Michigan County Road Commission Self-Insurance Pool

EMPLOYMENT PRACTICES GUIDELINES

Use of This Handbook

The contents of this Handbook, including any forms provided, are intended only for use by members of the Michigan County Road Commission Self-Insurance Pool. The Handbook and its forms are not a substitute for the advice of an attorney. Legal advice should be sought from competent legal counsel whenever circumstances so warrant. The law as it relates to employment matters is constantly evolving and changing, and, therefore, legal counsel should be regularly and routinely consulted on these matters.

I. EMPLOYEE HANDBOOKS

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Employee Handbooks - General Considerations

There is no legal requirement that an employer prepare and distribute an employee handbook or manual. However, employee handbooks offer employers the opportunity to communicate personnel policies, employee benefits, and work standards to all employees in a single document. Employee handbooks also provide valuable instruction and guidance for supervisors and personnel administrators regarding the implementation and enforcement of the employer's policies, thus fostering uniform and consistent treatment of employees and reducing the risk of disparate treatment.

Before drafting an employee handbook, an employer must first decide to whom the policies will be addressed. The handbook should specify to which group of employees it applies. If a handbook is to be addressed and distributed to employee groups that include employees represented by a labor organization, appropriate qualifications regarding the applicability of policies conflicting with collective bargaining provisions must be included. The handbook should make it clear that it does not supersede the collective bargaining agreement and that, to the extent the handbook conflicts with the terms of the collective bargaining agreement, the collective bargaining agreement will control with respect to bargaining unit employees. It is important that the handbook not be seen by the union as an attempt to unilaterally change terms and conditions of employment which constitute mandatory subjects of bargaining.

If an employer decides to adopt and distribute an employee handbook, there are numerous federal and state laws that have an impact on the content of policies and procedures included in any such handbook which should be considered. The following is a partial list of federal and state legislation that affect employer policies and procedures:

Federal

- Age Discrimination in Employment Act
- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act
- Equal Pay Act
- Fair Labor Standards Act
- Immigration Reform and Control Act
- Portal-to-Portal Act
- Family and Medical Leave Act
- Drug-Free Workplace Act
- Uniformed Services Employment and Reemployment Rights Act

State

- Elliott-Larsen Civil Rights Act
- Michigan Persons with Disabilities Civil Rights Act
- Whistleblowers Protection Act
- Polygraph Protection Act of 1981
- Public Employment Relations Act
- Payment of Wages and Fringe Benefits Act
- Publicly Funded Health Insurance Contribution Act
- Michigan Occupational Safety and Health Act
- Bullard-Plawecki Employee Right to Know Act

Employee handbooks can provide an appropriate means through which an employer can distribute legally required policies, such as equal employment opportunity, unlawful harassment, and family and medical leave policies.

No hard-and-fast rules dictate which policies should or should not be included in a handbook or manual. Generally, a basic employee handbook will contain the following:

- An introductory section describing the purpose of the handbook, the employees to whom the policies apply, sources of additional information, a description of the employment-at-will relationship, and a statement that the policies in the handbook replace previous policy statements and practices.
- An equal employment opportunity policy setting forth the employer's commitment to equal employment opportunity. A specific enumeration of the factors the employer does not consider when making employment decisions (race, age, sex, etc.) is useful for the information of employees and helpful in the defense against allegations of unlawful discrimination.
- A policy prohibiting harassment on the basis of gender and other prohibited grounds, including a description of the employer's internal complaint procedure.
- An hours-of-work section describing work schedules, breaks, meal periods, the workweek and the workday established for overtime pay calculations, time-recording requirements, and overtime work requirements. A statement prohibiting overtime work by an FLSA non-exempt employee without specific authorization by a supervisor and a statement that overtime work may be required on occasion are often included in the hours-of-work policies.
- A benefits section setting forth vacations, holidays, sick leave, leaves of absence, insurance coverage, pension plans and other benefits available to employees. Clear statements of eligibility requirements and conditions for receipt of benefits should be included, and all such statements should be compared with applicable summary plan descriptions of benefits to ensure consistency and accuracy.
- Work safety and/or conduct rules informing employees about the employer's expectations as to behavior in the workplace. To avoid implications that cause is required for termination, reference to specific disciplinary consequences of particular acts or omissions should be avoided.

- An acknowledgment and receipt form for employees to sign and return, recording their receipt, understanding of, and agreement to abide by the provisions in the manual or handbook.

It is highly recommended that all individual employees to whom the handbook applies sign a form acknowledging receipt and understanding of the handbook, including critical provisions such as at-will employment, that policies can change anytime, that employment decisions are in the employer's sole discretion, etc. This signed acknowledgement of notice/receipt and understanding should be done whenever the handbook is updated and distributed. Such forms, when the employer collects and retains them, are useful in establishing that employees had notice of the policies, expectations, and prohibitions of the employer and can be invaluable in the defense of wrongful discharge actions by demonstrating the employee's knowledge and acceptance of the at-will employment relationship.

Additional policies addressing solicitation/distribution rules, open-door policies, employment classifications, personnel records, punctuality and attendance, bulletin boards, jury duty, dress codes, educational benefits and drug/alcohol policies are also often desirable and included in employee handbooks.

The most important drafting considerations are clarity and compliance with legal requirements. Great care should be taken to eliminate ambiguities in language that could give rise to confusion or dispute. Statements or promises that are inconsistent with the employment-at-will relationship should be avoided. Similarly, language anticipating a "long and successful relationship" and promising "job security" should be avoided because of the inference of an employer's commitment to indefinitely retain employees whose job performance may be minimally satisfactory.

Compensation provisions as to overtime pay should clearly state the categories or classifications of affected or eligible employees. FLSA-exempt employees who are not eligible for overtime pay should be expressly excluded from the overtime pay provisions.

Because consistent application of policies is fundamental to good personnel relations and critical to favorable resolution of allegations of unlawful discrimination and other claims against employers, orientation and training of supervisors and managers prior to implementation of new and revised policies is extremely important. All steps necessary to ensure that supervisors understand the content, application and administrative procedures for each policy should be taken prior to distribution of the materials and discussions with non-supervisory personnel.

Distribution of new or revised employee handbooks should be carefully documented. A record should be created showing the dates of distribution and the names of employees to whom the materials were given. The collection and retention of receipt forms from employees for the new or revised handbooks or manuals is an essential part of the implementation process. As noted above, receipt forms can be critical in resolving disputes in favor of the employer. In the event an employee balks at executing the

acknowledgment form, the employee should be informed that the policies will be implemented as of the effective date of the manual or handbook and that continuing to work and accepting compensation from the employer will be considered acceptance of the terms and conditions of employment expressed in the handbook or manual. If reluctance continues, the employee should be informed of the foregoing in writing and a copy of the notice should be retained by the employer.

Implementation of the new policies is not the end of the process of creating effective handbooks or manuals. Periodic review by the employer and by legal counsel should be performed to ensure continued consistency of the document with business and legal requirements.

Model Employee Handbook provisions are included in this chapter. They should be carefully reviewed and tailored to meet the needs of each Road Commission.

EMPLOYMENT PRACTICES GUIDELINE

Employee Handbooks – Contractual Disclaimers

A concern with regard to employee handbooks is the potential for employee claims that the handbooks are actually contracts of employment and thus binding on employers. Courts are at times willing to treat employee handbooks as employment contracts, holding employers liable for breaches of contract when they fail to follow the provisions set out in their handbooks. For example, in the landmark case of *Toussaint* v *Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980), the employee specifically asked at the time of hire about job security and was told by a Blue Cross employee that "as long as [he] did [his] job," he would be with the company. In addition, the employee received a copy of the Blue Cross supervisory manual, which expressly provided that employees could not be terminated except for just cause. The Michigan Supreme Court found that the employer was bound by its handbook provision providing that an employee would not be discharged except for just cause.

On the other hand, ambiguous language will not bind an employer. In *Schippers* v *SPX Corporation*, 444 Mich 107; 507 NW2d 591 (1993), the Michigan Supreme Court found that an employee handbook's statements that the employer had adopted policies that were "fair to all employees and in the best interest of the company" and that "[t]he company, by its actions and attitudes, will endeavor to maintain a spirit of good will, loyalty and harmony among all persons in the organization" did not rise to the level of an express contractual promise in writing to discharge for cause only. In addition, the Court noted that the handbook contained a contractual disclaimer and that the employer reserved the right to change or terminate the policies at any time with or without notice. Similarly, in the companion case of *Rood* v *General Dynamics Corp*, the Michigan Supreme Court declined to find that a provision in an employee handbook defining involuntary termination as "discharge for reasons of misconduct or unacceptable performance" rose to the level of an express written contractual promise of discharge only for cause.

