

HALE, STEIN, MURPHY, HALE  
& ASSOCIATES, P.C.

A PROFESSIONAL CORPORATION

ATTORNEYS AND COUNSELORS

KENNETH R. HALE  
ROBERT L. STEIN  
KATHLEEN M. MURPHY  
MICHAEL S. HALE  
HEATHER HALE WILSON

15415 Middlebelt Road  
Livonia, MI 48154  
734-525-2422  
Facsimile 734-525-0612

TROY OFFICE  
101 BIG BEAVER  
TROY, MI 48098  
248-743-4370

[www.halesteinlaw.com](http://www.halesteinlaw.com)

**Laying the Groundwork for a Human Resources Audit**

*For Michigan Employers*

**Hale, Stein, Murphy, Hale & Associates, P.C.**

15415 Middlebelt Road  
Livonia, MI 48154

**Internet:** [www.halesteinlaw.com](http://www.halesteinlaw.com)

**January, 2008**

Copyright 2008

All rights reserved. No part of this publication may be reproduced, sold or distributed in any form or by any means without the express written permission of the Law Offices of Hale, Stein, Murphy, Hale, and Associates, P.C.

*Laying the Groundwork for a Human Resources Audit - for Michigan Employers* was developed for clients of the Law Offices of Hale, Stein, Murphy, Hale & Associates, P.C. It is designed to be used as a tool to help Michigan employers *begin* the process of performing a human resources audit.

Employment laws are extremely complex and are adopted and amended frequently. In addition, judicial opinions that interpret state and federal employment laws often dictate changes in policy or practice. Therefore, while this guide may be useful in helping employers initially launch an HR audit, it is essential the employing organization complete the audit under the guidance of private legal counsel.

The publication is general in nature and is not intended to be legal advice. It should not be used as a sole source of guidance. This publication is intended to help ascertain compliance with major labor and employment laws under Michigan and United States law, and to offer some general recommendations regarding certain employment practices and procedures for employers in the State of Michigan. It is not intended to examine every legal issue an organization may face. Because each organization is unique, not all of the information presented herein may apply to all organizations; likewise, other compliance issues may exist which are not addressed by this document.

Because the information contained herein extends to a broad range of business matters, it also necessitates specific consultation with tax professionals, certified public accountants, and other professionals with whom the employing organization regularly consults.

## **Laying the Groundwork for a Human Resources Audit - For Michigan Employers**

### I. Hiring practices

- A. Equal employment opportunities
- B. Help wanted notices
- C. Position descriptions
- D. Application for employment
- E. Employee interviews
- F. Background checks
  1. Employment references
  2. “Consumer credit reports” – The Fair Credit Reporting Act
  3. Criminal background checks
  4. Driving records
  5. Substance screens
  6. Conditional job offers
- G. Compliance with youth employment laws
- H. Compliance with immigration laws

### II. The employment relationship

- A. “At-will” v. “just cause”
- B. Independent contractor v. employee

### III. Classification of employees

- A. Full time v. part time
- B. Exempt v. nonexempt

### IV. Employment documents

- A. Information maintained in personnel files
- B. Michigan’s Social Security Number Privacy Act
- C. Employee right to review file

### V. Payment of wages

- A. Minimum wage
- B. Overtime pay
- C. Deductions from pay
- D. Breaks and meal periods

### VI. Benefits

- A. Obtain specific consultation to assess compliance with various complex laws:
  - Employee Retirement Income Security Act of 1974 (ERISA)<sup>1</sup>
  - Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)<sup>2</sup>
  - Family and Medical Leave Act of 1993 (FMLA)<sup>3</sup>
  - Health Insurance Portability and Accountability Act (HIPAA)<sup>4</sup>
  - Uniformed Services Employment and Reemployment Rights Act (USERRA)<sup>5</sup>

---

<sup>1</sup> 29 USC 1001 et seq

<sup>2</sup> 29 USC 1161 et seq

<sup>3</sup> 29 USC 2601 et seq

<sup>4</sup> 42 USC 201 et seq

<sup>5</sup> 38 USC 4311

- VII. Internet, electronic mail and voice mail policies
  - A. Important elements of Internet, e-mail and voice mail policies
  
- VIII. Anti-harassment policies
  - A. Has a sound anti-harassment policy been adopted, and is it enforced?
  - B. Important elements of anti-harassment policy
    - Statement that harassment will not be tolerated
    - Definition of harassment (the prohibited conduct)
    - Several avenues to make a complaint
    - Investigation procedures
    - Confidentiality to the extent possible
    - Disciplinary action for substantiated complaints
    - No retaliation policy
  - C. Anti-harassment training
  
- IX. Protections against competition and non-disclosure
  - A. Non-compete agreement
  - B. Confidentiality agreement
  
- X. No solicitation policies
  
- XI. Occupational Safety and Health (OSHA, MIOSHA)
  
