Section 3: Operations
Chapter 11: Employment and Personnel

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

1. Pre-Employment Inquiries
2. Personnel Records
3. Disability Accommodations and Discrimination
4. Pregnant Workers Fairness Act (PWFA)
5. Workplace Violence
6. Harassment
7. Fair Labor Standards Act (FLSA)
8. Independent Contractors
9. Family Medical Leave Act (FMLA)
10. Employment Posters
11. Employee Documentation
12. Whistleblowers' Protection Act (WPA)
13. Retaliation
14. Paid Medical Leave Act (PMLA)

Pre-Employment Inquiries
While most employment disputes involve current or former employees, a municipality must be aware of issues related to applicants as well. Employers should familiarize themselves with the guidelines and procedures pertaining to the following issues, as they apply to both pre-employment interviews and information requested on an application form:

- Protected classification
- Disabilities and medical history
- Accommodating applicants
- Arrest and conviction records
- Physical and medical examinations
- Drug testing
- Background checks

Personnel Records
Under the Bullard-Plawecki Employee Right to Know Act, employers are required to allow former and active employees to review and obtain a copy of his or her personnel records upon written request and at reasonable intervals. The Act applies to employers with four or more employees, including the state and its agencies. Generally, an employee's review is limited to no more than two times in a calendar 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.

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 be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, and/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.

Any medical-related information pertaining to an employee must be kept confidential and apart from the location of an employee's personnel records.

Under MCL § 423.501(2)(c), personnel records do not include:

- Employee references supplied to an employer if the identity of the person making the reference would be disclosed;
- 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;
- Medical reports and records made or obtained by the employer if the records or reports are available to the employee from the doctor or medical facility involved;
- 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;
- Information that is kept separately from other records and relates to a criminal investigation pursuant to section 9 of the Act;
- Records limited to grievance investigations which are kept separately and are not used for the purposes provided in the Act;
- Records maintained by an educational institute which are directly related to a student; and
- 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. However, a record concerning an occurrence or fact about an employee kept by one of the aforementioned individuals may be entered into a personnel record if entered not more than six months after the date of the occurrence or the date the fact first becomes known.

Disability Discrimination and Accommodation

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.

The ADA applies to all employers with 15 or more employees, including local governments. However, employers with 15 or fewer employees should be familiar with the PWDCRA, as it applies to Michigan employers with one or more employees and has different requirements for accommodating employees than the ADA. Nevertheless, reasonable accommodation is a key requirement of both 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.

Pregnant Workers Fairness Act (PWFA)
The PWFA applies to all employers, including local governments, that have 15 or more employees. The PWFA requires covered employers to provide reasonable accommodation for qualified applicants or employees who have known limitations related to or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship. Employers generally should engage in an interactive process with the employee or applicant to identify an appropriate reasonable accommodation. Accommodations may be required for employees who are temporarily unable to perform an essential function in certain circumstances.

Workplace Violence
Workplace violence continues to be a significant issue for employers. Violence in the workplace obviously affects employee safety, well-being, and productivity. Importantly, the Michigan Supreme Court has held that an employer may face liability for an employee's criminal acts under the doctrine of *respondeat superior*, if the employer "had (1) actual or constructive knowledge or prior similar conduct and (2) actual or constructive knowledge of the employee's propensity to act in accordance with that conduct." *Hamed v. Wayne County*, 490 Mich. 1, 12 (2011). At focus in this evaluation is whether the employee's conduct was foreseeable to the employer. In addition, courts have recognized claims against employers based upon negligent hiring, supervision, and retention of employees. Also, the General Duty Clause under Section 5(a)(1) of the federal Occupational Safety and Health Act of 1970 (OSHA) has been interpreted to cover incidents of workplace violence. Specifically, under the General Duty Clause, employers must provide their employees with a place of employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

Harassment
Employees have a right to work in an environment free from unlawful harassment in the workplace including sexual harassment and harassment or discrimination based on race (including hair texture and protective hair styles), religion, color, sex, (including pregnancy and conditions related to pregnancy), national origin, ancestry, citizenship status, military status, marital status, age, disability, genetic information, sexual orientation, transgender status, height, weight, or other protected classes established through state or federal law or by local ordinance.

Prevention is the best tool employers have to eliminate harassment in the workplace. Employers can do this by establishing an effective complaint or grievance process, providing anti-harassment training to their managers and employees, and taking immediate and appropriate action when an employee complains. Additional information on harassment can be found at www.eeoc.gov.