The employee handbook should contain a disclaimer which must, at a minimum, inform employees that the handbook does not constitute a contract and that the employment relationship may be terminated at the will of either party (please note, however, that such provision will not apply to employees covered by a collective bargaining agreement which provides for termination for just cause only). This information should be displayed prominently in clear, unambiguous language. A disclaimer should also disavow the effect of any conflicting representations and reserve the right to modify handbook policies on a unilateral basis.

MODEL EMPLOYEE HANDBOOK PROVISIONS

SECTION 1.
GENERAL EMPLOYMENT POLICIES AND PRACTICES

A. Introduction and Nature of the Employment Relationship.

This Employee Handbook contains information about the employment policies and practices of the Road Commission. We expect each employee to read this Employee Handbook carefully, as it is a valuable reference for understanding your job and management's expectations. The Road Commission retains the right to make decisions involving employment as needed in order to conduct its work in a manner that is beneficial to the employees and the Road Commission. This Employee Handbook supersedes and replaces any and all prior Employee Handbooks and inconsistent verbal or written policy statements. Except for the policy of at-will employment, which can only be changed by the Board in writing, the Road Commission reserves the right to revise, delete and add to the provisions of this Employee Handbook. All such revisions, deletions or additions must be in writing and signed by the Managing Director. No oral statements or representations can change the provisions of this Employee Handbook.

The provisions of this Employee Handbook are not intended to create contractual obligations with respect to any matters it covers, nor is this Employee Handbook intended to create a contract guaranteeing that you will be employed for any specific time period.

The Road Commission is an at-will employer. This means that, regardless of any provision in this Employee Handbook, either you or the Road Commission may terminate the employment relationship at any time, for any reason, with or without cause or notice. Nothing in this Employee Handbook or in any document or statement, written or oral, shall limit the right to terminate employment at-will. No officer, employee or representative of the Road Commission is authorized to enter into an agreement—express or implied—with any employee for employment other than at-will unless those agreements are in a written contract signed by the Managing Director.

This Employee Handbook refers to current benefit plans maintained by the Road Commission. Refer to the actual plan documents and summary plan descriptions if you have specific questions regarding the benefit plan. Those documents are controlling.

The employment policies and benefit summaries found in this Employee Handbook do not supersede the provisions of any collective bargaining agreement.

If there are any discrepancies between any employment contract and the Employee Handbook, the provisions of the employment contract are controlling.

B. Equal Employment Opportunity.

In order to provide equal employment and advancement opportunities to all individuals, employment decisions at the Road Commission will be based on merit, qualifications, and abilities. Except where required or permitted by law, employment practices will not be influenced or

affected by an applicant's or employee's religion, race, color, national origin, age, sex (including gender identity, sexual orientation, and pregnancy), height, weight, marital status, genetic information, or disability.

The Road Commission will make reasonable accommodations for qualified individuals with known disabilities unless doing so would result in an undue hardship. This policy governs all aspects of employment, including selection, job assignment, compensation, discipline, termination, and access to benefits and training. **Any employee who believes he/she needs a reasonable accommodation must submit a written request for that accommodation to the Road Commission within 182 days after the date the employee knew or reasonably should have known that an accommodation was needed.** Failure to do so will prevent the employee from alleging that the Road Commission failed to accommodate him/her in violation of the Michigan Persons with Disabilities Civil Rights Act.

Any employees with questions or concerns about any type of discrimination in the workplace are encouraged to bring these issues to the attention of the Managing Director. Employees can raise concerns and make reports without fear of reprisal. Anyone found to be engaging in any type of unlawful discrimination will be subject to disciplinary action, up to and including termination of employment.

C. Policy Against Unlawful Harassment.

The Road Commission is committed to providing a work environment that maintains employee equality, dignity, and respect. In keeping with this policy, the Road Commission strictly prohibits discriminatory practices, including harassment, sexual or otherwise. Any unlawful harassment, whether verbal, physical, or environmental, is unacceptable and will not be tolerated. It is the responsibility of all employees of the Employer to nurture and maintain work environments in which employees, citizens, and vendors are valued, welcomed, and treated with respect.

Harassment of or discrimination against Road Commission employees based on race, color, religion, national origin, age, sex (including gender identity, sexual orientation, and pregnancy), height, weight, marital status, genetic information, or disability is prohibited. The Road Commission resolves to provide:

- A workplace free from discrimination based on an individual's race, color, religion, national origin, age, sex (including gender identity, sexual orientation, and pregnancy), height, weight, marital status, genetic information, or disability, and the provision of public services on the same basis.

- A workplace free from harassment and hostility due to race, color, religion, national origin, age, sex (including gender identity, sexual orientation, and pregnancy), height, weight, marital status, genetic information, or disability.

- Equal employment opportunities in all phases of employment through recruitment, retention, and advancement of diverse qualified people, and utilization of job-related criteria in making employment decisions.

Sexual harassment is illegal under federal and state laws. It is defined by the Equal Employment Opportunity Commission as any unwelcome sexual advance, request for sexual favors, or other verbal or physical conduct of a sexual nature when:

a. submission to the conduct is made either explicitly or implicitly a term or condition of an individual's employment;

b. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting the individual; or,

c. the conduct has the purpose or effect of substantially interfering with the individual's performance or of creating an intimidating, hostile or offensive working environment.

Harassment on the basis of religion, race, color, national origin, age, sex (including gender identity, sexual orientation, and pregnancy), height, weight, marital status, genetic information, or disability is illegal under federal and/or state laws. Such harassment is defined as unwelcome conduct or communication on the basis of a protected category when the conduct or communication has the purpose or effect of substantially interfering with an employee's work performance or of creating an intimidating, hostile or offensive working environment.

Violations of this policy shall subject the offending employee to disciplinary measures, up to and including discharge.

Management is responsible for addressing all reports of discrimination, including racial and gender harassment. Any employee who has a complaint must bring the problem to the attention of responsible Road Commission officials. Employees may bring their complaint to the Managing Director. If the complaint is about the Managing Director, the employee shall register his/her complaint with the Road Commission Board Chair. The Road Commission shall designate appropriate personnel to investigate the complaint.

The success of this policy will be dependent upon communications between an employee, his or her co-employees and those charged with enforcing the Policy. The Road Commission cannot respond or react to harassment conditions that are unknown to it and/or cannot be documented. Therefore, a significant responsibility will be incumbent upon the employee who believes he or she has been harassed by another employee(s) to advise the offending employee to put him/her on notice of the offending behavior and that such activity must stop. Further, any employee who believes he or she has been harassed in violation of this Policy should promptly report such harassment to Road Commission management for investigation.

Management is responsible to objectively investigate reports of any harassment by or between employees of the Road Commission. All harassment complaints should be reduced to writing and include all appropriate information in order to facilitate investigation of the complaint. Specifically, the complaint should contain:

- The full name and address of the person filing;

- The full name and address (if known) of the person against whom the charge is being made; and

- A short summary of the allegedly harassing action or conduct.

The recipient of the complaint and/or appropriate designee shall conduct an independent investigation and evaluation of the validity of the complaint. Investigations and evaluations shall be completed in a timely fashion. Anonymous complaints will not be pursued. Complaints will be resolved in the best interests of both the complainant and the Road Commission.

The Road Commission will take appropriate corrective action, including disciplinary measures, to remedy all violations of this policy. There will be no discrimination or retaliation against any employee because the employee has filed a complaint, testified, assisted, or participated in an investigation under this policy. If both a harassment complaint and a union grievance are filed by an employee concerning the same alleged discriminatory conduct, the grievance procedure contained in the Collective Bargaining Agreement will be utilized to resolve that complaint. This policy does not preclude any employee from filing a complaint or grievance with an appropriate outside agency.

D. Prohibition of Unlawful Retaliation in the Workplace.

The Road Commission takes unlawful retaliation very seriously and is committed to a policy prohibiting its occurrence. Unlawful retaliation will not be tolerated. Any complaint of unlawful retaliation will result in an investigation and appropriate corrective action. Any employee found in violation of this policy will be subject to disciplinary action which may include termination.

It shall be a violation of this policy for any Road Commission employee to ridicule, threaten, discipline or otherwise discriminate or retaliate against another Road Commission employee because that employee has:

1. Opposed a discriminatory practice by the Road Commission; or

2. Made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding or hearing with respect to a discriminatory practice by the Road Commission.

A discriminatory practice is one in which the employee alleges that the Road Commission has treated an employee differently from other similarly situated employees, and/or harassed an employee, on the basis of race, age, color, sex (including gender identity, sexual orientation, and pregnancy), religion, national origin, marital status, height, weight, genetic information, or disability.

The Road Commission prohibits unlawful retaliation by the Road Commission, its supervisors, managers, and employees. Retaliatory conduct includes any conduct or communication which has the purpose or effect of substantially interfering with an individual's job performance or creates an intimidating, hostile, or offensive working environment. The purpose of this policy is not, however, to insulate employees from warranted discipline. Any employee whose conduct legitimately warrants discipline will still be subject to such discipline, even if the employee tries to prevent same by making a complaint of discrimination.