- XII. Recordkeeping issues
  - A. Federal mandates
    1. Fair Labor Standards Act
    2. Title VII of the Civil Rights Act of 1963
    3. Family and Medical Leave Act (50 or more employees)
    4. Americans With Disabilities Act (15 or more employees)
    5. Age Discrimination in Employment Act
    6. Immigration Reform and Control Act of 1986 and Immigration Act of 1990
    7. Occupational Health and Safety Act of 1970
  - B. State mandates
    1. Michigan's Bullard-Plawecki Right to Know Act
    2. Michigan's Payment of Wages and Fringe Benefits Act
    3. Michigan's Occupational Health and Safety Act
  
- XIII. Posting requirements
  - A. Obtain specific consultation to assess compliance with federal and state posting requirements:
    - Equal Employment Opportunity is the Law
    - Equal Employment Opportunity Poster – Michigan Law Prohibits Discrimination
    - Fair Labor Standards Act Federal Minimum Wage
    - Job Safety and Health Protection Act
    - Uniformed Services Employment and Reemployment Rights Act
    - Family and Medical Leave Act
    - Federally Financed Construction
    - Notice to Employees Working on Government Contracts
    - Federal Employee Polygraph Protection Act

- Migrant and Seasonal Agricultural Worker Protection Act
- Notice to Workers with Disabilities Paid at Special Minimum Wages
- Michigan Minimum Wage Poster
- Michigan Minimum Wage Rules – General and Overtime Compensation Rules
- Michigan Minimum Wage Rules – Wage Deviation Rules
- New/Revised Material Safety Data Sheet
- Material Safety Data Sheet Location
- Bureau of Employment Standards Overtime Compensation Rules
- Michigan Youth Employment Standards Act
- Michigan Safety and Health Protection on the Job
- Notice to Employees – Michigan Employment Security Act
- Michigan Whistleblowers Protection Act
- Summary of Work-Related Illnesses and Injuries

## Laying the Groundwork for a Human Resources Audit

### I. Hiring practices

#### A. Equal employment opportunities

##### Are employment policies nondiscriminatory?

- In accordance with federal and state law, an employer may not discriminate against an individual because of race, color, religion, sex, national origin,<sup>6</sup> age,<sup>7</sup> citizenship status,<sup>8</sup> disability,<sup>9</sup> height,<sup>10</sup> weight,<sup>11</sup> marital status<sup>12</sup> or veteran status.<sup>13</sup>
- An employer may not refuse or decline to hire an individual that falls into a protected class, and may not adopt procedures which are designed to exclude - or which have a discriminatory impact upon – individuals in these protected groups.
- Similar protections exist for persons with disabilities if the specific disability is unrelated to the individual's ability to perform the duties of a particular job.
- Michigan law prohibits an employer from inquiring about *arrest* records that did not result in conviction, except pending felony arrests prior to dismissal or conviction.<sup>14</sup> Regarding criminal convictions, policies of excluding individuals with criminal convictions, without regard to the number, nature, date of the convictions, and effect on the individual's fitness for a particular position may constitute a violation of civil rights laws.
- Certain exemptions may be obtained where there is a bona fide occupational qualification essential to the normal operation of the business.

#### B. Help wanted notices

##### Are help wanted ads/notices appropriately worded?

- Help wanted ads, signs, notices, etc. may not indicate a preference or restriction based on religion, race, color, national origin, age, sex, height, weight, marital status or arrest record.<sup>15</sup>

---

<sup>6</sup> Title VII of the Civil Rights Act of 1964, 42 USC 2000e-1 et seq, prohibits discrimination in hiring based on race, color, religion, sex or national origin.

<sup>7</sup> Age Discrimination in Employment Act of 1967, 29 USC 621 et seq; Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.

<sup>8</sup> Immigration Reform and Control Act of 1986, 8 USC 1101 et seq.

<sup>9</sup> American with Disabilities Act of 1990, 42 USC 12101 et seq (applies to employers with 15 or more employees), Michigan Persons with Disabilities Civil Rights Act, MCL 3.1101 et seq (applies to all employers).

<sup>10</sup> Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.

<sup>11</sup> Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.

<sup>12</sup> Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.

<sup>13</sup> Uniformed Services Employment and Reemployment Rights Act , 38 USC 4301 et seq.

<sup>14</sup> MCL 37.2205a.

<sup>15</sup> Michigan Elliott-Larsen Civil Rights Act, MCL 37.2205a(1).

- Including an equal employment opportunity statement in the advertisement or notice is recommended and will help encourage a wide range of candidates.
- Certain employers may have a legal obligation to advertise they are an “affirmative action” employer.

