tort Liability Act, an employer may be held responsible for the actions of its employees. Under the legal doctrine of *respon-*

deat superior, an employer may be liable for the acts of an employee committed in the course of employment. In addition, the courts have recognized claims against employers based upon negligent hiring, supervision and retention of employees. Also, the "general duty" clause in the federal Occupational Safety and Health Act of 1970 (OSHA) under which an employer is required to provide employees with employment free from recognized hazards that cause or are likely to cause death or serious physical harm has been extended to cover incidents of workplace violence.

Ten steps a municipality as an employer can take to minimize the risk of workplace violence are:

1. Analyze the work environment for security risks and take appropriate precautions, including installing intercom systems in remote areas, providing adequate lighting, etc. Notify employees that employer-provided desks, computers and lockers are subject to inspection without prior notice. Develop a relationship with local law enforcement agencies and solicit their input.
2. Carefully screen applicants. Question applicants about gaps in employment history. Require applicants to provide consent to contact former employers and have them release former employers from liability for providing employment related information. Consider conducting an in-depth investigation that includes credit history and criminal background checks. If done by an outside agency, an employer must comply with the federal Fair Credit Reporting Act. Advise applicants that they may be required to take a pre-employment drug test.
3. Establish personnel policies prohibiting threats, harassment, fighting and weapons in the workplace. Ensure that rules are enforced without exception. Consider instituting random or periodic drug testing.
4. Train employees to report suspicious, harassing or threatening behavior, since extreme violence is often preceded by lesser offenses.
5. Train supervisors how to detect early warning signs of potentially violent behavior and in conflict resolution methods. Require supervisors to immediately report all suspicious or inappropriate conduct.
6. Take all complaints seriously. Develop a complaint procedure and ensure that all complaints are investigated by individuals trained in investigative techniques. Take timely and appropriate remedial action.
7. Provide opportunities for employees to address concerns. Institute an open door policy to encourage better management /employee communications. Provide counseling opportunities through an employee assistance program.
8. Take steps to minimize job related stress. Workplace violence is less likely to occur when employees believe that their supervisor is fair and treats employees equally. Supervisors should treat employees with respect, while at the same time addressing performance and conduct issues in a direct and constructive manner.
9. Use law enforcement agencies and the courts where applicable. Immediately contact your local law enforcement agency when threatening behavior occurs. Use the Michigan stalking legislation and other laws to obtain a restraining order against employees engaging in disruptive behavior.
10. Make preventing workplace violence a priority. Establish a team of key employees to implement, communicate, enforce, monitor and review a comprehensive preventive program for a safe work environment.

Sexual and other Harassment

Sexual harassment is a form of sexual discrimination that violates both Title VII of the Civil Rights Act of 1964 and the Michigan Elliott-Larsen Civil Rights Act (1976

PA 453, as amended, MCL 37.2101 et seq.). Both statutes also prohibit harassment based on any protected classification. Proactive handling of harassment issues in the workplace should be a foremost concern for employers. In order to assist employers with this process, the Equal Employment Opportunity Commission (EEOC) has issued guidelines addressing numerous issues pertinent to supervisor harassment, including action based on sex, race, color, religion, national origin, age, disability or protected activity. Additional information on liability for harassment for small employers is likewise available from the EEOC. These guidelines and other documents can be downloaded at www.eeoc.gov.

EEOC Guidelines

The guidelines provide a comprehensive question and answer review of employer liability for supervisor harassment. The guidelines also set forth procedures, questions and factors to be used and considered when preparing an anti-harassment policy and investigating potential or existing harassment.

The following are suggested measures for municipalities as employers to consider when handling harassment issues:

- *Anti-harassment policy.* Create and implement a strong and effective anti-harassment policy that candidly informs employees that harassment is both illegal and against the policy of the employer. The policy should emphasize that harassment by any manager, supervisor, employee, customer or third party will not be tolerated.
- *Complaint procedure.* Establish a complaint procedure as part of the policy. The policy should notify employees that harassment complaints will be taken seriously, investigated and if harassment is found to exist, will result in discipline against the offender(s), possibly resulting in termination. The policy should contain a statement prohibiting retaliation against an employee who files a complaint. The policy should provide a contact in addition to the employee's supervisor.
- *Distribution and communication.* Ensure that the policy is distributed and communicated to all employees. Explain during the distribution process that all employees must read the policy and if they have any questions or comments, they are to raise them with a designated individual. Employees should be required to sign a verification noting that they have read and understand the policy. Periodic redistribution of the policy is advised.
- *Education.* The workforce should be educated about the types of behavior which are unacceptable. New employees should attend a workshop on harassment, with previously hired employees receiving periodic refresher information as well.
- *Supervisor training.* Care in selecting individuals for supervisory and managerial level positions should be taken to ensure that the individuals selected will treat employees properly and will avoid inappropriate conduct. Further, additional training for supervisors should be provided to educate them about their important role in this area. Supervisors should be trained to recognize what conduct may create a hostile environment and to stop it at the onset. Supervisors should also be instructed to intervene when they see such conduct occurring and to advise the Human Resources Director or someone in a comparable position.
- *Investigating a complaint.* Upon receipt of a complaint of harassment or when an employer has reason to believe that a potentially harassing situation has occurred or is occurring, the employer must act promptly. All complaints of harassment must be taken seriously. It is imperative that an employer investigate all complaints completely and objectively. In addition, an employee making a complaint should be notified as to the outcome of his or her complaint once a final decision has been made.