All employees should know, and are herewith placed on notice, that the Road Commission will not tolerate or permit unlawful retaliation to occur in the workplace. **Employees who are found to be in violation of this policy will be considered to have violated a serious Road Commission policy and will be subject to a variety of disciplinary measures up to and including discharge.** Under this policy it is the Road Commission's position that responsible personnel will take affirmative action or actions, as may be necessary and appropriate, to prevent unlawful retaliation from occurring in the workplace and to investigate all reported incidents in a fair, objective, impartial manner and within a reasonable time frame. In those instances where a violation of the policy is verified through investigation, action or actions will be taken to discipline those involved where appropriate and to prevent reoccurrence of the unlawful retaliation.

Under the policy, the Road Commission's management is responsible for objectively investigating reports of any unlawful retaliation by or between employees of the Road Commission. Incidents of retaliation shall be reported to the Managing Director. If the complaint is against the Managing Director, the employee shall register his complaint with the Road Commission Board Chair. The Road Commission shall designate appropriate personnel to investigate the complaint. All retaliation complaints should be reduced to writing and include all appropriate information in order to facilitate investigation of the complaint. Specifically, the complaint should contain:

1. The full name and address of the person filing;

2. The full name and address (if known) of the person against whom the charge is being made; and,

3. A short summary of the alleged retaliatory action or conduct.

The recipient of the complaint and/or an appropriate designee shall conduct an independent investigation and evaluation of the validity of the complaint. Investigations and evaluations shall be completed in a timely fashion. Anonymous complaints will not be pursued. Complaints will be resolved in the best interests of both the complainant and the Road Commission.

This policy is intended to facilitate the elimination of unlawful retaliation against employees in the workplace. Employees who believe they have been subjected to unlawful retaliation are encouraged to report same in order that all employees may have a fair and objective environment in which to work. If both a retaliation complaint and a union grievance are filed by an employee concerning the same alleged retaliatory conduct, the grievance procedure contained

in the Collective Bargaining Agreement will be utilized to resolve the complaint. This policy, however, does not supersede existing statutes and should not be construed to preclude any employee's alternative course of action for redress of unlawful retaliation.

E. Categories of Employment.

FULL-TIME EMPLOYEES regularly work at least a forty (40) hour workweek.

PART-TIME EMPLOYEES work less than forty (40) hours per week. They are considered "regular" if they work a relatively consistent schedule and/or number of hours each week.

In addition to the preceding, employees are also categorized as "exempt" or "non-exempt."

NON-EXEMPT EMPLOYEES – are entitled to overtime pay as required by applicable Federal and State law.

EXEMPT EMPLOYEES – Pursuant to applicable Federal and State laws, exempt employees are not entitled to overtime pay, and are not subject to certain deductions to their weekly salary under the Road Commission's policies.

Upon hire, your supervisor will notify you of your employment classification.

F. Immigration Reform and Control Act.

In compliance with the Federal Immigration Reform and Control Act of 1986 (IRCA), as amended, the Road Commission is committed to employing only individuals who are authorized to work in the United States.

Each new employee, as a condition of employment, must complete the Employment Eligibility Verification Form I-9 and present documentation establishing identity and employment eligibility.

If an employee is authorized to work in this country for a limited time period, the individual will be required to submit proof of renewed employment eligibility prior to expiration of that period to remain employed by the Road Commission.

G. Position Description and Pay Administration.

The Road Commission maintains a job description for each position in the Road Commission. The job description outlines the essential duties and responsibilities of the position, as well as the required qualifications and working conditions affecting the job. When the duties and/or responsibilities of a position change, the job description is revised to reflect those changes. The Road Commission shall have discretion to modify the job description to meet its needs at any time.

Paychecks are distributed every two (2) weeks on _____. Timesheets must be completed within two days of each pay period. All deductions from pay are itemized and presented to employees with the paycheck. Approved pay deductions may include: federal and state income taxes; Social Security and Medicare; medical and group hospitalization insurance premiums (if paid by the employees); and other benefits (e.g. required employee pension contributions, etc.).

H. Performance Evaluations.

The Road Commission is under no obligation to conduct performance evaluations. Neither the fact that they are or are not conducted, nor the manner in which they may be conducted, should be construed as altering the "at-will" nature of the employment relationship. That being said, the Road Commission strives to conduct performance evaluations of each employee on an annual basis.

The annual performance review is a formal opportunity for the supervisor and employee to exchange ideas that will strengthen their working relationship, review the past year, and anticipate the Road Commission's needs in the coming year. The purpose of the review is to encourage the exchange of ideas in order to create positive change within the Road Commission. To that end, it is incumbent upon both parties to have an open and honest discussion concerning the employee's performance. Both supervisor and employee should attempt to arrive at an understanding regarding the objectives of the coming year.

SECTION 2.
HOURS OF WORK, ATTENDANCE AND PUNCTUALITY

A. Hours of Work.

The workweek is generally from [*Monday through Friday*], with normal operating hours from [*7:00 a.m. to 4:00 p.m.*], with one hour for lunch.

B. Overtime.

Because of the nature of our business, your job may periodically require that you work beyond normal operating hours. You will be given advance notice of this when feasible, but this is not always possible. Overtime pay, which is applicable only to Non-Exempt Employees, is for any time worked in excess of 40 hours in a workweek. You should not work overtime hours without prior approval by your immediate supervisor. Violations of this policy will result in disciplinary action, up to and including termination from employment.

Non-Exempt Employees will be paid at a rate of time and one-half their regular hourly rate for hours worked in excess of forty (40) hours in a workweek. Only actual hours worked count toward computing weekly overtime.

C. Attendance and Punctuality.

It is important for you to report to work on time and avoid unnecessary absences. The Road Commission recognizes that illness or other circumstances beyond your control may cause you to

be absent from work from time to time. However, excessive absenteeism or frequent tardiness may result in disciplinary action, up to and including termination of employment. Excessive absenteeism or frequent tardiness puts an unnecessary strain on your coworkers and can have a negative impact on the success of the Road Commission.

You are expected to work when scheduled. If you are absent for any reason or plan to arrive late or leave early, you must notify your supervisor as far in advance as possible and no later than one hour before the start of your scheduled work day. In the event of an emergency, you must notify your supervisor as soon as possible.

For all absences extending three (3) or more consecutive days, you should indicate the reason for the absence and your expected return-to-work date. A physician's statement may be required as proof of the need for any illness-related absence regardless of the length of the absence.

An employee who is absent from work for three (3) consecutive days without notification to the Road Commission will be considered to have voluntarily terminated his or her employment. The employee's final paycheck will be mailed to the last mailing address on file with the Road Commission.

SECTION 3.
LEAVE BENEFITS

A. Vacation.

Full-time and regular part-time employees are eligible for paid vacation.

Vacation is calculated according to the Road Commission's fiscal year, which begins _____ 1 and ends _____ 31.

During your initial year of employment, you earn vacation on a pro-rated basis to be taken the following year. You will be eligible to use earned vacation after ____ consecutive days of employment. Thereafter, you receive vacation as follows:

- After one (1) full fiscal year, you shall be entitled to one (1) week of paid vacation annually.
- After two (2) full fiscal years, you shall be entitled to two (2) weeks of paid vacation annually.
- After six (6) full fiscal years, you shall be entitled to three (3) weeks of paid vacation annually.
- After fifteen (15) full fiscal years, and each year thereafter, you shall be entitled to four (4) weeks of paid vacation annually.

- After twenty (20) full fiscal years, and each year thereafter, you shall be entitled to five (5) weeks of paid vacation annually.

Regular part-time employees receive paid vacation time in proportion to the number of hours they normally are scheduled to work.

To be eligible for full vacation pay, a full-time employee must have received pay for ninety-five percent (95%) of his or her normally scheduled work hours during the preceding fiscal year. If a full-time employee does not meet the ninety-five percent (95%) requirement in the preceding year, the vacation time and pay shall be pro-rated accordingly.

Vacation pay shall be computed on the basis of the full-time employee's normal straight time wage at the time the vacation is taken.

Use of vacation is subject to approval by the Road Commission and must be requested in daily increments, using the appropriate leave request form. Vacations must be used in the fiscal year earned and cannot be carried over. The Road Commission will purchase one week of vacation per fiscal year from an employee in lieu of taking time off, at the employee's request.

Upon termination, eligible employees will be paid for accrued but unused vacation. A full-time employee, with less than one (1) year of service at the time of termination, will not be paid for and waives all rights to any accrued but unused vacation.

B. Personal Days.

Full-time employees are eligible, immediately upon hire, for three (3) paid personal days each year. During the initial year of employment, you will receive personal days on a pro-rated basis.