Fair Labor Standards Act (FLSA)
The Fair Labor Standards Act establishes the minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments. Special rules may also apply to state and local government employment involving fire protection and law enforcement activities, volunteer services, and compensatory time off in lieu of overtime pay. More information

on the Fair Labor Standards Act can be found at www.dol.gov.

Notably, Michigan law also states that employers may not require employees to refrain from disclosing or discussing their wages.

Exempt or Non-Exempt
An employer must classify each employee as either exempt or non-exempt according to the FLSA. Non-exempt positions are legally entitled, whereas exempt positions are not. To determine if an employee is exempt, the employee's actual duties must meet the duties and salary test of the FLSA.

Overtime Considerations
Both the federal Fair Labor Standards Act and a similar Michigan statute require that overtime be paid at 1.5 times a non-exempt 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.

In a 2025 opinion letter involving a municipal employer, the Department of Labor (DOL) clarified that certain "emergency pay" predetermined under municipal policy and tied to designated emergency work conditions does not qualify as a discretionary bonus and must be included in the regular rate when calculating overtime. Whether compensation must be included in the regular rate depends on the circumstances and applicable statutory exclusions.

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.

Law enforcement, emergency responders, firefighters, and seasonal employees may accrue a maximum of 480 hours of comp time. All other public employees may accrue a maximum of 240 hours. Once the maximums are reached, the employee must be paid overtime.

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 unless doing so would "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.

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 1.5 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. For example, police and fire employees with a seven-day work period must be paid overtime after 53 and 43 hours of work, respectively. An employer can agree by union contract, or otherwise, to pay overtime for fewer hours worked. The FLSA also provides an overtime exemption for law enforcement or fire protection employees of a public agency that employs fewer than five employees during the workweek in law enforcement or fire protection activities.

Independent Contractors
There are a number of benefits to utilizing the services of an independent contractor to perform functions for your municipality. The FLSA's protections do not apply to independent contractors. 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 completing the work assignment.

Whether a worker is an employee or independent contractor under the FLSA depends on the economic realities of the working relationship. The ultimate inquiry is whether the worker is economically dependent on the employer for work or is instead in business for themselves. The worker's title or designation, receipt of a Form 1099, or an agreement identifying the worker as an independent contractor does not, standing alone, determine the worker's status.

Under the DOL's 2024 regulations, the economic realities analysis considers the totality of the circumstances, including: (1) the worker's opportunity for profit or loss depending on managerial skill; (2) investments by the worker and the potential employer; (3) the degree of permanence of the work relationship; (4) the nature and degree of control the employer has over the worker; (5) the extent to which the work performed is an integral part of the potential employer's business; and (6) the worker's skill and initiative.

No single factor or subset of factors is determinative, and additional factors may be relevant if they bear on whether

the worker is in business for themselves or economically dependent on the employer for work.

Employers should be aware that the DOL is currently reconsidering its independent contractor standard. Since May 1, 2025, the Wage and Hour Division has not applied the 2024 Rule's analysis in its FLSA investigations and instead has relied on longstanding economic realities principles reflected in earlier Department guidance. However, until further action is taken, the 2024 Rule remains in effect for purposes of private litigation.

Proposed 2026 Rule
In February 2026, DOL issued a proposed rule that would rescind and replace the 2024 independent contractor rule. The proposed rule would retain the economic reality inquiry but identify two "core" factors: (1) the nature and degree of control of the employer over the work and (2) the worker's opportunity for profit and loss based on initiative and/or investment. Three additional factors would be considered: the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the potential employer, and whether the work is part of an integrated unit of production.

The proposed rule also provides that the parties' actual practices are more relevant than what may be contractually or theoretically possible.

Different standards may apply when determining worker status under other federal or state laws. As such, classification under one law does not necessarily determine a worker's status under another.

IRS Common Law Test
The Internal Revenue Service provides common law rules that help an employer determine the degree of control and independence of a possible independent contractor. These include:

1. Behavioral: Does the employer control or have the right to control what the worker does and how the worker does the job?
2. Financial: Are the business aspect of the worker's job controlled by the payer? These include things like how the worker is paid, whether expenses are reimbursed, who provides the tools, equipment, and supplies, etc.
3. Relationship Type: Are there any written contracts or employee-type benefits? Will the relationship continue and is the work performed a key aspect of the business?

Family and Medical Leave Act (FMLA)
The Family Medical Leave Act of 1993, 29 U.S.C. §2601 et seq., entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. Eligible employees who work for a covered employer are entitled to:

- Twelve workweeks of leave in a 12-month period for:
  - the birth of a child and to care for the newborn child within one year of birth;
  - the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
  - to care for the employee's spouse, child, or parent who has a serious health condition;

    - a serious health condition that makes the employee unable to perform the essential functions of his or her job;
    - any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" or
- Twenty-six workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member's spouse, son, daughter, parent, or next of kin (military caregiver leave).