- *Taking appropriate action.* If the investigation results in a finding that the behavior amounts to harassment, appropriate action must be taken so that the harassment is eliminated and does not reoccur. This may consist of both disciplinary action imposed on the harasser and remedial action for the victim of the harassment. Employers should treat like situations similarly in terms of the investigation process, the action taken, etc.

Recent court decisions illustrate the need for employers to elevate harassment, based on any factor, on their list of important workplace issues. Employers attuned to harassment issues and committed to eradicating workplace harassment of any kind can avoid or substantially reduce their legal risks.

Overtime Considerations – Exempt and Non-exempt Employees

Both the federal Fair Labor Standards Act (FLSA) and a similar Michigan statute require that overtime be paid at 1.5 times a nonexempt employee's regular rate of pay for each hour over 40 worked in a workweek. Averaging of hours over two or more weeks is not allowed even if the employee is paid biweekly. The act does *not* require that an employee be paid overtime for hours worked in excess of eight per day, or for work on weekends or holidays, so long as the employee does not work more than 40 hours in a week.

The act does not consider paid holidays, sick time and vacation leave as hours worked. An employee's meal period can also be excluded from compensable working time if it is at least 30 minutes long and the employee is completely relieved of all duties and free to leave the workstation. Rest periods or coffee breaks 20 minutes or shorter must be counted as hours worked. Whether rest periods longer than 20 minutes count as hours worked depends upon an employee's freedom during the breaks.

Compensatory time or overtime?

The FLSA authorizes a public agency to provide compensatory time (comp time) off in lieu of overtime compensation, at a rate of not less than 1.5 hours for each hour of overtime worked. In order for the use of comp time to be allowed, there must be an agreement or understanding between the employer and employees.

Public employees may generally accrue up to 240 hours of FLSA comp time (160 hours of actual overtime work). However, employees who work in a public service, emergency response or seasonal activity may accumulate up to 480 hours of FLSA comp time (320 hours of actual overtime work). An employee who has accrued comp time and wishes to use the time must be permitted to do so within a "reasonable period" after making the request if it does not "unduly disrupt" the operations of the agency. Undue disruption must be more than mere inconvenience to the employer.

Even where there is a comp time agreement, an employer may freely substitute cash, in whole or in part, for comp time. In addition, the U.S. Supreme Court has ruled that nothing in the FLSA prohibits a public employer from compelling the use of comp time. Upon termination of employment, an employee must be paid for all unused comp time figured at: (a) the average regular rate received by the employee during the last three years of employment, or (b) the final regular rate received by the employee, whichever is higher.

Who is entitled to overtime pay?

There are a number of positions that are exempt from the overtime requirements of the FLSA. The major exemptions relate to executive, administrative and professional employees, commonly referred to as the "white-collar" exemptions. To qualify for such an exemption, the employee must be paid on a salary basis (at least $455 per week) and perform certain duties.

Executives are those employees who manage an enterprise or department, or subdivision thereof, customarily and regularly direct two or more full-time employees or

their equivalent, and have the authority to hire or fire employees (or have their recommendations be given particular weight). **Administrative** employees are individuals who perform office or non-manual work directly related to management policies or general business operations of the employer, and whose work requires the exercise of discretion and independent judgment with respect to matters of significance. **Professional** employees are those individuals who perform work requiring advanced training acquired by a prolonged course of specialized intellectual instruction, as distinguished from general academic education, apprenticeships or routine training and involving the exercise of discretion and judgment, or who perform original or creative work depending primarily on invention, imagination or talent in the recognized field of artistic endeavor.