Personal days are calculated according to the Road Commission's fiscal year, which begins _____ 1 and ends _____ 31. Personal days can be used as vacation, sick time or to take care of personal matters. Requests for planned personal days must be given to your supervisor for approval.

Personal days cannot be carried over to the following year. Employees are not paid in lieu of taking the actual time off. Upon termination, employees are not paid for earned but unused personal days.

C. Holidays.

Holidays are established by the Board each year and posted. A copy will be furnished to each employee.

Eligible employees receive a paid holiday only if the holiday falls on a day they are normally scheduled to work.

Full-time and regular part-time employees are eligible for paid holidays after completing ninety (90) days of employment. Regular part-time employees are eligible for holiday pay in proportion to the number of hours they normally are scheduled to work.

Exempt employees will receive holiday pay in compliance with State and Federal wage and hour laws.

Non-exempt employees must work their scheduled workday before and after the holiday in order to be paid for the holiday, unless they are absent with prior permission from their supervisor.

D. Paid Medical Leave.

Full-time employees accrue, immediately upon hire, one paid medical leave day (8 hours) each month to a maximum of one hundred twenty (120) days (960 hours). New hires may begin using paid medical leave after ninety (90) consecutive days of employment.

Exempt employees will receive paid medical leave in compliance with State and Federal wage and hour laws.

Employees may use accrued paid medical leave for any of the following:

- Physical or mental illness, injury, or health condition of the employee or his or her family member;
- Medical diagnosis, care, or treatment of the employee or employee's family member;
- Preventative care of the employee or his or her family member;
- Closure of the employee's primary workplace by order of a public official due to a public health emergency;
- The employee's or his or her family member's exposure to a communicable disease that would jeopardize the health of others as determined by health authorities or a health care provider;
- In domestic violence and sexual assault situations, for medical care, psychological or other counseling, receiving services from a victim services organization, relocation and obtaining legal services, and participation in civil or criminal proceedings.

Paid medical leave may be used in 1-hour increments. To receive paid medical leave, employees must report the absence to their supervisor prior to the beginning of their shift, except when the failure to notify is due to circumstances beyond the control of the employee. The notice will include the reason for and expected duration of the absence. Evidence of illness or injury acceptable to the Road Commission may be required at any time as a condition for qualifying for paid medical leave, including absences due to family care responsibilities.

It is also understood that employees whose employment is terminated with the Road Commission for whatever reason, other than retirement, are not entitled to pay for unused accrued medical leave. Employees who retire directly from active duty (i.e., not deferred retirement) shall be entitled to one fourth (1/4) of their unused accrued medical leave in pay at their present straight

time hourly rate. An employee on extended sick leave (more than thirty (30) consecutive calendar days) will not continue to accumulate benefits.

E. Family and Medical Leave Act (FMLA).

The Road Commission complies with the Family and Medical Leave Act (FMLA) and will grant up to 12 weeks of leave during a 12-month period to eligible employees (or up to 26 weeks of military caregiver leave). The purpose of this policy is to provide employees with a general description of their FMLA rights. In the event of any conflict between this policy and the applicable law, employees will be afforded all rights required by law.

Employee Eligibility

To be eligible for leave under this policy, an employee must meet **all** of the following requirements:

- Have worked for the Road Commission for at least twelve (12) months.
- Have worked at least 1,250 hours for the Road Commission over the twelve (12) months preceding the date the leave would commence.
- Currently work at a location where there are at least fifty (50) employees within seventy-five (75) miles.

The 12 months of employment do not have to be consecutive. All periods of absence from work due to or necessitated by service in the uniformed services are counted as hours worked in determining eligibility.

Leave Entitlement

To qualify as FMLA leave under this policy, the leave must be for one of the following reasons:

- The birth of a child or placement of a child with the employee for adoption or foster care.
- To care for a spouse, child or parent who has a serious health condition.
- For a serious health condition that makes the employee unable to perform the essential functions of his or her job.
- For any qualifying exigency arising out of the fact that a spouse, child or parent is a military member on covered active duty or on call to covered active duty status.
- To care for a covered service member with a serious injury or illness, when the employee is the spouse, son, daughter, or next of kin of the servicemember (military caregiver leave).

For all but military caregiver leaves, an eligible employee can take up to 12 weeks of FMLA during any 12-month period. The Road Commission will measure the 12-month period as a rolling 12-month period measured backward from the date an employee uses any leave under this policy. Each time an employee takes leave, the Road Commission will compute the amount

of leave the employee has taken under this policy in the last 12 months and subtract it from the 12 weeks of available leave, and the balance remaining is the amount the employee may be entitled to take at that time.

An eligible employee can take up to 26 weeks for FMLA military caregiver leave during a single 12-month period. FMLA leave already taken for other FMLA circumstances during the preceding 12 months will be deducted from the total of 26 weeks available.

Spouses employed by the Road Commission are jointly entitled to a combined total of 12 workweeks of family leave for the birth or placement of a child for adoption or foster care, and to care for a parent (but not a parent-in-law) who has a serious health condition. Both may only take a combined total of 26 weeks of leave to care for a covered injured or ill service member (if each spouse is a parent, spouse, child or next of kin of the service member).

Leave for birth or placement for adoption or foster care must conclude within 12 months of the birth or placement.

A qualifying exigency arising out of covered active duty includes short-notice deployment, military events and activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and additional activities that arise out of active duty, provided that the Road Commission and employee agree, including agreement on timing and duration of the leave.

Intermittent Leave or a Reduced Work Schedule

Under some circumstances, employees may take FMLA leave intermittently - which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule.

- If FMLA leave is for birth or placement for adoption or foster care, use of intermittent leave is subject to the Road Commission's approval.

- FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

The Road Commission may temporarily transfer an employee to an available alternative position with equivalent pay and benefits if the alternative position would better accommodate the intermittent or reduced schedule, in instances when leave for the employee or employee's family member is foreseeable and for planned medical treatment, including recovery from a serious health condition or to care for a child after birth or placement for adoption or foster care.

When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the company's operations.

Use of Paid and Unpaid Leave

An employee who is taking FMLA leave because of the employee's own serious health condition or the serious health condition of a family member, as well as for FMLA military caregiver leave, must use all paid vacation, personal or sick leave prior to being eligible for unpaid leave. Sick leave must run concurrently with FMLA leave if the reason for FMLA leave is covered by the established sick leave policy.

An employee who is taking leave for the adoption or foster care, as well as military FMLA leave for a qualifying exigency, must use all paid vacation and personal leave prior to being eligible for unpaid leave.

Employee Notice Requirement

All employees requesting FMLA leave must provide written notice of the need for leave to the Road Commission. When the need for leave is foreseeable, the employee must provide the Road Commission with at least 30 days' notice. When an employee becomes aware of a need for FMLA leave fewer than 30 days in advance, the employee must provide notice of the need for the leave either the same day the need for leave is discovered or the next business day. When the need for FMLA leave is not foreseeable, the employee must comply with the Road Commission's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

Employees seeking to use FMLA leave due to a serious health condition affecting the employee or an immediate family member will be required to provide a medical certification supporting the need for leave.

Continuation of Health Benefits During Leave

The Road Commission will continue an employee's health benefits during the leave period at the same level and under the same conditions as if the employee was continuously at work.

While on paid leave, the Road Commission will continue to make payroll deductions to collect the employee's share of insurance premiums. While on unpaid leave, the employee must continue to make this payment, either in person or by mail. The payment must be received by the Road Commission by the ____ day of each month. If the payment is more than 30 days late, the employee's health care coverage may be dropped for the duration of the leave. The Road Commission will provide 15 days' notification prior to the employee's loss of coverage.

If the employee chooses not to return to work for reasons other than a continued serious health condition of the employee or the employee's family member or a circumstance beyond the employee's control, the Road Commission will require the employee to reimburse the Road Commission the amount it paid for the employee's health insurance premiums during the leave period.

Return to Work After Leave

The Road Commission may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. If an employee is on FMLA leave due to his or her own serious health condition, the employee will be required to submit a fitness-for-duty certification prior to his or her return to work.

Upon return from FMLA leave, an employee will be restored to his or her original job, or to an equivalent job with equivalent pay, benefits, and other employment terms and conditions. In addition, an employee's use of FMLA leave will not result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave.

The Road Commission may choose to exempt certain key employees from this requirement and not return them to the same or similar position when doing so will cause substantial and grievous economic injury to business operations. Key employees will be given written notice at the time the FMLA leave is requested of his or her status as a key employee.

F. Jury Duty.

Full-time employees summoned for jury duty are paid the difference between their normal rate of pay and the jury duty pay, up to a maximum of ten (10) days. Employees must provide the Road Commission with a copy of the court payment records in order to be compensated. If an employee is required to serve more than ten (10) days of jury duty, the Road Commission will provide the employee with unpaid leave.