Employers Subject to the FMLA
Currently, a private sector employer must employ 50 or more employees in 20 or more workweeks in the current or preceding calendar year. Public employers, however, are covered without regard to the number of employees employed. 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.

Eligible Employees
Only eligible employees are entitled to FMLA leave. An eligible employee is one who:

- Works for a covered employer (all public employers are "covered employers");
- Has worked for the employer for at least 12 months;
- Has at least 1,250 hours of service for the employer during the 12-month period immediately preceding the leave; and
- Works at a location where the employer has at least 50 employees within 75 miles.

Employment Posters
Both federal and state labor regulations require employers to clearly display labor and employment posters detailing applicable labor laws. These posters should be posted in a conspicuous area available to all employees. Both federal agencies, such as the Department of Labor, and state agencies have these posters available at no cost and several vendors also provide applicable posters as updates occur for a small annual fee.

Employee Documentation
Too often employers cannot establish the appropriateness of an adverse employment action due to a lack of documentation. Having fair, accurate, and non-biased documentation of employee behavior and performance can establish that the adverse action wasn't related to discrimination based on race, color, sex, age, religion, national origin, marital or veteran status, height, weight, disability, or other protected classes established through state or federal law or by local ordinance. Without documentation, it may become difficult for the employer to defend its actions against an employee.

Whistleblowers' Protection Act (WPA)
Michigan's Whistleblowers' Protection Act prohibits employers from discharging, threatening, or otherwise discriminating against an employee as to their compensation, terms, conditions, location, or privileges because the employee reports or is about to report to a public body—verbally or in writing—a violation or a suspected violation of a law, regulation, or rule. See MCL § 15.262. To demonstrate a violation of the WPA, a plaintiff must show that (1) he or she was engaged in a protected activity as defined by the WPA, (2) that he or she was discharged, and (3) that there is a causal connection between the protected activity and his or her discharge. If a plaintiff is able to establish those elements, courts will then turn to a burden-shifting analysis. Under that analysis, the burden will shift to the employer to articulate a legitimate business reason for the plaintiff's discharge. Thereafter, the plaintiff will have the opportunity to rebut with any evidence that the employer's proffered legitimate business reason was mere pretext for retaliating against the plaintiff's protected activity.

Retaliation
Retaliation against employees who pursue their legal rights and/or engage in protected activities is prohibited by most employment laws, including, but not limited to the FMLA, FLSA, WPA, PWFA, ESTA, ELCRA, and the Michigan's Workers' Compensation Act (WCA), and the Michigan Occupational Safety and Health Act (MIOSHA). At the crux of each of these assessments is whether the plaintiff can provide sufficient evidence to substantiate his or her claims of unlawful retaliation.

Earned Sick Time Act (ESTA)
Michigan's Earned Sick Time Act requires employers, except the federal government, that have one or more employees to provide eligible employees with earned sick time. See MCL § 408.963. Employees accrue one hour of paid sick leave for every 30 hours worked. An employer may use an accrual method or may frontload the required amount of earned sick time. A "small business," generally an employer with 10 or fewer employees, may limit an employee's use of earned sick time to 40 hours per year. Other employers may limit an employee's use of sick time to 72 hours per year. An employer may also use both methods for different classifications of employees. Employers using the accrual method must allow employees to carry over unused earned sick time from year to year, although annual use may remain subject to the applicable limits. Employers that frontload earned sick time are not required to permit carryover of unused earned sick time.

Earned sick time may be used for the employee's or family member's mental or physical illness, injury or health condition; medical diagnosis, care, treatment, or preventative medical care; if the employee or a covered family member is a victim of domestic violence or sexual assault; meetings at a child's school or place of care related to the child's heath, disability, or the effects of sexual assault or domestic violence on the child; or a public health emergency, including exposure to a communicable disease. An employer may not require an employee to search for or secure a replacement worker before using earned sick time. An employer may require newly hired employees to wait 120 days before using earned sick time.

If the need for earned sick time is foreseeable, an employer may require up to 7 days' advance notice. For unforeseeable leave, an employer may require notice as soon as practicable or in accordance with a compliant written notice policy. For absences that are more than 3 consecutive days, an employer may require reasonable documentation supporting the use of sick time but may not delay the commencement of leave while awaiting documentation. Earned sick time is protected and may not be treated as an absence that leads to a retaliatory personnel action.

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