### C. Position descriptions

#### Are written job descriptions for each position provided to each applicant?

- Written job-related position descriptions delineate the skills, qualifications, essential functions, duties and responsibilities of each position and to help ensure sound selection procedures and avoid unlawful discrimination.
- Position descriptions should be thorough but some flexibility should be maintained. The description may contain a statement that it is not inclusive of all duties that the Employee will be required to perform. Employer may reserve right to change the responsibilities and duties at its sole discretion.
- Written position descriptions may be utilized by the EEOC as evidence of “essential job functions” when evaluating claims under the Americans with Disabilities Act.
- Position descriptions should be provided to all applicants.
- Upon hire, the job description shall be signed by the Employee to indicate acceptance and knowledge of the responsibilities of the position. The signed job description shall be placed in the Employee’s personnel file at the office with a copy provided to the Employee.

### D. Application for employment

#### Is a sound and lawful application for employment utilized?

- Employers must develop a job application that will elicit adequate, pertinent, job-related information while avoiding unlawful pre-employment inquiries.
- Michigan law specifically prohibits employers from posing certain pre-employment inquiries unless the employer can establish that such inquiries are addressed to a bona fide occupational qualification. ***Some*** of the prohibited inquiries include (list is not exhaustive):<sup>16</sup>
  - ❖ Age or date of birth (employers *may* ask if applicant is 18 or over to determine legal age for employment)
  - ❖ Birthplace

---

<sup>16</sup> A Pre-Employment Inquiry Guide may be obtained through the Michigan Department of Civil Rights, [www.michigan.gov/mdcr](http://www.michigan.gov/mdcr); 1(800) 482-3604.

- ❖ Height
  - ❖ Weight
  - ❖ Sex of applicant
  - ❖ Religion
  - ❖ Marital status
  - ❖ Children
  - ❖ Maiden name
  - ❖ Race or skin color
  - ❖ Physical or mental condition where unrelated to requirements of specific job
  - ❖ Arrest record (employers *may* ask if convicted of a crime or if felony charges pending)
- Employers should avoid inquiries which may bring out information that may have a disparate impact on protected classes of persons.
  - Employers should coordinate the application with the employment termination policy. For instance, at-will employers should include at-will statement in job application.
  - The application should contain an Equal Employment Opportunity Statement.
  - Where drug screens are utilized, include language on application notifying prospective employees of this fact.
  - Application should include statement whereby applicant certifies accurate and complete information.
  - Applications should be kept on file for one year from the date of making of the record or from the date the personnel action is taken, whichever is later.<sup>17</sup>
  - Application should contain a statement whereby the applicant gives permission to verify information, including references, education, criminal records, and information relating to the applicant's credit standing (see section (F)(2) below regarding Fair Credit Reporting). The statement should also include language authorizing former employers, references, and other sources to release the information without notice, and without liability for damages.
  - Application should include language stating that the existence of a criminal conviction does not necessarily preclude employment.

#### **E. Employee interviews**

##### **Are lawful pre-employment inquiries posed during employee interviews?**

- Interview questions should be carefully drafted in order to elicit job-related, non-discriminatory information, and to avoid making unlawful pre-employment inquiries (See Section D above).

---

<sup>17</sup> 29 CFR 1602.14.

- Oral interview questions should be limited to job-related inquiries, should be consistent with written questions, and the same questions should be presented to each applicant.
- Training should be provided for all individuals conducting interviews.
- Interviews should be properly documented.

## **F. Background checks**

### **1. Employment references**

#### **Is there a sound policy regarding the providing of employment references?**

- Caution must be used when providing references for former employees. Where procedures are not sound, they may expose the employer to defamation claims.
- Michigan law provides for a qualified privilege to disclose *documented* information regarding a former employee's *job performance*, provided it is done in good faith.<sup>18</sup>
- Providing general impressions of an individual that are not related to job performance and are not documented in the file may subject the employer to defamation claims.
- Some employers choose to limit reference information to dates of employment and salary.
- Care must be used when divulging disciplinary information. Michigan law prohibits an employer from divulging discipline-related information without written notice by first class mail to the employee's last known address before the information is divulged, unless the employee waived the notice or the disclosure is court ordered.<sup>19</sup> Additionally, under Michigan law, disciplinary reports, reprimands, etc. that are more than four years old must be deleted from an employee's file.<sup>20</sup> Employers should carefully review files to ensure that dated information of this nature is not maintained.
- Only designated individuals should be allowed to provide references. Those individuals should be trained as to proper procedure.
- All reference checks should be appropriately documented.
- Caution must also be used when checking references. Care must be used to avoid unlawful inquiries. All responses should be documented.

---

<sup>18</sup> MCL 423.452.

<sup>19</sup> MCL 423.506.

<sup>20</sup> MCL 423.507.