Exempt employees may be provided time off with pay when necessary to comply with State and Federal wage and hour laws.

The Road Commission reserves the right to request proof of jury service issued by the Court upon return.

G. Military Leave.

Employees who are required to fulfill military obligations in any branch of the Armed Forces of the United States or in State military service will be given the necessary time off and reinstated in accordance with Federal and State law.

The time off will be unpaid, except where State law dictates otherwise. Exempt employees may be provided time off with pay when necessary to comply with State and Federal wage and hour laws.

Accrued vacation may be used for this leave if the employee chooses. Military orders should be presented to your supervisor and arrangements for leave made as early as possible before departure. Employees are required to give advance notice of their service obligations to the Road Commission unless military necessity makes this impossible. You must notify your supervisor of

your intent to return to employment based on requirements of the law. Your benefits may continue to accrue during the period of leave in accordance with State and Federal law.

H. Witness Leave.

Employees are given the necessary time off without pay to attend or participate in a court proceeding in accordance with State law. We ask that you notify your supervisor of the need to take witness leave as far in advance as is possible.

Exempt employees may be provided time off with pay when necessary to comply with State and Federal wage and hour laws.

I. Bereavement Leave.

Full-time employees are eligible immediately upon hire for five (5) paid days for time required to be absent from their scheduled work week as a result of making arrangements or attendance at the funeral of his/her immediate family. These days are to be taken on consecutive working days. The day after the funeral may be included as one of the days. Members of the immediate family include spouses, parents and children.

Full-time employees are eligible immediately upon hire for one paid day to attend the funeral of brothers, sisters, mother-in-law, father-in-law, grandparents, grandchildren, sisters-in-law, brothers-in-law and stepchildren.

The Employer reserves the right to request written verification of an employee's familial relationship to the deceased and his or her attendance at the funeral service as a condition of the bereavement pay.

J. Victims of Crime Leave.

The Employer will grant reasonable and necessary leave from work, without pay, to employees who are victims of a crime or employees who are representatives of victims of a crime to attend or participate in legal proceedings pertaining to the crime. Affected employees must give the Employer reasonable notice that leave under this policy is required.

Exempt employees may be provided time off with pay when necessary to comply with State and Federal wage and hour laws.

SECTION 4.
INSURANCE AND OTHER ECONOMIC BENEFITS

A. Employee Benefits.

The Road Commission has developed a comprehensive set of employee benefit programs to supplement its employees' regular wages. This Employee Handbook describes the current benefit plans maintained by the Road Commission. Refer to the actual plan documents and summary plan descriptions if you have specific questions regarding the benefit plan. Those documents are controlling.

The Road Commission reserves the right to modify its benefits at any time. We will keep you informed of any changes.

B. Medical Insurance.

The Road Commission currently provides individual health and dental insurance benefits for eligible full-time employees and their dependents, beginning after the first full month of employment. Eligible employees may elect to participate in the available health plan(s) offered by the Road Commission. The Road Commission presently pays the insurance premium for all eligible employees. The Road Commission may require employees to pay a portion of insurance premium in the future. Information about the Road Commission health plan(s) will be provided to the employee at the time of hire.

C. Life Insurance.

Eligible full-time and regular part-time employees are enrolled in this plan immediately upon hire. You must complete an insurance form and designate your beneficiary. The cost of this insurance is fully paid by the Road Commission. Participating employees may also be covered under the plan's Accidental Death and Dismemberment rider.

D. Workers' Compensation.

On-the-job injuries are covered by our Workers' Compensation insurance policy. This insurance is provided at no cost to you. If you are injured on the job, no matter how slightly, report the incident immediately to your supervisor. Consistent with applicable State law, failure to report an injury within a reasonable period of time could jeopardize your claim. We ask for your assistance in alerting management to any condition which could lead to or contribute to an employee accident.

E. Retirement Plan.

The Road Commission provides eligible employees hired prior to _____ 1, 20__, with a defined benefit retirement plan. For those employees hired on or after _____ 1, 20__, the Road Commission provides eligible employees with a defined contribution retirement plan. These

plans are intended to be used in combination with your Social Security benefits and personal resources to provide you with supplemental income upon retirement.

SECTION 5.
ON THE JOB

A. Social Security Number Privacy.

To ensure to the extent practicable the confidentiality of our employees' Social Security Numbers (SSN's), no employee may acquire, disclose, transfer or unlawfully use the Social Security Number of any other employee except in accordance with this policy. The release of employee SSN's is restricted to employees with a legitimate business need for the information.

Except where permitted by State or Federal law, we will not: 1) publicly display all or more than four sequential digits of an employee's SSN; 2) use all or more than four sequential digits of an employee's SSN as a primary account number for an individual; 3) visibly print all or more than four sequential digits of an employee's SSN on any identification badge or card; 4) require an individual to use or transmit all or more than four sequential digits of their SSN to gain access to an internet web site or computer system or network unless the connection is secure, the transmission is encrypted, or a password or unique pin is also required to gain access; 5) include all or more than four sequential digits of an employee's SSN in or on any document or information mailed or otherwise sent to an individual if it is visible on or without manipulation from outside the envelope or packaging; or 6) include all or more than four sequential digits of an employee's SSN in any document or information mailed to a person.

Employee Social Security Numbers may be collected in the ordinary course of business for the purpose of identity verification or to administer benefits in accordance with State and Federal laws. Any documents, which include employee SSNs that are discarded, are to be shredded.

Any violation of this policy will result in disciplinary action up to and including discharge.

B. Standards of Conduct.

Each employee has an obligation to observe and follow the Employer's policies and to maintain proper standards of conduct at all times. If an individual's behavior interferes with the orderly and efficient operation of the Road Commission, corrective disciplinary measures will be taken. **Nothing in this policy is designed to modify the Road Commission's at-will employment policy.**

Disciplinary action may include a verbal warning, written warning, suspension with or without pay, and/or discharge. The appropriate disciplinary action imposed will be determined by the Road Commission. The Road Commission does not guarantee that one form of action will necessarily precede another.

The following may result in disciplinary action, up to and including discharge: violation of the Employer's policies or safety rules; insubordination; unauthorized or illegal possession, use

or sale of alcohol or controlled substances on work premises or during working hours, while engaged in Employer activities or in Employer vehicles; unauthorized possession, use or sale of weapons, firearms or explosives on work premises; theft or dishonesty; fighting or physical harassment; sexual harassment; disrespect toward fellow employees, visitors or other members of the public; performing outside work while on Employer time or use of Employer property, equipment or facilities in connection with outside work; destroying or willfully damaging the personal property of another, including the Employer's property; negligence in the performance of duties likely to cause or actually causing personal injury or property damage; poor attendance, tardiness, or poor performance. These examples are not all inclusive.

C. Access to Personnel Files.

Upon written request, employees will be allowed to review their personnel records up to two (2) times each year or as otherwise permitted by law, during normal business hours. If a review during normal office hours would require an employee to take time off from work with the Road Commission, then the Road Commission shall provide some other reasonable time for review. The record may be copied, and a reasonable fee may be charged for duplication of the personnel record. If there is a disagreement as to the information in the record, employees may ask to have it corrected or removed and may submit a statement explaining their position. Such statement becomes part of the personnel record.

D. Changes in Personal Data.

For benefit purposes, changes in name, address, telephone number, marital status, number of dependents or changes in next of kin and/or beneficiaries should be given to the Road Commission promptly.

E. Care of Equipment.

Employees are expected to demonstrate proper care when using the Road Commission's property and equipment. No property may be removed from the premises without the proper authorization of management. If you lose, break or damage any property, report it to your supervisor at once.

F. Road Commission Vehicles.

Operators of Road Commission vehicles are responsible for the care, operation, and cleanliness of the vehicle. Accidents involving a Road Commission vehicle must be reported to your immediate supervisor immediately.

Employees are responsible for any moving and parking violations and fines which may result when operating a Road Commission vehicle.

Road Commission vehicles must be operated by the employee only. Smoking is prohibited in Road Commission vehicles. The use of seat belts is mandatory for operators of and passengers in Road Commission vehicles.

G. Travel/Expense Accounts.

The Road Commission will reimburse employees for reasonable expenses incurred through pre-approved business travel. Mileage or transportation, parking fees, and meal costs when required are all illustrative of reasonable expenses. Expense receipts are required. Employees authorized to use their personal cars for Road Commission business are reimbursed at the Internal Revenue Service approved rate.

H. Electronic Mail Monitoring and Internet Usage.

The Road Commission recognizes its employees' need to be able to communicate efficiently with fellow employees and residents. Therefore, the Road Commission has installed an internal electronic mail (e-mail) system to facilitate the transmittal of business-related information within the Road Commission and with our residents.

The e-mail system is intended for business use only. The use of the Road Commission's e-mail system to solicit fellow employees or distribute non-job-related information to fellow employees is strictly prohibited.

