
RISK CONTROL SOLUTIONS

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

HIRING DECISIONS REDUCING YOUR EXPOSURE TO LITIGATION

OVERVIEW

Today, news stories about people receiving high dollar settlements as a result of employment related discrimination claims are not uncommon. Frequently when these individuals claim discrimination, they feel employers have violated a state or federal statute concerning hiring and related employment practices. Even when such claims do not result in a settlement, they cost the employer in legal fees and other expenses. These cases point out how important it is to comply with employment laws.



Compliance with state and federal laws serves two basic purposes. First, employers who comply are more likely to be fair and provide equal opportunity to all. Second, compliance with laws provides protection for the community and its employees. Many statutes require government officials to adhere to higher standards than employers in the private sector. Both the public and the courts scrutinize governmental agencies more closely than private sector business. Today, the public is more politically aware and will frequently criticize the actions and decisions that public employees make.

REDUCING YOUR EXPOSURE

Reducing the risk of liability is important in every area of employment. However, the hiring process -- including recruiting and interviewing -- presents many pitfalls. To avoid violating federal and state laws regarding this area of employment, we recommend the following practices. While there is no guarantee that following them will eliminate your liability, it will greatly reduce your exposure.

Create an employment application that reduces your exposure to claims of discrimination:

- Avoid using pre-printed forms unless they are specifically designed for use in Michigan. Have a human resource professional or an attorney review the form before implementing its use.
- Do not ask questions that applicants might interpret as subject them to discrimination. Areas to avoid are: race, gender, national origin, age, religion, marital status, height, weight, disabilities, arrest records (unless for law enforcement), worker's compensation or other areas protected by state or federal law. The best guideline is the Michigan Department of Civil Rights Pre-Employment Inquiry Guide. Contact your local Civil Rights office or go to www.michigan.gov/mdcr, under Publications.
- Avoid questions that do not directly address a candidate's ability to perform the job for which the person is being considered.
- Clearly ask applicants to provide information about previous employment and the reason for leaving. Ask the candidate to sign a statement of truthfulness, an At-Will disclaimer if relevant, and a release of information.

- Be careful about any inquiry concerning an applicant's disability. You may ask "Can you perform the essential functions of the job with or without accommodation?" For further guidance in this area, look at the various resources available from the Equal Employment Opportunity (EEO) on the *Americans with Disabilities Act*.
- DO NOT query the web or look to Social Media sights for information about the subject until a signed release is obtained at the interview or background investigation stage.

Create an interviewing and decision making process that is fair and objective:

- Develop a written interview plan that details each step of the selection process. Communicate the plan to all employees who interview and hire. Make sure everyone follows the plan.
- Develop-job related questions that allow you to measure the candidate's ability to perform the essential functions of the job. Do not ask questions about medical history or worker's compensation claims.
- Ask the same questions of all candidates for the same position.
- Provide all interviewers with training, emphasizing what types of inquiries are unlawful. Make sure they know the requirements of the job for which they are conducting interviews.
- Treat all candidates exactly the same, regardless of their qualifications or their relationship to members of your community.
- Evaluate the candidate's responses to your questions by keeping job related notes and using a rating system that objectively measures responses.
- Conduct the interview professionally. Show respect for all candidates: Be sincere and objective, and listen to what the candidate has to say. Do not make hasty judgments.
- Do not make promises you cannot keep such as guarantees about the length of employment.
- Apply the suggestions in the job application section to the interview process. The interview is a part of the pre-employment hiring process.
- **Extend a lawful job offer to the candidate once you have made the hiring decision:**
- Make the job offer contingent on the outcome of a medical/psychological exam and background investigation, if they are required.
- Require medical standards that are directly related to the job.
- The background investigation should only encompass areas that are job related.
- Require all employees to complete the U.S. Department of Justice, Immigration form (I-9)
- Provide reasonable accommodation if the candidate requests it. Be able to prove undue hardship if you deny the request.
- Keep all medically related information confidential and in a location separate from personnel files. Human Resources should control medically related information and should release it only when someone requests it specifically for business related reasons. These cases will be rare. Legal counsel should review any request for medical information before Human Resources releases it.

Note: In most cases, the law does not consider drug tests to be medical examinations.

- Conduct a thorough orientation process that documents the employee's receipt of all policies, procedures and safety practices.

Review all employment practices with an attorney who is familiar with state and federal laws. Be aware of other areas that you should consider to avoid pre-employment discrimination:

- Establish policies and procedures that comply with the requirements of the Equal Employment Opportunity Commission (EEOC), the Americans with Disability Act (ADA) and the Family and Medical Leave Act (FMLA).

- Audit any testing device for job- relatedness and discrimination.
- Post all notices from the EEOC and the Michigan Department of Civil Rights.
- Have up-to-date and accurate job descriptions.
- Prove all job requirements by conducting a job analysis.
- Make sure that your recruitment and advertisement processes are non-discriminatory.
- Provide access to employment equally to all individuals.
- Conduct thorough but job related background and reference checks.

