



# Liability & Property Pool Workers' Compensation Fund

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## RISK CONTROL SOLUTIONS

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

### PREVENTING SEXUAL ABUSE OR MISCONDUCT Developing Municipal Policies

#### OVERVIEW

In the past decade, there have been numerous high-profile sexual abuse scandals involving both public and private organizations. As the societal stigma associated with reporting instances of sexual assault or repeated sexual abuse continues to decrease, more and more new cases of such abuses will likely come to light.

While it may not seem likely that the average municipality will experience such scandals, all organizations must be aware of the issue and take reasonable steps to limit the risk of such crimes occurring through their own operations and programs. The widespread damage that can be done if municipal executives, employees, or even private contractors or volunteers engage in such criminal acts includes the trauma inflicted upon the abused individual, the loss of the community's overall trust in the municipality, its officers, managers, and employees, and the potential legal liability.

All municipalities should engage in a periodic review of all programs and ongoing operations to assess the possible risk from employee and third-party involvement in possible abuse and assault. The following suggested criteria and recommended practices may assist the organization in developing policies and procedures to limit such risks.

#### EMPLOYMENT PRACTICES

Under Michigan law, an employer may be held accountable for the criminal acts of an employee if the employer knew or should have known of the employee's "propensities and criminal record" before the employee engaged in such conduct. See *Hersh v Kentfield Builders, Inc.*, 385 Mich 410, 412 (1971).<sup>1</sup>

Because of this potential employer liability, municipalities should conduct criminal background checks on all job applicants. Individuals with a criminal history of violence or criminal sexual conduct should be denied employment.

While the use of third-party contractors or volunteers in providing programs may afford the municipality a certain amount of protection from liability, instances of volunteers or private contractors found guilty of abuse or assault would likely be viewed by the community as the same as if an employee had committed the act. So, it is also recommended that volunteers and contractors who will be working with vulnerable populations, discussed below, undergo a criminal background check before beginning work on behalf of the municipality.

<sup>1</sup> Audrey J. Forbush of Plunkett Cooney is the legal advisor to the Law Enforcement Action Forum.

## **ORGANIZATIONAL REVIEW**

One of the key aspects of crimes involving sexual abuse and assault is that they usually occur in isolated situations where the attacker and victim are alone together. The municipality should review all programs and operations for situations where employees are in isolated, one-on-one contact with each other as a part of their normal work routine. These situations are most likely to involve overnight work shifts or isolated facilities that are not visited regularly by members of the public or other employees. Such facilities and work schedules may also pose an increased risk of assault to employees by members of the public.

One possible solution for such conditions is the installation and maintenance of proper exterior and interior lighting at all facilities. Another solution is the installation of exterior and interior video monitoring which has the added benefit of reducing instances or severity of other criminal acts. Reducing the general risk of assault from members of the public can be accomplished by installing security fencing around a facility with key-card access for employees only, as well as key-card access at building entrances or throughout the facility itself.

With respect to employee-on-employee instances of assault, an annual review of the organization's harassment policies and procedures is recommended for all employees. Instances of harassment may be viewed as possible indicators of potential future violations of expected workplace behavior, with the worst case being an assault by a fellow employee. While this training won't guarantee that such assaults won't occur, it is an opportunity for the organization to communicate to all employees the types of behaviors that won't be tolerated in the workplace. This training should make clear to all managers what is expected from them in the way of reporting, documenting, and investigating such claims of misconduct. All employees should understand the reporting procedures for any potential harassment or instances of possible assault.

Another key aspect of crimes involving abuse and assault, particularly instances of long-term, repeated abuse, is that abusers sometimes target individuals with characteristics that make them more vulnerable to being taken advantage of. Children, the elderly, individuals with developmental disabilities, and persons who are incarcerated may be especially vulnerable to abuse. The municipality should review all programs and ongoing operations to identify situations involving such individuals involved in organizational programs and services. Situations in which employees, volunteers, or contractors may have isolated, one-on-one contact with these vulnerable populations should be identified as situations that are especially at risk for abusive behavior or sexual assault.

If the municipality seeks to limit the potential for abuse and assault in such situations described above to the greatest degree possible, isolated, one-on-one contact with vulnerable individuals should be eliminated. This may be accomplished through adequate staffing, internal video monitoring of facilities, and program guidelines provided to volunteers and contractors who staff certain programs. Again, the average municipal program or service will likely take place in a public setting or a setting involving multiple municipal employees with little to no isolated, one-on-one contact with vulnerable individuals. Situations that are at particular risk involve incarcerated individuals, residential housing for the elderly or developmentally disabled, and sporting activities that involve showering, overnight travel, or medical treatment and examinations. Possible risk prevention techniques for these situations may involve video monitoring; written logs documenting contact with vulnerable individuals; rules prohibiting isolated, one-on-one contact between employees and participants, or informational materials for program participants on reporting instances of abuse or assault to municipal management.

## **RECOMMENDATIONS**

The following are recommended best practices for minimizing the risk of instances of assault or abuse by municipal employees or third parties.