Management reserves the right to enter, search and/or monitor the Employer's e-mail system and the files/transmission of any employee without advance notice and consistent with applicable State and Federal laws. Employees should expect that communications that they send and receive by the Employer's private e-mail system will be disclosed to management. Employees should not assume that communications that they send and receive by the Employer's e-mail system are private and confidential.

The Road Commission's policies against sexual and other types of harassment apply fully to the e-mail system. Therefore, employees are also prohibited from the display or transmission of sexually explicit images, messages, ethnic slurs, racial epithets or anything which could be construed as harassment or disparaging to others.

Employees shall not use unauthorized codes or passwords to gain access to others' files. All e-mail passwords must be made available to the Road Commission at all times.

Access to the internet is provided by the Road Commission to facilitate the assigned duties and responsibilities of Road Commission personnel. The use of the internet facilities by an employee must be consistent with the following:

Internet users are required:

- To respect the privacy of other users; for example, users shall not intentionally seek information on, obtain copies of, or modify files or data, belonging to other users, unless explicit permission to do so has been obtained.
- To respect the legal protection provided to programs and data by copyright and license.
- To protect Road Commission data from unauthorized use or disclosure.
- To respect the integrity of the computing systems.
- To safeguard their accounts and passwords.

Unacceptable Use:

- Activities unrelated to Road Commission business.
- Activities unrelated to official assignments and/or job responsibilities.
- For any illegal purpose.
- To transmit threatening, obscene or harassing materials or correspondence.
- To receive materials construed as harassing or embarrassing to others.
- For unauthorized distribution of Employer data and information.
- To interfere with or disrupt network users, services or equipment.
- For private purposes of any nature.
- For solicitation for religious and political causes.
- For private advertising for products or services.
- For activity to foster personal gain.

Pursuant to the Electronic Communications Privacy Act of 1986 (18 USC 2510 et seq.), notice is hereby given that there are NO facilities provided by the Road Commission's system for sending or receiving private or confidential electronic communications. Employees are hereby notified they have no expectation of privacy when using the Road Commission's information systems.

The Road Commission will have access to all mail and user access requests and will monitor messages as necessary to assure efficient performance and appropriate use. The Road Commission reserves the right to log network use and monitor file server space utilization by users and assumes no responsibility or liability for files deleted. This policy is intended to be illustrative of the range of acceptable and unacceptable uses of the internet facilities and is not necessarily exhaustive.

Violation of this policy will result in disciplinary action, up to and including discharge.

I. Professional Appearance.

Employees are expected to maintain the highest standards of personal cleanliness and present a neat, professional appearance at all times.

J. Reference Requests.

The Road Commission will not honor any oral requests for references. All requests must be in writing, and all responses will be provided on Road Commission letterhead. Generally, we will only confirm our employees' dates of employment, salary history and job title.

An employee should not under any circumstances provide another individual with information regarding current or former employees of the Road Commission. If you receive a request for reference information, please forward it to your supervisor.

K. Protecting Road Commission Information.

Protecting the Road Commission's information is the responsibility of every employee, and we all share a common interest in making sure it is not improperly or accidentally disclosed. Do not discuss the Road Commission's confidential business with anyone who does not work for us.

Any third-party requests for Road Commission information must be in writing and directed to the Road Commission's Freedom of Information Act (FOIA) Coordinator for response.

L. Bulletin Board.

Information of interest and importance to you is regularly posted on our bulletin board. We suggest that you look at it regularly. This bulletin board is for administrative use only; employees may not post or remove any information.

M. Cellular Telephones.

Employees in certain positions are issued Road Commission cellular telephones so they may maintain contact with others when they are out of the office on business.

Employees are encouraged to take appropriate safety precautions when using their cellular telephone. Employees are expected to comply with applicable state laws regarding the use of cellular telephones while driving.

The use of cellular telephones is not a work requirement for most employees. Employees who are not issued a Road Commission cellular telephone will not be reimbursed for the use of their personal cellular telephones and are expected to make business calls from the office.

Employees are expected to demonstrate proper care of their cellular telephones. If you lose, break or damage your Road Commission cellular telephone, report it to your supervisor at once. All cellular telephones issued by the Road Commission must be returned upon leaving the Road Commission or upon transferring to a position that does not require a Road Commission cellular telephone.

N. Contact with the Media.

All media inquiries regarding the Road Commission and its operations must be referred to the Managing Director. Only the Managing Director is authorized to make or approve public statements pertaining to the Road Commission or its operations. No other employees, unless specifically designated by the Board, are authorized to make those statements.

O. Separation from Employment.

Should you decide to leave your employment with the Road Commission, we ask that you provide your supervisor with at least two weeks' advance written notice. If you do so, this will be noted favorably should you ever wish to reapply for employment with the Road Commission.

In the event of separation from employment, or immediately upon request by the Managing Director or his or her designee, employees must return all Road Commission property that is in their possession or control.

Employees who are rehired following a break in service exceeding six (6) months, other than an approved leave of absence, are considered new employees from the effective date of their re-employment for all purposes, including for purposes of measuring benefits.

You should notify the Road Commission if your address changes during the calendar year in which termination occurs so that your tax information will be sent to the proper address.

SECTION 6.
SAFETY IN THE WORKPLACE

A. Each Employee's Responsibility.

Safety can only be achieved through teamwork at our Road Commission. Each employee must practice safety awareness by thinking defensively, anticipating unsafe situations, and reporting unsafe conditions immediately.

Please observe the following precautions:

1. Notify your supervisor of any emergency situation. If you are injured or become sick at work, no matter how slightly, you must inform your immediate supervisor immediately.

2. The use of alcoholic beverages or illegal substances during working hours will not be tolerated. The possession of alcoholic beverages or illegal substances on the Road Commission's property is forbidden.

3. Use, adjust and repair machines and equipment only if you are trained and qualified.

4. Know the proper lifting procedures. Get help when lifting or pushing heavy objects.

5. Understand your job fully and follow directions. If you are not sure of the safe procedure, don't guess; ask your supervisor.

6. Know the locations, contents, and use of first aid and firefighting equipment.

7. Wear personal protective equipment in accordance with the job you are performing.

8. Comply with OSHA standards and/or applicable State job safety and health standards as written in our safety procedures manual.

9. Unauthorized possession, use or sale of weapons, firearms, or explosives on work premises is forbidden.

A violation of a safety precaution is in itself an unsafe act. A violation will lead to disciplinary action, up to and including discharge.

B. Workplace Violence.

Violence by an employee or anyone else against an employee, supervisor or member of management will not be tolerated. The purpose of this policy is to minimize the potential risk of personal injuries to employees at work and to reduce the possibility of damage to Road Commission property in the event someone, for whatever reason, may be unhappy with a Road Commission decision or action by an employee or member of management.

If you receive or overhear any threatening communications from an employee or outside third party, report it to your supervisor at once. Do not engage in either physical or verbal confrontation with a potentially violent individual. If you encounter an individual who is threatening immediate harm to an employee or visitor to our premises, contact an emergency agency (such as 911) immediately.

All reports of work-related threats will be investigated and documented. Employees are expected to report and participate in an investigation of any suspected or actual cases of workplace violence.

Violations of this policy, including your failure to report or fully cooperate in the Employer's investigation, will result in disciplinary action, up to and including discharge.

C. Workplace Searches.

To protect the property and to ensure the safety of all employees, residents and the Road Commission, the Road Commission reserves the right to conduct personal searches consistent with State law. Specifically, the Road Commission reserves the right to search any employee's office, desk, files, locker, equipment or any other area or article on our premises. In this regard, it should be noted that all offices, desks, files, lockers, equipment, etc. are the property of the Road Commission, and are issued for the use of employees only during their employment. Inspection may be conducted at any time at the discretion of the Road Commission.

Persons entering the premises who refuse to cooperate in an inspection conducted pursuant to this policy may not be permitted to enter the premises. Employees working on or entering or leaving the premises who refuse to cooperate in an inspection as well as employees who after the inspection are believed to be in possession of stolen property or illegal substances, will be subject to disciplinary action, up to and including discharge.

D. Smoking in the Workplace.

Smoking, including the use of any tobacco or vapor product, is prohibited in any enclosed, indoor area owned or operated by the Road Commission, including the main building and offices, and in any Road Commission vehicle. Smoking shall be allowed, while on break time, in designated outdoor areas. Employees who smoke should treat nonsmoking co-workers with courtesy. In situations where the preferences of smokers and nonsmokers are in direct conflict, the preferences of nonsmokers will prevail.

Employees who violate this policy will be subject to disciplinary procedures. Any complaint concerning a violation of this policy should be submitted to the Managing Director for investigation and appropriate resolution.

