



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

THE AMERICANS WITH DISABILITIES ACT and MICHIGAN HANDICAPPERS' CIVIL RIGHTS ACT EMPLOYMENT ISSUES

The Americans with Disabilities Act (ADA), enacted in 1990 and amended in 2008 and 2010, extends specific protections to approximately 54 million Americans with disabilities. The intent of Title I of the ADA is the creation of employment opportunities for the disabled. The law is very broad and has been subject to much interpretation. In the 2009-2010 fiscal year, more Americans filed discrimination charges against their employers than in any year since the ADA was passed. The Equal Employment Opportunity Commission (EEOC) reported they had 25,165 complaints of ADA violations (up 17.3 percent) from the year before. It is, therefore, important for employers to understand and follow the provisions of the ADA. The Michigan Handicapper's Civil Rights Act (HCRA) includes provisions similar to those of the ADA. In some cases, however, the HCRA imposes higher standards for employers.

The ADA covers employers with fifteen or more employees while the HCRA covers employers with one or more employees. Michigan employers must comply with both laws because an individual may bring action under both statutes. Where the laws differ, an employer should always follow the higher standard.

WHO IS COVERED?

The ADA and the HRCA protect individuals with disabilities. Both laws include the following conditions in their definitions of disabilities:

- **A physical or mental impairment that substantially limits one or more of the major life activities.** Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. This includes individuals with Downs Syndrome and those with psychiatric disorders. The law specifically extends protection to individuals with Cerebral Palsy, HIV, AIDS and Multiple Chemical Sensitivity. It also covers individuals who cannot read as long as the inability to read results from a medically certifiable condition such as dyslexia.

The law considers alcoholism to be a disability. However, the employer has the right to uphold the same standards of performance and conduct applied to other employees.

- **A record of such an impairment.** This means a medical history of a condition such as cancer, heart disease or chronic back pain. The intent is to protect individuals from discrimination as a result of a medical condition that once existed but now has abated.
- **Being regarded as having such an impairment.** This includes individuals with a disfigurement or individuals who associate with or care for people with disabilities, including HIV or AIDS.

The ADA, but not the HRCA, may consider a person to be disabled as a result of his/her relationship to a disabled person. For example, the ADA protects the individual who is caring for a person with AIDS even though the caregiver is not infected.

Whom Does the ADA Exclude?

The ADA does not protect persons who currently use drugs illegally; homosexuals or bisexuals; persons with specific behavior disorders such as transvestitism, pedophilia, compulsive gambling, kleptomania, or pyromania; or individuals suffering from psychoactive substance use disorders resulting from the current illegal use of drugs.

In addition, the law does not cover individuals with temporary conditions such as broken legs or sprained backs.

WHAT ARE YOUR OBLIGATIONS AS AN EMPLOYER?

Employers may not discriminate against **qualified individuals** with disabilities. A **qualified individual** with a disability is a person who, with or without accommodation, **meets the essential eligibility requirements of the job and can perform its essential functions**. If an employer has a candidate with a disability who meets the requirements of the job and can perform its essential functions, the employer may not eliminate him or her because of the disability. Employers may not use concerns about workers' compensation claims or increased health care benefit costs for the employee or an employee's family member protected under the ADA to eliminate the individual as a candidate. An employer also cannot retaliate against an applicant or employee for asserting their rights under the ADA.

Exceptions

- Employers need not hire or employ a disabled individual who, with or without reasonable accommodations, cannot perform the essential functions of the job. Essential functions are those that are important to the job and are actually performed by people who are currently in the job on a daily basis.
- Employers need not hire or employ a person with disabilities if doing so would pose a direct threat to the health and safety of the individual or of others. However, the employer must be able to demonstrate a direct threat and have solid medical evidence.

Employers must not ask prospective or current employees if they have a disability. If the candidate has an obvious physical disability, the employer may ask how he or she would accomplish the essential functions of the job.

MAKING REASONABLE ACCOMMODATIONS

Employers must reasonably accommodate the individual with a physical or mental disability so that he or she can be effective in the job or apply for the position. The applicant or the employee, not the employer, activates this requirement by making known the need for accommodation. A reasonable accommodation is any change in the work environment or in the ways things are done that result in an equal employment opportunity for an individual with disability. Examples of common accommodations are:

- Having an interpreter available during an interview with a hearing impaired individual.
- Job restructuring to eliminate non-essential functions the individual cannot perform. The employer may substitute other functions the employee is able to do.
- Modifying equipment such as raising desk height for a person using a wheelchair.
- Modifying a work schedule.

The HCRA says that employers with fewer than 15 employees do not need to restructure a job or alter a work schedule. This is one area in which that the state law is less demanding.

THE "UNDUE HARDSHIP" EXCEPTION

The ADA provides that employers may refuse to make reasonable accommodation if it imposes an undue hardship on the employer. Undue hardship means that the accommodation would be too expensive, too difficult, or too disruptive to normal business operations or that the employer has too few employees to shift job responsibilities if that is what is needed to make a reasonable accommodation. However, employers should explore all options before arriving at this conclusion. The EEOC applies a sliding scale to the ability to

reasonably accommodate. The larger the employer, the more likely it is that he or she must provide an accommodation.