- Where letters of recommendation are obtained on prospective employees, under Michigan law they must be kept in a separate file.<sup>21</sup>

## 2. “Consumer credit reports” – The Fair Credit Reporting Act

### **If “consumer credit reports” are obtained regarding employees, is the employer in compliance with the Fair Credit Reporting Act?**

- Employers must give written notice that a “consumer credit report” may be used and obtain written authorization before requesting the report.
- “Consumer credit report,” under the FCRA, includes more than just credit reports - driving records and other similar matters fall under this definition, too.
- Employer must give the individual a pre-adverse action disclosure that includes a copy of the report and a copy of *A Summary of Your Rights Under the Fair Credit Reporting Act* (may be obtained from the Federal Trade Commission) before taking adverse action based on a “consumer credit report.”

## 3. Criminal background checks

### **Where criminal background checks are utilized, is the policy sound and nondiscriminatory?**

- Use of *arrest* records to disqualify applicants is unlawful discrimination.<sup>22</sup>
- An employer may inquire about pending felony charges and records of criminal convictions.
- An employer may consider the relationship between a conviction and an applicant’s fitness for a particular job, but criminal convictions should not be an outright disqualification for employment.
- Criminal background information should be maintained separately from the employee’s personnel file.
- Complete checks of criminal records require a release and authorization from the employee, which can be included on the application form.

## 4. Driving Records

- Where employees drive on company time, either in their own vehicle or in the employer’s vehicle, driving records should be obtained in order to ascertain whether the individual is an acceptable driver. This also may be required for insurance purposes.

---

<sup>21</sup> MCL 423.501(2)(c)(i).

<sup>22</sup> *Gregory v Litton Systems, Inc.*, 472 F2d 631 (9<sup>th</sup> Circuit 1972).

- Where driving records are obtained, compliance with the Fair Credit Reporting Act (section (F)(2) above) is necessary.
- Driving record checks require authorization from the employee.
- Employers should consider verifying driving records on a regular basis, such as annually, in order to detect changes. Employee authorization should acknowledge that records will be verified periodically.
- Where employees drive on company time, the policy addressing the obtainment of driving records should be coordinated with a comprehensive employee driving policy, which should address the employee's responsibility to notify the employer of changes in the driving record.
- Where the employer uses commercial motor vehicles, it is critical to review and understand the numerous and complex federal and state rules and regulations which affect the commercial drivers and/or their employing motor carriers. Companies that employ commercial motor vehicle drivers must, in conjunction with very specific state and federal requirements, which include (but are not limited to): developing a specialized job application, conducting a thorough background investigation, implementing a controlled substance and alcohol use testing program, and maintaining driver qualification files.

## **5. Substance Screens**

### **Important components of a substance screen policy, where one is used:**

- Employer must decide whether or not to adopt a "zero tolerance" policy and whether to conduct substance screens at the time of hire.
- Include notice on application for employment that drug screens are utilized.
- Obtain Release from all liability, claims and damages for administration of the substance screen test.
- Reliable labs should be used, and confirmation tests should be used where applicable.
- Confidentiality must be maintained within employing organization, and when notifying applicant.
- Maintain results in a separate file.
- Provide means of challenging results.
- Prohibition on possessing or consuming alcohol or illegal drugs on Employer's property, in Employer vehicle or during work hours.
- Any Employee suspected of being under the influence of drugs or alcohol, or involved in an accident, may be required to submit to urine analysis or blood test.

- Any Employee convicted of selling drugs, convicted of illegal drug usage or illegal possession may be terminated.
- Employees who, as part of a medical treatment plan, are required by a physician to use prescription drugs or narcotics must report this fact to their immediate supervisor along with any reasonable medical documentation requested by the Employer prior to reporting to work. A determination shall be made by the Employer as to whether the Employee is able to perform his/her work responsibilities satisfactorily.

#### **6. Conditional Job Offers**

- Sensitive information, such as birth date, race, sex, etc. may be required in order to perform a background check, such as a driving record check, criminal background check, substance screen or medical exam. In order to ensure compliance with civil rights statutes that make it unlawful to obtain certain information (such as the job applicant's date of birth, sex, race, etc.) on a pre-employment basis, the employment practice of using a written conditional job offer should be used.
- Specifically, if the organization desires to hire an applicant, it should refrain from making the unlawful sensitive inquiries (race, sex, DOB, etc.) until *after* a conditional job offer has been extended. Thus, the job offer would be conditioned upon a satisfactory background check.

#### **G. Compliance with youth employment laws**

##### **Are hiring and other employment practices in compliance with youth employment laws?**

- Federal and state laws impose restrictions regarding minimum age requirements, the hours of work and type of work that may be performed by minors.
- Employers should obtain work permit affirming the minor is of an appropriate age provided for by Michigan law.
- A minor whose employment is illegal because of the lack of a work permit may entitle minor to twice the rate of base weekly compensation under Michigan workers' compensation law where there is an injury. Insurance will not cover the double compensation here.
- Michigan law mandates a 30 minute meal and rest period for minors employed for more than 5 continuous hours of work.