Salary Basis Test and Allowable Deductions

In order to meet the salary basis test, an employee must regularly receive each pay period the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Thus, if an exempt employee is ready, willing and able to work, deductions may not be made for time when work is not available as long as the employee performed some work during that week. Under new regulations that went into effect in 2004, the deductions an employer can make from an employee's pay without violating the salary basis requirement have been expanded. For example, an employer can now suspend an exempt employee without pay for one or more full days for violating written work rules that apply to all employees. Unpaid full-day absences for personal reasons and in some cases for illness will also not affect an employee's exempt status.

The new regulations contain a "safe harbor" provision for employers who make improper deductions. Impermissible deductions will not result in the loss of an employee's exempt status if the employer (1) has a clearly communicated policy prohibiting improper deductions, including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future. This safe harbor provision does not apply, and the employer will lose the exemption, if the employer willfully continues to make improper deductions after receiving employee complaints.

Overtime rules for police and fire

In addition to the difference in maximum comp time accrual caps, the FLSA provides another very significant difference for public employees engaged in law enforcement and fire protection activities. As a general rule, employees must be paid overtime at one and one-half (1½) times their regular rate of pay for all hours worked in excess of 40 hours per week. Under Section 207(k) of the act, however, police and fire employees who have an established and regularly recurring work period that is not less than seven consecutive days nor more than 28 consecutive days are only entitled by the statute to receive overtime pay if they work more than the maximum number of hours established by law for their work period.

For employees having a 28-day work period, overtime must be paid for hours worked in excess of 171 (law enforcement) or 212 (fire protection). These figures are prorated for employees whose work periods are less than 28 days. Thus, for police and fire employees with a seven-day work period, overtime must be paid after 53 and 43 hours of work, respectively, under Section 207(k). An employer can agree by union contract, or otherwise, to pay overtime for fewer hours worked.

Independent contractor or employee?

There are a number of benefits to utilizing the services of an independent contractor to perform functions for your municipality. At the same time, there are considerable risks in incorrectly designating a person as an independent contractor when he or she is really an employee. This exposure includes liability for back taxes, overtime compensation, medical expenses and costs related to com-

pleting the work assignment. The existence of an employer-employee relationship versus an independent contractor relationship depends, to a large extent, on the amount of control the municipality exerts over the worker. Relevant factors include the following:

- *Instructions.* If the worker must follow instructions as to when, where and how to perform the job, this supports employee status.
- *Training.* Requiring training supports employee status.
- *Integration.* Integration of the worker's services into the business operations suggests employer control.
- *Services rendered personally*. If services must be rendered personally by a specific worker, this suggests an employment relationship.
- *Control of assistants.* Control by the municipality over hiring, supervision and pay of the worker's assistants implies employee status.
- *Ongoing relationship.* A continuing relationship suggests an employer-employee relationship exists.
- *Set hours of work.* The establishment of set hours by the municipality implies control.
- *Full time work.* A person who must devote full working time to the municipality is subject to the municipality's control.
- *Work on premises.* On-premises work may indicate employer control, especially when the work could be done elsewhere.
- *Order or sequence.* Work that must be performed in an order or sequence established by the municipality suggests control.
- *Reports to hirer.* A requirement that the worker submit regular oral or written reports to the municipality implies control.
- *Payment method.* Payment by the hour, week, or month generally indicates an employer-employee relationship. Payment by the job or commission indicates independent contractor status.
- *Payment of expenses.* Payment of the worker's business or travel expenses may suggest an employer-employee relationship.
- *Furnishing tools, materials.* Providing tools, materials and other equipment shows an employer-employee relationship.

Factors indicative of an independent contractor:

- *Significant investment.* Independent contractor status is implied if the individual invests in the facilities and/or equipment used for the work.
- *Realization of profit or loss.* An individual who can realize a profit or suffer a loss as a result of providing services is usually an independent contractor.
- *Serving more than one firm.* An individual who provides services to several unrelated firms at the same time generally is an independent contractor.
- *Serving the public.* An individual whose services are regularly available to the general public is typically an independent contractor.

How these factors apply to a particular work arrangement will determine whether the person is an employee or independent contractor. No single factor is necessarily determinative in addressing this question.

Family and Medical Leave Act

Eligible employees who work for a covered employer are entitled under the federal Family and Medical Leave Act of 1990 (FMLA) to 12 weeks unpaid leave during a 12-month period for a variety of reasons:

1. the birth of the employee's child and to care for the newborn child;
2. the placement of a child with the employee for adoption or foster care;
3. the care for the spouse, child or parent, of the employee, if the spouse, child or parent has a serious health condition; and
4. a serious health condition which results in the employee being unable to perform the functions of his or her job.