One undue hardship argument that the EEOC will not accept is that reasonably accommodating a disabled individual will cause resentment among remaining employees. The ADA requires that managers and supervisors deal with employees who feel that disabled employees are getting preferential treatment.

The cost of a reasonable accommodation is one factor in determining undue hardship. The EEOC will consider the nature and cost of the accommodation, the overall financial resources of the organization and of the worksite, and the type of operation.

The HCRA sets specific formulas for measuring the reasonableness of an accommodation for private employers. Public employers, however, are not limited to this ceiling and are therefore held to a higher standard.

AN ADA & HRCA COMPLIANCE CHECKLIST:

- Designate an individual to serve as the ADA & HCRA coordinator. The selected individual should be able to handle employment-related issues and questions.
- Make certain that facilities are readily accessible for both applicants and employees. This includes locations where you hold company functions or sites where you send employees for training.
- Provide managers and supervisors with training on the ADA and HRCA. Stress that it is unlawful to ask whether or not a candidate has a disability or to question an obviously disabled person about his or her condition. Limit questioning to how the candidate would be able to perform the essential functions of the job.
- Prepare accurate, objective job descriptions for all positions. The descriptions should specify the essential functions of the job and distinguish between those functions and others that can be transferred to other personnel. Essential functions must be those that current employees in the position perform regularly or functions that are the reason for the existence of the position if it is new. Always review and update job descriptions before advertising.
- Always include an Equal Employment Opportunity statement in your advertisements or job posting.
- Provide all employees with sensitivity training regarding disabilities.
- Make sure you have displayed the required ADA and HRCA posters at all work sites.
- Look for ways to accommodate rather than ways to defend "undue hardship." Remember that, in most cases, the employee must ask for an accommodation.
- Never impose an accommodation on anyone just because he or she has a disability.
- Obtain help from legal counsel, a Human Resource specialist, or other technical experts in the field of disability legislation.
- Remove all medical information from personnel files and retain in a separate but confidential file.

For more information, contact the League's Loss Control Services, MML Risk Management Services, or the appropriate state or federal agency. You may also wish to review the Risk Control Solution entitled *The Americans with Disabilities Act, Title II: Non-Discrimination in Government Services, Programs, and Activities*.

As with all employment issues, we encourage you to discuss your employment related concerns with an attorney.



Important Contact Information

MML Risk Management Services	734/662-3246 or 800/653-2483
Loss Control Services	800/482-2726
Michigan Department of Labor	517/3731820
Michigan Department of Civil Rights	313/456-3700
Equal Employment Opportunity Commission	800/669-4000

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.



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THE AMERICAN'S WITH DISABILITIES ACT & THE MICHIGAN HANDICAPPER'S CIVIL RIGHTS ACT EMPLOYMENT ISSUES SELF-ASSESSMENT

Michigan employers, regardless of size, have a legal responsibility to conduct employment practices in compliance with Title I of the Americans with Disabilities Act (ADA) as well as the Michigan Handicapper's Civil Rights Act (HCRA). In addition, public employers may have additional requirements to meet under state legislation. It is, therefore, important for every employer to review the provisions of both the ADA and the HCRA to assure that they are in compliance with both laws. The following checklist will help you to identify the major provisions of both laws.

Does Your Organization:

1. Have adequate knowledge of the ADA and HRCA?

Yes No →

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- Do you understand and know the differences between the ADA and HRCA?
- Do you know if you are covered by the ADA or HRCA, or both?
- Have you had competent legal counsel or another expert review your employment practices to assure compliance with both laws?
- Do you rely on an attorney or other knowledgeable person when making major employment decisions or changes to employment practices or policies?

2. Openly communicate its commitment to the ADA and the HRCA?

Yes No →

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You should:

- Include an anti-discrimination statement in all communications.
- Display the combined EEO and the HCRA posters at worksites in locations where employees congregate and at all sites at which individuals may apply for employment.

3. Review employment documents and practices to eliminate discrimination?

Yes No →

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You should review:

- Employment applications
- Interview questions
- Testing and screening devices
- Promotional criteria and opportunities
- Personnel files
- Employment decision-making process
- Employment policies and procedures
- Training opportunities and requirements
- Job descriptions
- Return to work policies

4. Take action to avoid claims of discrimination?

Yes No →

<p>Have you:</p> <ul style="list-style-type: none">▪ Identified essential functions of every job?▪ Trained supervisory personnel on provisions of the ADA and HRCA? <p>Do you:</p> <ul style="list-style-type: none">▪ Openly enforce your organization's policies against discrimination and harassment?▪ Seek to accommodate rather than claim undue hardship?
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Conclusions



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



If you are unable to answer “yes” to any one or more of the four questions, your organization may have an exposure to claims from prospective and current employees resulting from your organization's failure to comply with the ADA and HRCA. Missing components of one or more of the four 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 and a specialist in ADA and HRCA for advice;**
- **Contact MML Risk Management Services at (800) 653-2483; or**
- **Contact the League's Loss Control Services at (800) 482-2726;**
- **Contact the Equal Employment Opportunity Commission at (800) 669-4000;**
- **Contact the Michigan Department of Civil Rights at (313) 456-3700.**

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.