Implementing lawful employment practices is not an easy or quick process. You must spend significant time and effort to do it the right way. However, reducing the risk of exposure to litigation certainly out-weighs the effort. It is an excellent idea to obtain the assistance of other agencies to assist you. These include federal, state, and private organizations that provide services for a fee. We encourage you to review your current employment practices and then talk to your legal counsel to determine if you have an increased exposure.

LAWS THAT AFFECT GOVERNMENTAL AGENCIES IN MICHIGAN:

The Civil Rights Act of 1964 & 1991 prohibits discrimination on the basis of sex, race, color, national origin or religion. Title VII also holds employers and supervisors responsible for preventing sexual harassment.

The Pregnancy Discrimination Act prohibits discrimination on the basis of pregnancy.

The Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against individuals over the age of 40.

The Equal Pay Act (EPA) makes it unlawful to pay employees of different sexes differently for equal work on jobs requiring equal skill, effort and responsibility.

The Michigan Elliott-Larsen Civil Rights Act provides additional coverage above and beyond the federal laws. Michigan also prohibits employers from discriminating on the basis of marital status, height, weight, or age, not limited to 40 years or over.

The Federal Americans with Disability Act (ADA) and the *Michigan Handicappers' Civil Rights Act (MCRA)* both prohibit discrimination on the basis of handicap or disability. Both statutes limit the type of inquiries that employers can make concerning an employee's physical or mental condition. They also require employers to make reasonable accommodations.

If you need more help with hiring practices or other employment related areas, contact MML Risk Management Services or the League's Loss Control Services.



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/ |

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.



michigan municipal league

Liability & Property Pool Workers' Compensation Fund

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Hiring Decisions Self-Assessment

Employers run the risk of being sued every time they interview and select candidates. Public agencies cannot afford to make mistakes in the hiring decision process. A serious mistake may result in costly litigation expenses. In addition, hiring the wrong person may also create hidden costs. It is, therefore, important that your organization review its hiring and decision making process.

| DOES YOUR ORGANIZATION: | YES | NO |
|--|--------------------------|--------------------------|
| 1. Have a documented recruitment plan? | <input type="checkbox"/> | <input type="checkbox"/> |
| Does the plan | | |
| • Identify nondiscriminatory recruitment sources? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Ensure that employees who accept and handle applications are aware of discrimination laws? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Accept and objectively consider all applications for employment? | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Have an application form that meets state and federal guidelines? | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Has a Human Resource professional reviewed the application form? | <input type="checkbox"/> | <input type="checkbox"/> |
| Does the form | | |
| • Avoid questions that prohibited by the Department of Civil Right Pre-Employment Inquiry Guide? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Include statements of truthfulness and a release of information? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Include an At-Will disclaimer if appropriate? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Avoid inquiries about medical information and worker's compensation? | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Have a formal interviewing and decision making process? | <input type="checkbox"/> | <input type="checkbox"/> |
| Does the process include requirements for: | | |
| • A written interview plan? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Job related and behavioral interview questions that are prepared before the interview? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Treating all candidates the same, especially in regard to the questions interviewers ask all candidates for the same position? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Training all interviewers to avoid discriminatory practices? | <input type="checkbox"/> | <input type="checkbox"/> |
| • An objective decision making process that measures only skills needed to perform the job? | <input type="checkbox"/> | <input type="checkbox"/> |

| | YES | NO |
|--|--------------------------|--------------------------|
| 5. Extend a formal job offer? | | |
| • Is it contingent on the outcome of medical/ psychological examination and background investigation, if required? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Are medical examinations job related? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Is medical information kept confidential and separate from personnel files? | <input type="checkbox"/> | <input type="checkbox"/> |

DOES YOUR ORGANIZATION:

| | | |
|--|--------------------------|--------------------------|
| 6. Conduct a thorough new employee orientation/training process? | <input type="checkbox"/> | <input type="checkbox"/> |
| 7. Have an attorney review your organization's hiring and orientation process? | <input type="checkbox"/> | <input type="checkbox"/> |
| 8. Have and properly post EEO and ADA policies? | <input type="checkbox"/> | <input type="checkbox"/> |
| 9. Have testing devices that are valid and job related? | <input type="checkbox"/> | <input type="checkbox"/> |
| 10. Have a policy regulating the use of the Internet and Social Media in hiring? | <input type="checkbox"/> | <input type="checkbox"/> |
| 11. Conduct thorough background investigations? | <input type="checkbox"/> | <input type="checkbox"/> |

Conclusions



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



If you were unable to answer "yes" to one or more of the ten critical questions, your organization may have a greater exposure to discrimination claims. 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;



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