#### **H. Compliance with immigration laws**

##### **Are hiring practices in compliance with immigration laws?**

- An employer may not knowingly hire or recruit any alien not authorized to work in the United States, regardless of the size of the employer.<sup>23</sup>
- Employers must examine acceptable documentation in order to establish the identity of all new hires and eligibility to work in the United States and attest that the documents appear to belong to the individual and to be genuine.

## **II. The Employment Relationship**

### **A. “At-will” v. “just cause”**

#### **Is the organization an “at-will” or “just cause” employer?**

- Michigan law implies “at-will” employment relationship, meaning that either the employer or the employee may end the relationship with or without notice, for any reason or no reason at all (so long as the reason is nondiscriminatory). Presumption of “at-will” employment may be rebutted by circumstances.
- If employment is of definite duration, “just cause” employment relationship is implied absent written agreement to the contrary.
- If the organization is an “at-will” employer, is an “at-will” employment statement incorporated into the application for employment and employee handbook? Are employees required to sign an acknowledgment of “at-will” employment?
- Persons holding authority to change employee’s status should be very limited in number.

### **B. Independent Contractor v. employee**

- The distinction between employee and independent contractor is important as it can affect important issues, including how an individual pays taxes, and whether he or she is eligible for benefits.
- Courts may analyze many factors when determining whether an individual is an employee or independent contractor, such as any written agreement among the parties, control over the individual’s duties, how wages are paid, etc.
- Some courts use factors utilized by the Internal Revenue Service, which are grouped into three main categories: behavioral control, financial control, and the type of relationship between the parties. More specific information may be obtained at <http://www.irs.gov/pub/irs-pdf/p15a.pdf>.

## **III. Classification of employees**

### **A. Full time v. part time**

---

<sup>23</sup> Immigration Reform and Control Act of 1986, 8 USC 1324a(a)(1)(A)

- Definitions of full time and part time should be clearly defined, along with benefit eligibility (vacation time, holiday pay, health benefits, etc.)

#### **B. Exempt v. nonexempt**

- The FLSA provides an exemption from both minimum wage and overtime pay for individuals employed as bona fide executive, administrative, professional, outside sales employees and certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations. More specific information may be obtained from the U.S. Department of Labor website, <http://www.wagehour.dol.gov>, or from the Department's toll-free information and helpline, 1-866-4USWAGE.

### **IV. Employment documents**

#### **A. Information maintained in personnel files**

##### **Do personnel files contain appropriate, complete and up-to-date information?**

The following items should be kept in the personnel file for each employee. Information should be updated by employees as necessary:

- Completed and signed job application
- Emergency contact information
- Federal and State Withholding Tax Forms
- Employment Immigration Eligibility Form (I-9)(**Revised form must be used** for all individuals hired after 11/7/07; may be obtained at [www.uscis.gov](http://www.uscis.gov) or 1(800)870-3676)
- New Hire Reporting Form (this is a federal requirement but reporting is done at the state level). Both public and private employers must report all newly hired, rehired, or returning to work employees to the State of Michigan. The form is available online but electronic reporting is available.
- Driver's License (copy of) (only if Employee will drive as part of job functions)
- Certificate of vehicle insurance (if Employee uses his/her automobile for Employer business when on duty)
- Resume
- Records of hiring, interviews, screening, job assignments, work schedules, salary, job performance evaluations, promotions, demotions, transfers, layoffs, terminations, accomplishments, correspondence relating to the employee, reprimands and other discipline,<sup>24</sup> requests for accommodation (ADA, MPDCRA)
- Separate itemization of all credits for meals, tips and lodging against the minimum wage taken each pay period

---

<sup>24</sup> Under Michigan law, employers must delete records of disciplinary action or reprimands that are more than four years old unless release of the records is ordered by a court.

*Employers may or may not require the following items:*

- Medical records (must maintain them separately under Michigan law<sup>25</sup> )
- Letters of Recommendation (maintain them separately under Michigan law<sup>26</sup>)
- Signed Acknowledgements
  - a) At-Will Statement
  - b) Receipt of Personnel Manual
  - c) Handbook Changes and Waiver Clause
  - d) Statement of Driver Responsibility
  - e) Substance Screen Policy

**B. EEO-1 Reporting Form**

Certain large employers are required to file an Employer Information Report EEO-1, otherwise known as the EEO-1 Report, with the U.S. Equal Employment Opportunity Commission's EEO-1 Joint Reporting Committee on an annual basis. Specific information may be obtained at <http://www.eeoc.gov/eeo1survey>.

**C. Michigan's Social Security Number Privacy Act<sup>27</sup>**

Michigan's Social Security Number Privacy Act became effective March 1, 2005. The law restricts and/or prohibits many uses of Social Security Numbers. The law requires that policies be adopted to ensure that uses of Social Security Numbers are lawful and are kept confidential, and the policy must be printed in an employee manual or similar document.

