

LAWS THAT AFFECT EMPLOYMENT

INTRODUCTION

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 brief 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 LAWS

The Civil Rights Act of 1868

Enacted during the Reconstruction era, this law was largely ignored until 1968 when the United States Supreme Court declared it valid. Section 1981 of the act establishes "Equal Rights Under the Law" for all persons, including the "same right to make and enforce contracts." Subsequent Supreme Court rulings have held that Section 1981 prohibits racial discrimination in employment, including discrimination against people of Arabic and Hispanic descent. Section 1981 applies to all employers, regardless of size, and allows money damages.

The Civil Rights Act of 1964 Title VII; Civil Rights Act of 1991, codified as 42 U.S.C.A. 2000-e, et seq.

These laws prohibit employers with 15 or more employees from discriminating against individuals because of their race, color, religion, sex, or national origin. Employers that discharge or otherwise discriminate against an employee based on one of these characteristics have engaged in illegal discrimination.

- Title VII applies to every aspect of employment from the initial job posting to promotions and training.
- 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."
- With the passage of the Civil Rights Act of 1991, monetary damages are available for intentional 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. Employees have established a violation by showing that a specific employment requirement, for example a minimum weight of 165 pounds, denies employment opportunities to a disproportionately high number of women.
- 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 claims. The court may remedy violations by ordering reinstatement, with or without back pay, and may grant any other equitable relief it feels is appropriate.
- 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. Employers that have an affirmative action plan or wish to establish one should confer with their employment attorney, the EEOC, and the Michigan Department of Civil Rights.

The Pregnancy Discrimination Act specifically prohibits employers from discriminating against women based upon the fact that they are pregnant. This includes discrimination in recruitment, hiring, promotion, discipline, discharge and training.

The Equal Pay Act of 1963 It prohibits employers and unions from compensating workers within the same establishment at a different pay rate based on the employee's sex. It provides that workers who perform equal work in jobs calling for the same skill, effort, and 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 40 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 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 60 for pilots is a BFOQ because of concerns about safety.

- An employer can defend against ADEA suits by showing they dismissed the employee for reasons unrelated to age. However, if 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 employee assets placed in retirement plans during the person's employment. It is unlawful to discharge, fine, suspend, expel, discipline, or discriminate against a plan participant or beneficiary for exercising any right to which they are entitled under the 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 either 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. However, the act also provides sanctions for knowingly hiring, recruiting, or referring for a fee a person who is not legally authorized to work, including aliens who are not legally entitled to work or who are not lawfully admitted for permanent residence in the United States.

- The act 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 in any amount 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.

While certain states have legalized the medicinal and/or recreational possession and use of marijuana, the Drug-Free Workplace Act still requires affected employers to maintain a drug-free workplace program.

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) of 1990 provides that employers may not discriminate against individuals with disabilities who have the qualifications to perform the essential functions of the job, with or without reasonable accommodation. The ADA applies to all stages of the employment process, from recruitment to termination. For more information regarding the ADA, see the *Risk Control Solution* entitled ["Disability Protections in Employment."](#)

The Family and Medical Leave Act (1993) requires all public 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. Leave must be granted for qualifying exigencies arising out of the employee's spouse, son, daughter, or parent on active duty or being called 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.

The Personal Responsibility and Work Opportunity Act of 1996 (Welfare Reform) was established as a means of helping enforce payment of child support by non-custodial parents. It requires organizations to report, for every newly hired employee, their name, address and social security number (the information required on an IRS 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 of 1996 (HIPAA)

- 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. The act's portability provisions also limit the length of any preexisting condition exclusions an employer may impose.
- HIPAA also addresses medical savings accounts and COBRA, which allows eligible workers and their families to temporarily continue their employer-sponsored group health, dental, and vision coverage after a qualifying event that would otherwise cause their benefits to end.
- The act also establishes strict requirements for "covered entities" to protect a person's privacy rights and right to control how their health information is used.
 - Employers must 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.
 - 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 information found during investigations.

Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits discrimination by health insurers and employers based on any individual's "genetic information," which includes the results of genetic tests to determine whether someone is at increased risk of acquiring a condition in the future, as well as their family's medical history.

- 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.
- 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 their 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.

The 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 are not discriminated against in employment decisions. 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.

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 federal FLSA does not apply.
- Courts may sometimes require employers to garnish employee wages and to direct funds to a prescribed destination. However, the federal Consumer Credit Protection Act and state guidelines regulate and limit wages that are subject to garnishment. Laws also protect the affected employee's right to privacy.