Who is an eligible employee?
In order to be eligible for leave, an employee must have been employed for at least 12 months (52 weeks) and have worked at least 1,250 hours the year before the leave is scheduled to begin. Paid time off does not count as hours worked. The 12 months do not have to be consecutive. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation), during which other benefits or compensation are provided (e.g., worker's compensation or group health plan benefits), the week counts as a week of employment.

Employers subject to the FMLA
Currently a private sector employer must employ 50 employees for each working day during at least 20 weeks in either the current or preceding calendar year to be subject to the FMLA. Legislation has been periodically proposed that would reduce this number to 25 employees. Public employers are covered without regard to the number of employees employed. However, this is somewhat misleading because even if a small public employer is technically covered by the FMLA, the employee will not be eligible under the act unless he or she works within 75 miles of 50 employees of the employer.

The following factors are relevant when determining the number of employees:

1. Employees at the employer's workplace and employees employed by the same employer within 75 miles of the employee's workplace are counted.
2. Separate entities may be considered a part of a single employer depending on the degree of interrelationship of management, operations and ownership.
3. The 20 weeks do not have to be consecutive.
4. Part-time employees are included.
5. Employees on paid and unpaid leave are included if there is a reasonable likelihood they will return to work.
6. Leased employees employed through an employment agency may be included depending on the employer's degree of control and supervision of the workers.
7. The determination of whether the employer has the requisite number of employees is made at the time the employee requests the leave.

Determining the 12-month Period

Under regulations issued by the U.S. Department of Labor, employers may choose any one of four optional methods for determining the 12-month period during which the 12-weeks of FMLA leave may be taken. The only restriction is that the alternative chosen must be applied consistently and uniformly to all employees. The available options are:

1. the calendar year,
2. any fixed 12-month leave year (e.g. a fiscal year or a year starting on the employee's anniversary date),
3. the 12-month period measured forward from the date the employee's use of FMLA leave begins, or
4. a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.

If an employer fails to select one of the available options, the option that provides the most beneficial outcome for the employee will be used.

Under the last alternative, each time an employee uses statutory leave, the remaining balance in his or her leave entitlement is equal to the unused portion of the 12-week leave entitlement that was not used during the preceding 12-month period. The "rolling" 12-month period is the only alternative that prevents the possibility of "stacking" one year's leave entitlement to that authorized for the following year. Therefore, this is the method that has generally been used by employers.

Employee rights
Upon returning to work from FMLA leave, an employee is entitled to be restored to his or her previous position, or to an "equivalent position." An equivalent position must have equivalent pay, benefits and other terms and conditions of employment. For a job to be

equivalent it must involve the same or substantially the same duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility and authority. A position that is merely comparable or similar is not enough.

The only exception is for qualifying employees who have been designated by their employer as "key employees." Such employee must be provided with a written notice regarding this designation, and the employer must be able to show that denial of restoration is necessary to prevent substantial and grievous economic injury to its operations.

An employee who is restored to his or her original position (or an equivalent position) is not entitled to accrual of any seniority or employment benefits during the period of leave, though any benefits accrued before the leave are unaffected. An employee is entitled to continuation of employer-paid health care coverage during the period he or she was on leave. However, under the Department of Labor's FMLA rules, a restored employee has no greater entitlement to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the leave period. Thus, if an employee would have been laid off if he or she had not been on leave, the employee has no more entitlement to restoration than if he or she had been working at the time of the layoff.

Terminating employees – Minimizing the risk

Terminating an employee is potentially risky business that may expose an organization to a variety of legal claims. For example, depending upon an employer's policies, whether the employer has a civil service system, or whether an employee has an employment contract, an employee may have a claim for breach of contract. In addition, a terminated employee may allege that his or her termination was due to illegal discrimination because of his or her status as a member of a protected classification. Discharged employees may also claim that their former employer defamed them by making false, disparaging comments about them to co-workers or other parties, treated them in a manner intended to cause emotional distress, invaded their privacy by improperly disclosing the reason for an involuntary termination, or terminated them in retaliation for exercising some legal right, such as engaging in so-called "whistle blowing" activity or reporting discriminatory or other unlawful employment practices. This section discusses a number of measures a municipality as an employer can take to minimize the risk of exposure.