- ✓ **Conduct criminal background checks on all new hires** to identify anyone with a history of violence or criminal sexual conduct. A zero-tolerance stance on hiring such individuals should be taken by the organization. Background checks should also be conducted for third-party contractors and volunteers who may come into contact with certain vulnerable populations.
- ✓ **Conduct an annual review of the organization’s sexual harassment policies and reporting procedures.** All executives and management should understand what behavior may or may not constitute harassment or even assault and how they are expected to deal with such behavior as managers. All employees should have an understanding of what behaviors may constitute harassment and assault and the expectations of the organization as far as reporting such behavior and what employees can expect in the way or proper investigation of assault or abuse.
- ✓ **Communicate the municipality’s expectations on prohibiting one-on-one contact by contractors or volunteers involved in programming with vulnerable populations.** Volunteers and third-party contractors may be involved in certain aspects of municipal programs dealing with vulnerable populations. Isolated, one-on-one contact with vulnerable individuals should be prohibited if assault and abuse are to be prevented to the greatest degree possible.
- ✓ **Inspect facilities, work schedules, and municipal operations for situations of isolated contact between employees.** The use of external and internal video monitoring, and secure facility access can limit the potential of assault by the public or fellow employees.

Additional questions on this topic can be referred to the MML Risk Management Services Staff or the League’s Loss Control Services.

Risk Control Solutions on preventing discrimination and harassment in the workplace can be found online at:

[http://www.mml.org/insurance/risk\\_resources/pdf/risk\\_solutions/discrimination\\_in\\_employment2017.pdf](http://www.mml.org/insurance/risk_resources/pdf/risk_solutions/discrimination_in_employment2017.pdf)



### **Important Telephone Numbers**

MML Risk Management Services	734/662-3246 or 800/653-2483
Loss Control Services	800/482-2726

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**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.*

# **SAMPLE POLICY AND PROCEDURES**

## **Employee Sexual Misconduct**

### **I. Purpose**

Sexual misconduct by any employee, third-party contractor or volunteer is prohibited. All complaints alleging sexual abuse or misconduct will be investigated and, if sustained, the misconduct will result in discipline up to and including termination from employment and may include criminal charges.

### **II. Definitions**

A. Sexual Misconduct is any behavior by an employee, third-party contractor or volunteer who misuses their position or authority or power (including force) to commit a sexual act, initiate sexual contact with another person, or respond to a perceived sexually motivated cue (from a subtle suggestion to an overt action) from another person. It includes any communication or behavior by an employee, contractor or volunteer that would likely be construed as lewd, lascivious, harassing, inappropriate, or violates general principles of acceptable conduct.

B. Sexual Misconduct by an employee, third-party contractor or volunteer, some of which are criminal acts, includes those directed at colleagues, citizens, detainees, juveniles, and crime victims or witnesses, program participants, including but not limited to:

1. sexual contact by force
2. extorting sexual favors
3. gratuitous physical contact
4. employee-initiated sexual contacts
5. sexual harassment of colleagues/co-workers
6. engaging in citizen-initiated sexual contact while working
7. sexual behavior while working
8. voyeuristic actions that are sexually motivated
9. unnecessary contacts/actions taken by employees, third-party contractor or volunteer for personally and/or sexually motivated reasons
10. inappropriate and unauthorized use of municipal resources and/or information systems for other than legitimate working purposes
11. contact, except when prompted by a legitimate employment related purpose, with a subject who an employee has met as a result of the subject's interaction with the municipality, that the subject considers unwelcome, salacious and/or inappropriate.

### **III. Procedure**

A. All complaints of sexual misconduct made against a municipal employee, third-party contractor or volunteer will be received and forwarded to the office of the (Manager/Administrator/Mayor) or a designee for review and investigation.

1. It will be the (Manager/Administrator/Mayor)'s responsibility to determine the potential severity of the allegations and determine the resource used to initiate and complete the investigation.

2. If a criminal complaint is alleged, the (Manager/Administrator/Mayor) or a designee will contact (Department) to conduct a criminal investigation.
- B. All employees of this municipality will be responsible for reporting any incidence of sexual misconduct by another municipal employee, third-party contractor or volunteer. Failure to do so will lead to discipline up to and including termination.
- C. Supervisors will document any suspicions, allegations or reported complaints, of sexual misconduct by a municipal employee, third-party contractor or volunteer and submit their report to the (Manager/Administrator/Mayor) prior to the end of their shift.
- D. If the suspicions, allegations or reported complaint is of a serious or criminal nature, the Supervisor will personally contact the (Manager/Administrator/Mayor) or a designee and provide a briefing as soon as it is possible.

#### **IV. Retaliation**

- A. Retaliation against any employee, third-party contractor or volunteer who has complained or reported sexual misconduct by another employee is prohibited. Examples of behavior considered retaliatory include, but are not limited to, harassment communicated in the following manner: verbal, written, social media, electronically or through another person. Retaliation may also include threats, assaultive behavior, offensive touching, isolation/exclusion, unsupported poor evaluations, unwarranted reprimands, denial of job benefits or other adverse treatment.
- B. Any evidence of retaliation shall be considered a separate violation of this policy. Retaliation will be considered a serious violation requiring a disciplinary response—up to, and including—termination from employment.
- C. Monitoring to ensure retaliation does not occur is a responsibility shared by all employees but it is a specific responsibility of all supervisors, managers, and department heads.

#### **V. Responsibility**

It shall be the responsibility of every employee to comply with this order.

#### **VI. Compliance**

Violations of this policy, or portions thereof, may result in disciplinary action.

#### **VII. Application**

This order constitutes policy, and is not intended to enlarge the employer's or employee's civil or criminal liability in any way. It shall not be construed as the creation of a higher legal standard of safety or care in an evidentiary sense with respect to third party claims insofar as the employer's or employee's legal duty as imposed by law.

**DISCLAIMER:** *This information is current and accurate, to the best of our knowledge, on the date of issuance. Recent changes in the law, judicial rulings, and local considerations may necessitate modifications before you adopt this policy as your own. As always, you are encouraged to consult with your local legal advisor for specific legal advice prior to implementing this policy sample.*