E. Weapons.

Possession, use or sale of weapons, firearms, or explosives on work premises, while operating Road Commission machinery, equipment or vehicles for work-related purposes or while engaged in Road Commission business off premises is forbidden except where expressly authorized by the Road Commission and permitted by State and local laws. This policy applies to all employees, including but not limited to, those who have a valid permit to carry a firearm.

Employees who are aware of violations or threats of violations of this policy are required to report such violations or threats of violations to your supervisor immediately.

Violations of this policy will result in disciplinary action, up to and including discharge.

F. Drug and Alcohol-Free Workplace.

The Road Commission has vital interests in ensuring a safe, healthy, and efficient working environment for our employees, their co-workers and residents we serve. The unlawful or improper use of controlled substances or alcohol in the workplace presents a danger to everyone. In addition, we have a duty to comply with the requirements of the Drug-Free Workplace Act of 1988. For these reasons, we have established, as a condition of employment and continued employment with the Road Commission, a drug and alcohol-free workplace policy.

The Road Commission has implemented a drug testing program in compliance with local, State and Federal laws. Employees are prohibited from reporting to work or working while using illegal or unauthorized substances. Employees are prohibited from reporting to work or working when the employee uses any drugs, except when the use is pursuant to doctor's orders and the doctor has advised the employee that the substance does not adversely affect the employee's ability to safely perform his or her job duties. Employees are also prohibited from reporting for duty or remaining on duty with any alcohol in their systems and from consuming alcohol during working hours, including meal and break periods.

In addition, employees are prohibited from engaging in the unlawful or unauthorized manufacture, distribution, sale or possession of illegal or unauthorized substances and alcohol in

the workplace including on Road Commission paid time, on Road Commission premises, in Road Commission vehicles or while engaged in Road Commission activities.

In accordance with the Drug-Free Workplace Act of 1988, employees must notify the Road Commission of any criminal drug statute conviction for a violation occurring within the workplace within five days of such conviction.

Your employment or continued employment with the Road Commission is conditioned upon your full compliance with the foregoing drug and alcohol-free workplace policy. Any violation of this policy will result in disciplinary action, up to and including discharge.

The Road Commission further reserves the right to take any and all appropriate and lawful actions necessary to enforce this drug and alcohol-free workplace policy including, but not limited to, the inspection of Road Commission-issued lockers, desks or other suspected areas of concealment, as well as an employee's personal property when the Road Commission has reasonable suspicion to believe that the employee has violated this drug and alcohol-free workplace policy.

G. Drug and Alcohol Awareness Program.

In order to maintain a drug and alcohol free workplace, the Road Commission has established a drug and alcohol free awareness program to educate employees on 1) the danger of drug abuse and alcohol in the workplace; 2) the Employer's drug and alcohol free workplace policy; 3) the availability of any drug and alcohol counseling, rehabilitation, and employee assistance programs; and 4) the penalties that may be imposed upon employees for drug abuse and alcohol violations and violations of the Employer's drug and alcohol free workplace. Such education includes: the distribution of our drug and alcohol-free workplace policy at the employment interview and inclusion of the Employer's drug and alcohol-free workplace policy in the Employee Handbook and any other personnel policy publications.

RECEIPT OF EMPLOYEE HANDBOOK AND EMPLOYMENT-AT-WILL STATEMENT (NON-UNION EMPLOYEES)

This is to acknowledge that I have received a copy of the Employee Handbook and understand that it sets forth the terms and conditions of my employment as well as the duties, responsibilities, and obligations of employment with the Road Commission. I understand and agree that it is my responsibility to read the Employee Handbook and to abide by the rules, policies and standards set forth in the Employee Handbook.

I also acknowledge that my employment with the Road Commission is not for a specified period of time and can be terminated at any time for any reason, with or without cause or notice, by me or by the Road Commission. I acknowledge that no oral or written statements or representations regarding my employment can alter the foregoing. I also acknowledge that no manager or employee has the authority to enter into an employment agreement—express or implied—providing for employment other than at-will.

I also acknowledge that, except for the policy of at-will employment, the Road Commission reserves the right to revise, delete and add to the provisions of this Employee Handbook. All such revisions, deletions or additions must be in writing and must be signed by the Managing Director of the Road Commission. No oral statements or representations can change the provisions of this Employee Handbook. I also acknowledge that, except for the policy of at-will employment, terms and conditions of employment with the Road Commission may be modified at the sole discretion of the Road Commission, with or without cause or notice, at any time. No implied contract concerning any employment-related decision, term of employment or condition of employment can be established by any other statement, conduct, policy, or practice.

I understand that the foregoing agreement concerning my at-will employment status and the Road Commission's right to determine and modify the terms and conditions of employment is the sole and entire agreement between me and the Road Commission concerning the duration of my employment, the circumstances under which my employment may be terminated and the circumstances under which the terms and conditions of my employment may change. I further understand that this agreement supersedes all prior agreements, understandings and representations concerning my employment with the Road Commission.

NAME _____

DATE _____

EMPLOYEE
SIGNATURE _____

RECEIPT OF EMPLOYEE HANDBOOK AND EMPLOYEE ACKNOWLEDGEMENT (UNION EMPLOYEES)

This is to acknowledge that I have received a copy of the Employee Handbook. I understand and agree that it is my responsibility to read the Employee Handbook and to abide by the rules, policies and standards set forth in the Employee Handbook.

I also acknowledge that the Road Commission reserves the right to revise, delete and add to the provisions of this Employee Handbook. All such revisions, deletions or additions must be in writing and must be signed by the Managing Director of the Road Commission. No oral statements or representations can change the provisions of this Employee Handbook. However, all Union contracts will take precedence over any item in this Employee Handbook that may conflict with them.

NAME _____

DATE _____

EMPLOYEE
SIGNATURE _____

II. JOB DESCRIPTIONS

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Job Descriptions - General Considerations

Employers should use job descriptions to identify, define, and clearly describe jobs in the workplace, for purposes of evaluating employees, restructuring, determining appropriate pay structures, and making employment decisions. Job descriptions are also valuable tools for defending against disability discrimination and other types of litigation. Employers should be aware that reliance on a job description can produce negative results if the job description is not regularly reviewed, updated, and followed by the employer. A good job description is one which accurately reflects the duties, responsibilities, required education and training and working conditions of a job.

A good job description takes time to write and should be reviewed periodically to keep current. Written descriptions must be consistent and accurate. The following guidelines should be adhered to for preparing well-organized, clearly written job descriptions:

(1) **Be logical**. Make the description easy to understand. If the job description is repetitive, describe the tasks as they occur in the work cycle. For varied jobs, list the major tasks followed by less frequent or less important tasks.
(2) **Use proper detail**. Make sure the description covers the meaningful duties of the job but avoid excessive detail.
(3) **Use the active voice**. Each sentence should start with a functional verb in the present tense, third person singular, e.g., bends, cuts, polishes.
(4) **Quantify**. Instead of "lifts heavy packages," say "lifts packages weighing up to 50 pounds unassisted."
(5) **Describe rather than prescribe**. Say "operates copier," not "must know how to operate copier."
(6) **Be specific**. Break down complex operations into component tasks. Mention any equipment used.
(7) **Avoid vague terms**. Terms like designs, handles, operates, and so on do not tell what the employee does. Use active, action verbs such as cuts, lifts, sharpens. If vague terms are necessary, define them. Define terms like "may," "occasionally," and "periodically." For example, "may" can describe tasks which only some employees in a job perform; "occasionally" can describe tasks performed once in a while and not by a particular employee.
(8) **Be consistent**. Use consistent language throughout the job description.
(9) **Check accuracy**. To be certain that the job description is accurate, it should be approved by the supervisor of the job in question.

(10) **Assign job titles.** A final title should allow for quick identification of jobs, minimize confusion, and reflect most accurately a job's content, purpose, scope of duties, and responsibilities.

A job description can be formatted in many ways, but it should generally include the following items:

Job classification - The job classification includes the job title and wage and hour status.

Job summary – The job summary should provide a brief narrative that captures the purpose of the job. It should give a good idea of what the employee does, without going into significant detail. Before summarizing the job's purpose, the employer should ask, "What is the primary purpose of having this job?"

Essential job duties – A description of the essential job functions or tasks that the employee performs and the expected results.

Minimum qualifications – A list of all minimum required qualifications (sometimes called "Knowledge, Skills, Abilities") for the position, including the basic knowledge, skills, abilities, physical abilities, experience, licenses, training, educational requirements, etc., required for the position. All statements must be specific, realistic, and defensible. From a practical standpoint, if job qualifications are unnecessarily high, they screen out people who are qualified to perform the work.

Preferred qualifications – Additional measurable and job-related levels of experience, knowledge, and/or skill the ideal employee would have. These criteria must be applied equally to all candidates.

