

PUBLIC MANAGEMENT: HIRING, FIRING AND THE IN-BETWEEN

Direct Representation of Municipalities, Municipal Law Practice Groups

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Often, public officials find themselves as managers of employees with limited experience with the legal requirements placed on employers. While I can not address the myriad of potential topics here, following are a few highlights of the issues public employers should consider.

Background Checks

Employers must be aware of limits on the use of background investigations. Under the Fair Credit Reporting Act a credit report includes any communication of information by a consumer reporting agency about a consumer's credit, character, reputation, personal characteristics, or mode of living, which is used as a factor in establishing the consumer's eligibility for employment. Generally, if an employer wishes to obtain a report on a prospective employee the employer must provide conspicuous written notice and receive advance written consent. There are additional requirements depending on the type of information sought and whether the employer makes an adverse decision based on information contained in a consumer report.

Anti-Discrimination Laws

Federal and state anti-discrimination laws include: Title VII of the Civil Rights Act; the Immigration Reform and Control Act; the Age Discrimination in Employment Act; the Americans with Disabilities Act; the Rehabilitation Act; Michigan's Elliott-Larsen Civil Rights Act; and Michigan's Persons with Disabilities Civil Rights Act. Employers may not discriminate based on a person's race, ethnicity, color, gender, religion, age, origin, citizenship, height, weight, marital status, or disability. Michigan's Department of Civil Rights offers a helpful Pre-Employment Inquiry Guide with permissible and impermissible interview questions. (www.Michigan.gov/mdcr; publications).

Due Process for Terminations

The Supreme Court has ruled that public employees terminable for cause have a constitutionally protected property interest in continued employment. See, *Cleveland Board of Ed. v. Loudermill*, 470 U.S. 532 (1985). These employees have a right to due process when terminated. The *Loudermill* Court found that a pre-termination opportunity to respond to charges, coupled with a post-termination review procedure, provided sufficient due process. A public employer must therefore know which employees are terminable for cause and ensure that *Loudermill* protections are provided.

Personnel Files

Several statutes govern personnel files and other employment documentation. The Bullard-Plawecki Employee Right to Know Act outlines what a personnel file may and may not include. The Act also addresses the right to review personnel files, retention of disciplinary records, and disclosure of personnel files.

Other statutes also require employers to retain employment documents. The Family and Medical Leave Act; the Michigan Wage and Fringe Benefits Act; the Americans with Disabilities Act; OSHA; MI-OSHA; Title VII of the Civil Rights Act; the Fair Labor Standards Act; and the Age Discrimination in Employment Act include record-keeping requirements.

Social Security Privacy

Michigan's Social Security Privacy Act prohibits using or displaying more than 4 sequential digits of social security numbers except in limited circumstances. Furthermore, any municipality that obtains 1 or more social security numbers in the ordinary course must have a social security number privacy policy that: (1) ensures confidentiality; (2) prohibits unlawful disclosure; (3) limits access; (4) describes how to dispose of documents; and (5) sets penalties for violations.

The Fair Labor Standards Act

Under the Fair Labor Standards Act employers must pay non-exempt employees one and a half times their hourly rate for hours over 40 worked each week. However, the Act allows most political subdivisions of the State to provide time-off in lieu of overtime compensation subject to certain limits. Such substitution must be pursuant to an agreement between employer and employees.

Numerous issues can arise under the Fair Labor Standards Act including determining which employees are non-exempt, fluctuating work-weeks, multiple part-time positions by one employee, and voluntarism.

The Open Meetings Act

Finally, when employing or appointing someone to public office, interviews must be in an open meeting under the Open Meetings Act. The public is entitled to be present and must have the opportunity to address the public body. The body may, however, consider discipline, suspensions, complaints and evaluations in a closed hearing, if requested by the employee.