**D. Is there a policy in place regarding employee review of his or her personnel file?**

- Michigan's Bullard Plawecki Employee Right to Know Act, which applies to Michigan employers with 4 or more employees, gives employees the right to review, copy and file a response to information in their personnel record.<sup>28</sup>

**D. Statutory prohibition on use of information not contained in employee file**

- Michigan's Bullard Plawecki Employee Right to Know Act provides that employers may not use information not included in the employee's personnel file, but that should have been included in the file, for a judicial or quasi-judicial proceeding.<sup>29</sup> The Act provides for some limited exceptions. Supervisors/managers should not maintain separate files containing notes/records regarding employee performance, etc. – copies of the same should also be kept in the employee's main personnel file pursuant to this statute.

---

<sup>25</sup> MCL 423.501(2)(c)(viii)

<sup>26</sup> MCL 423.501(2)(c)(i)

<sup>27</sup> MCL 445.81 et seq

<sup>28</sup> MCL 423.501 et seq

<sup>29</sup> MCL 423.502

## **V. Payment of wages**

### **A. Minimum wage**

#### **Is the organization in compliance with minimum wage laws?**

- Michigan employers employing 2 or more employees who are at least 16 years old are required to pay the Michigan minimum wage of \$7.15 per hour and \$7.40 beginning July 1, 2008.
- The federal minimum wage was increased to \$5.85 per hour July 24, 2007, and will increase to \$6.55 per hour on July 24, 2008 and \$7.25 per hour on July 24, 2009.
- Where an employee is subject to both the state and federal minimum wage laws, the employee is entitled to the higher of the two minimum wage rates.
- Some limited exceptions may apply to workers with disabilities, students, youth workers during the first 90 days of employment, and tipped employees.
- Care must be used that deductions from an employees wages do not reduce the employee's earnings below the required minimum wage or overtime compensation.<sup>30</sup>

### **B. Overtime pay**

#### **Is the organization in compliance with rules regarding overtime pay?**

- Employers covered by the Fair Labor Standards Act must pay one and one-half times an employee's regular hourly wage for each hour or part thereof that the employee works in excess of 40 hours in one work week.
- The FLSA provides an exemption from overtime pay for individuals employed as bona fide executive, administrative, professional, outside sales employees and certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations. More specific information may be obtained from the U.S. Department of Labor website, <http://www.wagehour.dol.gov>, or from the Department's toll-free information and helpline, 1-866-4USWAGE.
- When calculating overtime pay, employees must generally be paid for all hours worked. When calculating "hours worked," certain rules must be followed regarding meal and break periods, travel time, training, staff meetings, etc.

### **C. Deductions from pay**

---

<sup>30</sup> 29 CFR 531.35; MCL 408.477(2)

- Except for those deductions required or expressly permitted by law or by a collective bargaining agreement, an employer shall not deduct from the wages of an employee, directly or indirectly, any amount without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction.<sup>31</sup>
- In the case of exempt employees (compensated on a salary basis), deductions from pay are permissible in limited circumstances in accordance with U.S. Department of Labor regulations.

### **C. Breaks and meal periods**

- Employers need not pay employees for meal periods of 30 minutes or more where the employee is completely relieved of his or her duties.<sup>32</sup>
- Break periods of less than 30 minutes generally are considered “hours worked” under the Fair Labor Standards Act and must therefore be paid.
- Meal and break periods are not mandated by law, unless the employee is a minor.

## **VI. Benefits**

### **Specific consultation should be obtained to assess compliance with the following complex laws:**

- Employee Retirement Income Security Act of 1974 (ERISA).<sup>33</sup> ERISA governs most employee benefit programs. It is designed to set minimum standards for retirement and health plans that are voluntarily provided by private employers, in order to protect individuals who are in the plans.
- Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).<sup>34</sup> COBRA gives certain employees and their families who lose health benefits the right to continue group health benefits for limited periods of time, under certain circumstances such as job loss, death, divorce and other life events. Individuals who qualify for COBRA may be required to pay the entire premium for coverage, up to 102 percent of the cost to the plan.
- Family and Medical Leave Act of 1993 (FMLA).<sup>35</sup> FMLA generally applies to employers with 50 or more employees. The law requires covered employers to grant eligible employees up to a total of 12 workweeks of unpaid leave during any 12-month period for: 1) birth and care of employees newborn child; 2) placement with the employee of a child for adoption or foster care; 3) care for an immediate family member with a serious health condition; or 4) to care for the employee’s own serious health condition.

---

<sup>31</sup> MCL 408.477

<sup>32</sup> 29 CFR 785.19(a)

<sup>33</sup> 29 USC 1001 et seq

<sup>34</sup> 29 USC 1161 et seq

<sup>35</sup> 29 USC 2601 et seq

- Health Insurance Portability and Accountability Act (HIPAA).<sup>36</sup> The Health Insurance Portability and Accountability Act (HIPAA) of 1996 establishes standards regarding the provision of health benefits, the delivery and payment of healthcare services, and the security and confidentiality of health information.
- Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>37</sup> The USERRA prohibits discrimination against persons because of their service in the uniformed services. Employers may not deny any benefit of employment because of an individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. USERRA also protects the right of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment following an absence due to military service or training.