The Bankruptcy Act provides that 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.

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, employers should:

- consider carefully before checking credit history unless the position requires financial responsibility or the handling of large sums of money;
- inform potential employees that their credit will be checked and must obtain their written permission before doing so;
- inform candidates if they were denied employment based on factors in a credit report. In such circumstances, the law also requires the employer to provide the candidate with the name of the credit agency that issued the report and to give the candidate an opportunity to discuss any problems in the report with the employer;
- if an adverse action is to be taken against an employee based on factors in a standard employment-related, authorized background investigation credit report, the law requires the employer to provide a Pre-Adverse Action Disclosure. Additionally, 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;
- however, if an 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.

Employers are encouraged to consult an HR professional or legal counsel when dealing with employment issues regarding background, internal misconduct, and/or criminal investigations.

STATE OF MICHIGAN LAWS

The Persons with Disabilities Civil Rights Act of 1976 provides that employers may not discriminate against a person based on their disability or genetic information if the person 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 qualifying disabilities. In addition, the act prohibits an employer from directly or indirectly acquiring or having access to any genetic information concerning an employee or applicant for employment, or a member of the employee's or applicant's family.

The Michigan Occupational Safety and Health Act (MIOSHA) establishes that employers must protect their employees by providing a safe workplace. The act also prohibits employers from discharging employees for filing or intending to file a complaint about unsafe working conditions.

The Elliot-Larsen Civil Rights Act prohibits discrimination in employment based on an individual's race, age, color, religion, national origin, sex, sexual orientation, gender identity or expression, height, weight, familial status, or marital status. Unlike the federal law, which limits age-based discrimination protections

to people 40 and over, Michigan's prohibition against age-based discrimination applies to all people of all ages.

The Payment of Wages and Fringe Benefits Act of 1978 is enforced by the Michigan Department of Labor. 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 two or more employees 16 years of age or older. These employers are not covered by the federal FLSA. The Minimum Wage Law 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. For the purposes of this act, "minors" are individuals under the age of 18 unless they have graduated from high school or have passed the GED.

- The 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, even for summer employment.
- 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 if injured.
- 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 Bullard-Plawecki Employee Right to Know Act regulates issues affecting an employee's right to privacy. Employee privacy should be a topic of concern for employers. Federal laws such as the ADA, HIPAA, GINA and FMLA also protect the privacy rights of employees. The state 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.

- 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 multiple laws 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.

The Veterans Preference Act in 1897 (MCLA 35.401 et seq) 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 act requires an employer to reemploy the employee without any exceptions. It also establishes criminal and civil penalties for violations of the act.

OTHER REQUIREMENTS

Recordkeeping

It is recommended that municipalities and organizations adopt the appropriate record retention and disposal schedules established by the state Department of Technology, Management & Budget (see online location in Resources below).

Before discarding any records, always consult with your attorney.

INFORMATION RESOURCES

MI Department of Civil Rights
<https://www.michigan.gov/mdcr>

MI Department of Labor and Economic Opportunity
<https://www.michigan.gov/leo>

MI Department of Labor and Economic Opportunity – Employer Resources
<https://www.michigan.gov/leo/bureaus-agencies/wd/resources-for-businesses>

MI Department of Labor and Economic Opportunity – Labor Division
Email: woodburyb@michigan.gov

U.S. Equal Employment Opportunity Commission
<https://www.eeoc.gov/>

MI Record Retention Schedules
<https://www.michigan.gov/dtmb/services/recordsmanagement/schedules>

MML Risk Control Solutions
<https://mml.org/programs-services/risk-management/risk-management-resources/risk-control-solutions/>

***Contact MML Risk Management Services Staff
or your Loss Control Consultant for more information.***



Important Phone Numbers

MML Risk Management Services	800.653.2483
Loss Control Services	800.482.2726
MI Department of Civil Rights	313.456.3700
MI Department of Labor and Economic Opportunity	517.335.9700
Equal Employment Opportunity Commission	800.669.4000

Note:

***This document is not intended to be legal advice.
It only identifies some of the issues surrounding this topic.
Public agencies are encouraged to review their procedures with an expert
or a competent attorney who is knowledgeable about the subject.***

LAWS THAT AFFECT EMPLOYMENT

Organizations should review their employment practices to assure compliance with applicable state and federal laws during all phases of employment. Costs related to violation of these laws can range from a range of monetary fines to substantial punitive damages determined by juries. Aside from avoiding liability exposures, employers should also comply with laws because they make good business sense.

