

DISCRIMINATION / RETALIATION

Title VII of the Civil Rights Act of 1964, 42 USC 2000e, prohibits employers with 15 or more employees from discriminating in employment based on race, color, religion, sex (including pregnancy and conditions related to pregnancy) and national origin. In addition, the U.S. Supreme Court and/or Equal Employment Opportunity Commission include transgender status, gender identity and sexual orientation as protected statuses under sex discrimination.

The Age Discrimination in Employment Act (ADEA), 29 USC 621, prohibits employers with 20 or more employees and governmental employers of any size from discriminating against individuals 40 years of age or older.

Genetic Information Nondiscrimination Act (GINA), 42 USC 2000ff-1, prohibits the use of genetic information in making employment decisions, restricts employers from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.

The Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101, as amended in 2023 protects protects employees from discrimination based on race, religion, color, national origin, age, sex, sexual orientation, gender identity or expression, pregnancy and conditions related to pregnancy, height, weight, marital status or misdemeanor arrest record.

The Americans with Disabilities Act (ADA), 42 USC 12101, prohibits employers with 15 or more employees from discriminating against individuals who have a disability (or who have a close association with someone having a disability), and requires reasonable accommodations for qualified disabled individuals unless it would create an undue hardship for the employer.

The Michigan Persons with Disabilities Civil Rights Act, MCL 37.1101, prohibits employers from discriminating against individuals on the basis of a disability or genetic information and specifies accommodations that may be required, if requested in writing within 182 days of the need arising.

The Pregnant Workers Fairness Act (PWFA), 42 USC 2000gg-1, prohibits employers with 15 or more employees from not providing reasonable accommodations to an employee's known limitations related to pregnancy,

childbirth or related medical conditions. Employers are only excused from making such accommodations if it would cause the employer undue hardship. This means that rather than requiring a leave of absence from an employee who is expecting or has recently given birth covered employers must accommodate these employees even if they are unable to perform essential functions.

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 USC 4301, protects individuals who serve in the uniformed forces from discrimination and provides specific rights, including leaves of absences, job security, continued health coverage, reinstatement and reasonable accommodations for disabled veterans. The CREW Act of 2022 extended USERRA protections to FEMA reservists based on membership and when deployed or training on behalf of FEMA.

Most laws cited in this guide prohibit retaliation against employees for exercising their rights under those laws. In addition, state and federal laws protect “whistleblowers” from retaliation for filing a claim or reporting a violation, or for participating in hearings, investigations or court actions. (See, i.e., Whistleblowers’ Protection Act, MCL 15.361 and Sarbanes-Oxley Act, 15 USC 7201.)

WAGE, HOUR & BENEFITS

The Fair Labor Standards Act (FLSA), 29 USC 201, establishes the federal minimum wage and requires overtime pay for all hours worked over 40 hours in a workweek, unless the employee is exempt. There is a special 8/80 rule applicable for certain health care industry positions.

A recent amendment provides certain rights to breaks for nursing women to express milk.

A recent U.S. Supreme Court decision held that exempt day-rate employees can still be entitled to overtime pay if there is not a guaranteed and predictable salary.

The FLSA also sets standards regarding the type of work minors can perform, number of hours, etc. Michigan’s Youth Employment Standards Act, MCL 409.101, and the Improved Workforce Opportunity Wage Act, MCL 408.411, are the comparable state laws.

The Employee Retirement Income Security Act (ERISA), 29 USC 1001, regulates employee “welfare” benefits (i.e., health insurance) and retirement plans.

The Michigan Wages and Fringe Benefits Act, MCL 408.471, regulates the payment of and deductions from wages and fringe benefits during employment, following termination of employment or the death of employees.

The Family and Medical Leave Act (FMLA), 29 USC 2601, requires employers with 50 or more employees to provide up to 12 weeks of unpaid leave each year for the birth, adoption or placement of a foster child, for a serious health condition of the employee or immediate family member, or a qualifying exigency arising out of active military duty. The act also provides 26 weeks to care for a family member with a serious injury or illness arising out of military duty. Public employers are covered regardless of size, but only their employees who work within 75 miles of 50 or more employees are eligible for FMLA.

Michigan’s Paid Medical Leave Act (PMLA), MCL 408.961, requires employers with 50 or more employees to provide 40 hours of paid time off during any consecutive 12-month period to an eligible employee for the employee’s or a family member’s (broadly construed) illness or injury (or for other reasons such as domestic violence, sexual assault or certain public health emergencies).

The Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 USC 1161, requires employers with 20 or more employees to offer continuation health insurance when coverage would otherwise have ended.

The Michigan Sales Representative Act, MCL 600.2961, requires payment of all commissions due at termination, generally within 45 days.

The Worker Adjustment and Retraining Notification Act (WARN), 29 USC 2101, requires most employers with 100 or more employees to notify employees, unions and state and local governments 60 days in advance of any plant closing and/or mass layoff.

Worker’s Disability Compensation Act, MCL 418.101, provides wage loss and medical benefits for employees who suffer work-related injuries or illnesses.

MISCELLANEOUS

Safety & Health Standards - The Occupational Safety and Health Act (OSHA), 29 USC 651, and the Michigan Occupational Safety and Health Act (MI-OSHA), MCL 408.1001, set minimum safety and health standards in the workplace.

Drug Testing - The Drug Free Workplace Act of 1988, 41 USC 701, requires employers receiving federal grants

or contracts to maintain drug-free workplaces. Note that employers may still take adverse action against employees who test positive for marijuana although its recreational and medical uses are legal under Michigan law.

Polygraph Testing - The Employee Polygraph Protection Act (EPPA), 29 USC 2001, and Polygraph Protection Act of 1981, MCL 37.201, generally prohibit employers from requiring employees or job applicants to take polygraph tests or from receiving results of tests.

Labor Relations - The Public Employment Relations Act (PERA), MCL 423.201, recognizes the right of most public employees in Michigan to unionize and protects them from retaliation for engaging in union or “concerted” activities. The National Labor Relations Act (NLRA), 29 USC 151, applies to all other employees who unionize or engage in “concerted” activities. Michigan’s Right to Work Law, MCL 423.14, allows employees to opt out of union membership. Michigan repealed its Right to Work statute in 2023, effective March 30, 2024, meaning employees in unionized workplaces will no longer have a statutory right to opt out of union membership or refrain from paying union dues or fees as a condition of employment.

Pre-Employment Checks - If a third party is used to obtain information, the Fair Credit Reporting Act (FCRA), 15 USC 1681, may apply and requires specific notices in addition to the written consent of an employee. The Disclosure of Employee Job Performance Act, MCL 423.451, provides a qualified privilege to employers responding to reference requests.

Personnel Files - The Bullard-Plawecki Employee Right to Know Act, MCL 423.501, permits employees to review and obtain a copy of their personnel file. The Act specifies what records must be included and excluded from a personnel file.

Privacy - The Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d, regulates the use, release and confidentiality of medical and other personal health records, and the Michigan Social Security Privacy Act, MCL 445.81, regulates the use of employee Social Security numbers. Michigan’s Internet Privacy Protection Act, MCL 37.271, prohibits an employer from requesting access to private pages of an employee’s private internet account, requesting passwords to access such pages or disciplining an employee who refuses to provide access or passwords.

The Labor & Employment Law Quick Reference Guide was prepared by The Labor & Employment Practice Group and distributed by the firm of Plunkett Cooney. Any questions or comments concerning the matters reported may be addressed to **Christina Corl** at (614) 629-3018 or **Courtney Nichols** at (248) 594-6360. Copyright © 2023, Plunkett Cooney. All rights reserved.