## **VII. Internet, electronic mail and voice mail policies**

### **Important elements of employer policy regarding internet, e-mail and voice mail:**

- No expectation of privacy in e-mail, voice mail communications or internet usage.
- E-mail, voice mail and internet are the Employer's property, and the Employer reserves the right to monitor the communications.
- Prohibition on transmission of trade secret and/or proprietary confidential information via e-mail voice mail or the internet.
- E-mail should be regarded as the equivalent of a business memorandum.
- Neither e-mail, voice mail, nor the internet may be used to defame individuals or to convey messages or images in violation of Employer's anti-harassment policy.
- Prohibition on solicitation of employees or distribution of information not related to the company's business.
- E-mail, voice mail and internet may not be used for personal purposes but only for business purposes
- Require employees to acknowledge in writing that they have received the e-mail/computer policy.
- Prohibition on illegally downloading electronic files, including those that may be copyrighted.
- Prohibition on downloading, transmission and possession of pornographic, profane or sexually explicit materials.
- Prohibition on attempting to access any computer system without proper authorization;

---

<sup>36</sup> 42 USC 201 et seq

<sup>37</sup> 38 USC 4311

- Employees must receive permission from their supervisor before posting messages to electronic bulletin boards, list-servers or similar public posting forums on the Internet. When posted, such messages must contain a disclaimer at the end of the message stating: “The opinions expressed in this message are mine only, and do not reflect the opinion or position of my Employer.”
- Internet activity, email and voice mail may be monitored by the Employer and privileges may be changed/revoked at any time.
- Discipline for violating email, voice mail and/or Internet policy can include termination

### **VIII. Anti-harassment policy**

#### **A. Has a sound anti-harassment policy been adopted, and is it enforced?**

- Employers have an obligation to implement policies and procedures which prohibit harassment and which provide for investigation of claims of harassment.

#### **C. Important elements of anti-harassment policy:**

- Statement that harassment will not be tolerated
- Definition of harassment (the prohibited conduct)
- Several avenues to make a complaint
- Investigation procedures
- Confidentiality to the extent possible
- Disciplinary action for substantiated complaints
- No retaliation policy
- The policy should be distributed to staff via personnel manual or otherwise.

#### **D. Periodic training should be provided to staff.**

### **IX. Protections against competition and non-disclosure**

#### **A. Non-compete agreement**

Under Michigan law, noncompete agreements must be reasonable in time and place, and must be reasonably limited to the employer’s business.<sup>38</sup>

#### **B. Confidentiality agreement**

Employers may require employees to sign a confidential information/non-disclosure agreement wherein the employee agrees to protect confidential information and trade secrets.

### **X. No Solicitation policy**

---

<sup>38</sup> MCL445.774a

- Adopting a “No Solicitation Policy” can have a number of positive effects, such as improving employee productivity and helping to avoid union-organizing campaigns.
- The policy must be very carefully drafted and enforced in order to minimize the risk of an unfair labor practice charge under the *National Labor Relations Act*. There are very technical rules that the National Labor Relations Board uses regarding the enforceability of these policies, and the use of precise language in drafting is essential.
- An enforced policy prohibiting solicitation by employees or distribution of literature during “working time” and in “working areas” is presumptively valid. However a policy prohibiting solicitation or literature distribution on “company time” or on “company property” is presumptively invalid.
- Employers can prohibit “non-employees” from soliciting and distributing literature by denying access to the employer’s property through an enforced “no visitor” policy.
- Where literature distribution is prohibited, the policy should apply to all literature (such as employees’ personal items) and not just union-related literature and postings.

## **XI. Occupational Safety and Health**

- The federal Occupational Safety and Health Act<sup>39</sup> promulgates employee safety and health standards for worker protection. Under the Act, where a state develops a plan that is as effective as the federal standards, the state plan pre-empts the federal plan. Michigan’s plan is known as the Michigan Occupational Safety and Health Act<sup>40</sup> (MIOSHA).
- MIOSHA, among other requirements, mandates that employers furnish to each employee, employment and a place of employment which is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to the employee.
- MIOSHA also includes very specific recordkeeping and reporting rules relating to workplace injuries and illnesses.
- More specific information may be obtained at [www.michigan.gov/miosha](http://www.michigan.gov/miosha) or by calling the Michigan Occupational Safety and Health Administration at 1(517) 322-1809.

## **XII. Recordkeeping issues**

- A solid recordkeeping system facilitates compliance with statutory mandates, promotes effective litigation strategies, and leads to greater efficiency in a business’s overall operation.