This self-assessment guide presents key elements of related laws, regulations, and standards. Evaluate your operations against best practices by asking the questions below. A response of "No" to any question indicates an area that may require further evaluation and an action plan for improvement or correction.

Organization Name			Completed by	Date
Yes	No	n/a	Does Your Organization:	
		1.	Confirm the validity, job-relatedness, and necessity of all employment requirements, such as minimum hiring prerequisites and screening measures?	
		2.	Treat all candidates for employment equally and without regard to race, color, religion, sex, age, sexual orientation, gender identity, height, weight, or national origin?	
		3.	Comply with the federal Americans with Disabilities Act and the Michigan Persons with Disabilities Civil Rights Act by:	
			considering all requests for accommodations?	
			providing reasonable accommodations?	
			documenting essential job functions for each position?	
			not asking job candidates questions about disabilities, medical conditions or history?	
		4.	Comply with the federal FMLA by:	
			providing family and medical leave time as well as health care benefits for qualified employees?	
			follow a written FMLA policy consistently?	
		5.	Comply with the Fair Labor Standards Act and the Michigan Minimum Wage Law by:	
			reviewing number of hours worked?	
			reviewing exempt versus nonexempt status?	
		6.	Placing in personnel files only that information which is permitted under the Bullard-Plawecki Employee Right to Know Act and other state and federal laws?	
		7.	When hiring minors, meet the state or federal child law requirements and require work permits when applicable?	
		8.	Review any Affirmative Action Programs with an attorney, the EEOC, and the Michigan Department of Civil Rights?	
		9.	Verify that employees who perform jobs which are equal in required skills, effort, responsibility, and performed under similar working conditions are compensated with the same pay regardless of their gender?	
		10.	Comply with the Immigration Reform and Control Act by requiring all new employees to complete the I-9 form and produce a required document for verification of employment eligibility status?	
		11.	Communicate retirement benefits to employees in compliance with the Employment Retirement Security Act?	

Yes	No	n/a	Does Your Organization:
		12.	Establish and communicate a written safety and health policy in compliance with the Michigan Occupational Safety and Health Act?
		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?
		14.	Keep information about employees confidential and accessible only to internal individuals who have a legitimate business reason to access and review the information?
		15.	Retain a competent attorney when dealing with labor organizations?
		16.	Have policies and procedures in place to handle requests for information about employees, including the following:
			have a specific written policy that governs the release of information to external individuals?
			have a policy that complies with the Bullard-Plawecki Employee Right to Know Act as well as the Freedom of Information Act?
			require documentation of a signed employee release in order to release employee information?
			ensure that information regarding employees is accurate and factual?
			ensure that supervisory employees understand and follow the release of information policy?
		17.	Post all required federal notices including the following:
			Fair Labor Standard Act – Minimum Wage
			Employee Polygraph Protection Act
			Family and Medical Leave Act
			Combined Equal Opportunity
			Occupational Health and Safety Act
		18.	Post all required state notices including the following:
			Whistleblower's Protection Act
			Michigan Wage and Hour – Minimum Wage
			Michigan Persons with Disabilities Civil Rights Act
			Michigan Occupational Health and Safety
			Unemployment Insurance
			Child Labor Law
			MSDS/ Right-to-Know

CONCLUSIONS



If you can honestly answer “yes” to all applicable questions, your compliance with state and federal laws affecting employment is on solid footing – congratulations! Following the recommended practices reduces your organization’s exposure to future claims in this area. Remain vigilant for new or changing risks and address them promptly.



If you answered “no” to one or more questions, your organization faces increased exposure to employment practices claims and the associated direct and indirect costs. Each “no” response indicates a possible deficiency in your risk management program. You should consider these carefully and take one or more of the actions below:

- Correct any deficiency that may exist;
- Contact your HR professional or your attorney;
- Contact MML Risk Management Services at the number below;
- Contact MML Loss Control Services at the number below;

***Contact MML Risk Management Services Staff
or your Loss Control Consultant for more information.***



Important Phone Numbers

MML Risk Management Services	800.653.2483
Loss Control Services	800.482.2726
MI Department of Civil Rights	313.456.3700
MI Department of Labor and Economic Opportunity	517.335.9700
Equal Employment Opportunity Commission	800.669.4000

Note:

***This document is not intended to be legal advice.
It only identifies some of the issues surrounding this topic.
Public agencies are encouraged to review their procedures with an expert
or a competent attorney who is knowledgeable about the subject.***