- Clearly establish the nature of the employment relationship at the beginning, either "at-will" or "for cause." An at-will employee can be terminated with or without cause, and with or without notice. Review applications, offer letters, personnel policies and employment contracts to ensure that proper at-will statements are included. If a "for cause" relationship is preferred, list examples of conduct or performance that can result in termination, while indicating that the list is not exhaustive. In addition, if progressive discipline is provided for, retain the flexibility to discharge immediately when circumstances warrant.
- Before deciding whether to terminate an employee, conduct a thorough investigation of the events in question and get the affected employee's version or explanation.
- Consider whether a neutral third party would believe that the misconduct or poor performance occurred and that the decision to terminate was fair under the circumstances. Does the "punishment fit the crime?"
- Consider whether the decision to terminate is inconsistent with prior statements concerning an employee's good performance (such as in a job evaluation) or inconsistent with previous actions taken by the employer such as a recent promotion or pay increase.
- Determine whether alternatives to termination exist, i.e., should the employee be given a "last chance" or be put under a "performance improvement plan"?

- If the decision to terminate is made, retain all documents and work product supporting the decision and secure the employee's personnel file.
- Ensure that all available appeal procedures to the employee, if any, are followed. Special procedures may exist for public sector employees – who have certain due process rights not accorded to private sector employees.

Briefly, if a public employee is determined to have a property interest in continued employment (e.g. if the employee is covered by an agreement or policy that states he or she can be terminated only for cause), due process requires at a minimum that the employee be given (a) written or oral notice of the charges against him, (b) an explanation of the employer's evidence, and (c) an opportunity to present his position, prior to termination. The employee may also be entitled to a post-termination hearing. This requirement can be satisfied by the grievance or arbitration provisions of a collective bargaining agreement.

- In addition, the Michigan Veterans' Preference Act (VPA) provides some very important rights to "veterans" employed by the state, or any county, city, township or village. Under this law, a veteran employed by one of the listed governmental bodies may only be removed, suspended or transferred from his or her office or employment for certain specified reasons. Furthermore, the removal, suspension or transfer may only occur after the veteran has been provided with a full hearing and advance written notice of the cause(s) for the action. The VPA contains exceptions for certain managerial and appointed positions (e.g. department heads and their first deputies). However, the law does not exclude employees on probationary status.
- Ensure that members of a protected classification are treated the same as employees outside the protected classification who engaged in similar conduct, under similar circumstances (severity of conduct, prior offenses, length of employment, etc.).

  Michigan and/or federal law prohibit employment discrimination on the basis of (among other characteristics) race, color, religion, sex, national origin, age, disability, height, weight and marital status.
- Do not do anything to embarrass the employee during the termination process. When possible, avoid "escorting" the employee from the workplace in front of co-workers.
- Consider providing outplacement services to the employee to aid in finding another job.
- If any severance benefits are provided (severance pay, payment of medical insurance premium, outplacement counseling, etc.), consider making benefits conditioned on the employee signing a release. For a release to be effective against federal age discrimination claims (employees 40 or older), it must meet specific minimum requirements, including providing for 21 days of review and a seven-day revocation period after signing.
- Be candid (but concise) when advising the employee of the reason for termination. Avoid the urge to either "sugarcoat" the reason in order to save the employee's feelings or over-explain why the decision to terminate was made.
- After termination, advise only those employees, or others, who have a need to know, the reason for the termination, and advise them to not discuss the matter.
- Do not make post termination statements in a termination notice, reference letter or responses to the state unemployment compensation office that are inconsistent with or contradict the reason for termination.
- Finally, if you have any questions about how to proceed (and even if you don't), it is always prudent to consult with a knowledgeable and experienced employment attorney prior to and during the termination.

In most instances, the situation will be relatively straightforward and you will not encounter any difficulties. However, advance planning and paying attention to the "details" can help to avoid any subsequent legal problems – which, unfortunately, can often be very stressful, time-consuming and expensive for everyone concerned.

About the author . . .

Melvin J. Muskovitz works in the Ann Arbor office of Dykema Gossett PLLC. Mr. Muskovitz, who represents management in labor and employment matters, has extensive experience in both the private and public sectors. He has represented businesses and governmental units in contract negotiations, arbitration and before federal and state administrative agencies throughout the country, including the Michigan Department of Civil Rights, the Equal Employment Opportunity Commission, the National Labor Relations Board, the Michigan Employment Relations Commission and the U.S. and Michigan Departments of Labor. Mr. Muskovitz also represents employers in all types of employment litigation, including discrimination wrongful termination claims.

Mel Muskovitz devotes a substantial portion of his time assisting his clients in avoiding legal problems by preparing or reviewing employee handbooks and training manuals, advising on appropriate preventative measures and employee discipline and assisting with day to day employment issues including compliance with the Fair Labor Standards Act, the Family and Medical Leave Act, the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964.