---

<sup>39</sup> 29 USC 651 et seq

<sup>40</sup> MCL 408.1001 et seq

- Following is an *overview* of requirements relating to employment records. The rules are complex and it is advisable to seek specific legal consultation when undertaking this endeavor.

## A. Federal mandates

### 1. Fair Labor Standards Act

Must retain 3 years:

- Payroll Records
- Records containing employee information:
  - Name
  - Address
  - Birthday (if under 19)
  - Sex
  - Occupation, including:
    - Hours worked; and
    - Rate of pay

Must retain 2 years:

- Employment and earning records
- Wage tables and work schedules
- Records of additions/deductions from wages

### 2. Title VII of the Civil Rights Act of 1963

Must retain one year from date of creation or action taken, whichever is later:

- Applications;
- Records that concern:
  - Hiring
  - Screening
  - Promotion
  - Demotion
  - Transfer
  - Layoff
  - Termination
  - Compensation
  - Training Programs

Must retain until final disposition of charge:

- discrimination charges
- EEOC or AG Action

Must retain one year from date of termination:

- Records relating to involuntary termination

### 3. Family and Medical Leave Act (50 or more employees)

- Basic payroll and employee information

- Dates FMLA leave is taken
- If taken in increments, the number of hours taken
- Employee written notice of leave
- Documents describing employee benefits and employer leave policies
- Premium payment of employee benefits
- Records of dispute with employer

#### **4. Americans With Disabilities Act (15 or more employees)**

Must retain one year from date of taking personnel action or from making the record, whichever is later:

- Records relating to requests for accommodations

#### **5. Age Discrimination in Employment Act**

Must retain 3 years

- Payroll records, including employee's name, address, date of birth, occupation, rate of pay and weekly compensation

Must retain one year from date of personnel action to which record relates:

- Job applications, resumes, replies to job advertisements, and records relating to the failure to hire an applicant
- Promotion, demotion, transfer, discharge
- Job orders submitted to employment agency or union
- Test papers from employer administered aptitude test
- Physical examination tests used in connection with personnel action
- Advertisements or notices regarding openings, programs or opportunities for overtime

Must retain for period of the plan plus one year:

- Records relevant to enforcement of action under ADEA

#### **6. Immigration Reform and Control Act of 1986 and Immigration Act of 1990**

Must retain 3 years from date of hire or one year after termination:

- INS form I-9, Employment eligibility form

#### **7. Occupational Health and Safety Act of 1970**

Must retain logs for businesses expected to be in operation for one year or longer:

- OSHA 300 log of work-related injuries
- Annual OSHA 300A summary of work-related injuries
- OSHA 301 injury and illness incident report

### **B. State mandates**

#### **1. Bullard-Plawecki Right to Know Act**

Must delete if more than 4 years old, unless release of records ordered in legal action:

- Disciplinary Reports
- Reprimands
- Records of disciplinary action

Cannot be kept unless employee authorizes or activity occurs on premises, during working hours, or interferes with employee's performance:

- Records of an employee's
  - Associations
  - Political activities
  - Publications
  - Communications of nonemployment activities

## **2. Michigan's Payment of Wages and Fringe Benefits Act**

Must retain 3 years:

- Personnel/payroll records, including:
  - Employee's name
  - Address
  - Birth date
  - Occupational classification
  - Rate of pay
  - Hours worked in each period
  - Itemization of deductions and fringe benefits

## **3. Michigan's Occupational Health and Safety Act**

- Nonexempt employers must retain records reflecting employee exposure and workplace environmental monitoring, as well as employee medical records.
- Employee medical records must be kept 30 years after the employee's last date of employment
- Employee exposure records and workplace environmental monitoring/testing records must be kept for 30 years.

## **XIII. Posting requirements**

**Specific consultation should be obtained to assess compliance with the following posting requirements under federal and state law:**

- Equal Employment Opportunity is the Law
- Equal Employment Opportunity Poster – Michigan Law Prohibits Discrimination
- Fair Labor Standards Act Federal Minimum Wage
- Job Safety and Health Protection Act
- Uniformed Services Employment and Reemployment Rights Act
- Family and Medical Leave Act
- Federally Financed Construction
- Notice to Employees Working on Government Contracts
- Federal Employee Polygraph Protection Act

- Migrant and Seasonal Agricultural Worker Protection Act
- Notice to Workers with Disabilities Paid at Special Minimum Wages
- Michigan Minimum Wage Poster
- Michigan Minimum Wage Rules – General and Overtime Compensation Rules
- Michigan Minimum Wage Rules – Wage Deviation Rules
- New/Revised Material Safety Data Sheet
- Material Safety Data Sheet Location
- Bureau of Employment Standards Overtime Compensation Rules
- Michigan Youth Employment Standards Act
- Michigan Safety and Health Protection on the Job
- Notice to Employees – Michigan Employment Security Act
- Michigan Whistleblowers Protection Act
- Summary of Work-Related Illnesses and Injuries