Working conditions (including physical demands) – Working conditions include environmental and other conditions which might affect the performance of the job. Such things as exposure to hazards, adverse weather conditions, odors and other unpleasant surroundings, frequent overtime, extensive travel, and other related factors should be included in this section.

Any physical demands that relate directly to the essential job duties and responsibilities should also be included in this section. Avoid including physical demands that are not essential to the position, as these requirements may exclude individuals with disabilities who would otherwise be capable of performing the essential job functions with or without reasonable accommodation. Consider the following:

- Environment, such as office or outdoors;
- Exposures encountered, such as hazardous materials, loud noise, or extreme heat/cold;
- Essential physical requirements, such as climbing, standing, stooping, or typing; and
- Physical effort/lifting, such as sedentary – up to 10 pounds; light – up to 20 pounds; medium – up to 50 pounds; heavy – over 50 pounds

Disclaimer – Should expressly state that the employee must be able to perform the essential functions of the position satisfactorily and, if requested, reasonable accommodations will be made to enable employees with disabilities to perform the essential functions of their job, absent undue hardship.

If minimum job qualifications are included in a job description, they must be carefully reviewed to make sure they are not discriminatory. To defend against charges of discrimination, the employer must show that successful job performance requires possession of the minimum job qualifications. Federal and State law have restricted the employer to job requirements that are:

- Vital to the business. The job requirement must be necessary for the business to achieve a safe and efficient operation.
- Applied equally to all.
- Not discriminatory. Federal law prohibits unequal treatment in employment based on race, color, national origin, religion, sex (including gender identity, sexual orientation, and pregnancy), genetic information, and disability. State law also protects the additional categories of height, weight, and marital status.

Frequently, old descriptions are ignored as positions are eliminated and employees take on additional responsibilities. Failing to list essential job duties weakens an employer's case if a candidate or employee with a disability is rejected because of an inability to perform omitted duties. It is important that job descriptions be done correctly and that they be regularly updated by the employer.

Job descriptions typically change over time as requirements and employee skill levels change. Employers may revise and/or add duties to reflect these changes. To reflect this, a statement should be included in the job description as follows: "The Employer retains the right to change or assign other duties to this position."

EMPLOYMENT PRACTICES GUIDELINE

Job Descriptions - Compliance with the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA)

Job descriptions are important in the context of complying with the Americans with Disabilities Act (ADA) and the Family Medical Leave Act (FMLA). Under the ADA, employers with 25 or more employees must consider without prejudice the application of any disabled individual who, with or without reasonable accommodation, is qualified to perform the essential functions of the job. The FMLA also uses the term "essential functions" and follows the ADA definition.

The ADA

The ADA does not require employers to develop or maintain job descriptions. The ADA also does not change an employer's right to establish job qualifications or to hire and promote the best-qualified person for the job. The ADA does require that employment qualifications be job-related and not adversely affect people with disabilities.

Well-prepared job descriptions help employers defend against claims brought under the ADA by defining essential job functions. Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation. An employer should carefully examine each job to determine which functions or tasks are essential to performance, particularly before taking an employment action such as recruiting, advertising, hiring, promoting, or firing. According to the Equal Employment Opportunity Commission (EEOC), factors to consider in determining if a function is essential include:

- Whether the reason the position exists is to perform that function;
- The number of other employees available to perform the function or among whom the performance of the function can be distributed; and,
- The degree of expertise or skill required to perform the function.

The employer's judgment as to which functions are essential and a written job description prepared before advertising or interviewing for a job will be considered by the EEOC as evidence of essential functions. Other kinds of evidence that the EEOC will consider include:

- The actual work experience of present or past employees in the job;
- The time spent performing a function;
- The consequences of not requiring that an employee perform a function; and,
- The terms of a collective bargaining agreement.

Job descriptions prepared after a discrimination complaint cannot be considered evidence of essential job functions.

Under the ADA, failing to reasonably accommodate a qualified person with a disability is a violation. A qualified person with a disability is one who, with or without a reasonable accommodation, can perform the essential functions of the job. The first step in this analysis is to determine what the essential functions of a job are. As discussed, job descriptions may be considered evidence of the essential functions of a job. The second inquiry, whether there is an available reasonable accommodation which will allow the employee to perform the essential functions of the job, is a more difficult one to answer. Such a determination must be made on a case-by-case basis, based upon the nature of the disability and the facts involved.

The FMLA

The FMLA also uses the term "essential functions." The FMLA permits covered employees to take unpaid leave for serious health conditions, which are defined as those that leave the worker unable to perform the essential functions of a job as defined in the ADA.

The FMLA clarifies that a health care provider may be required to certify that "the employee is unable to perform the functions of the position of the employee." Employers have the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the provider to review. A well-written job description helps to serve this purpose.

JOB DESCRIPTION

Job Title: _____ **FLSA Status**: _____

Purpose and Description:

_____

_____

_____

Essential Functions:

-
-
-
-
- All other duties as assigned.

Required Education, Skills, and Experience:

The following minimum qualifications are required to enable job holders to perform the essential functions of the job:

-
-

Preferred Education, Skills, and Experience:

The following additional qualifications are desired in successful job candidates:

-
-

Physical Demands:

The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of the job. Candidates whose disabilities make them unable to meet these requirements will still be considered fully qualified if they can perform the essential functions of the job with or without reasonable accommodation.

While performing the duties of this job, the employee is regularly required to:

Work Environment:

This position operates primarily in an _____ setting where exposure to _____ is possible. Days and hours of work are generally Monday through Friday, _____ a.m. to _____ p.m. Evening, night, and weekend work may be required as duties demand.

The employee in this position may be exposed to certain hazards as part of the duties and responsibilities of the position such as:

_____
_____
_____
_____
_____
_____
_____.

Disclaimer:

This job description is not intended to cover or contain a comprehensive listing of activities, duties or responsibilities that are required of the employee. Other duties, responsibilities, and activities may change or be assigned at any time with or without notice.

ADA PHYSICAL REQUIREMENT WORKSHEET

DATE: _____

EMPLOYEE: _____ JOB TITLE: _____

DEPARTMENT: _____ COMPLETED BY: _____

This form is designed to identify the "Physical Requirements" necessary to perform the essential functions of a particular job. All requirements are subject to possible modification to reasonably accommodate individuals with disabilities. Individuals who pose a direct threat or significant risk to the health and safety of themselves or others in the workplace, or are not able to perform the essential functions of the job with or without a reasonable accommodation, will not be considered qualified for employment. This document is not an employment contract.

PHYSICAL REQUIREMENTS

✓ **Check which of the following best describes the position**

☐ **Sedentary work** - Exerting up to 10 pounds of force occasionally, and/or a negligible amount of force frequently or constantly to lift, carry, push, pull or otherwise move objects, including the human body. Sedentary work involves sitting most of the time. Jobs are sedentary if walking and standing are required only occasionally, and all other sedentary criteria are met.

☐ **Light work** - Exerting up to 20 pounds of force frequently, and/or a negligible amount of force constantly to move objects. If the use of arm and/or leg control requires exertion of forces greater than that of sedentary work and if the worker sits most of the time, the job is considered light work.

☐ **Medium work** - Exerting up to 50 pounds of force occasionally, and/or up to 20 pounds of force frequently, and/or up to 10 pounds of force constantly to move objects.

☐ **Heavy work** - Exerting up to 100 pounds of force occasionally, and/or up to 50 pounds or force frequently, and/or up to 20 pounds of force constantly to move objects.

☐ **Very heavy work** - Exerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force constantly to move objects.

✓ **Check essential physical requirements of the job:**

☐ Climbing	☐ Balancing	☐ Stooping
☐ Kneeling	☐ Crouching	☐ Reaching
☐ Standing	☐ Walking	☐ Pushing
☐ Pulling	☐ Lifting	☐ Fingering
☐ Grasping	☐ Tactile sense	☐ Repetitive motions
☐ Seeing	☐ Hearing	☐ Talking

☐ Visual acuity (color, depth perception and field of vision)

COMMENTS:

EQUIPMENT AND TOOLS

List equipment and tools operated and the frequency of use:
(Those which cannot be delegated to a co-worker.)

Road Commission Vehicles:

Equipment:

Tools:

Other:

WORKING CONDITIONS

✓ **Check which working conditions the employee is subject to:**

Physical Conditions:

☐ Noise	☐ Extreme temperatures
☐ Vibration	☐ Wet and/or humid

Hazards:

☐ Mechanical	☐ Electrical	☐ Chemical
☐ Explosives	☐ Radiant energy	☐ Burns

☐ Other, including:

Atmospheric Conditions:

☐ Fumes	☐ Odors	☐ Dusts
☐ Mists	☐ Gases	☐ Poor ventilation

☐ Other, including:

III. PERSONNEL FILES

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Personnel Files – General Considerations

The maintenance of personnel files in Michigan is governed in large part by the Bullard-Plawecki Employee Right to Know Act (MCL 423.501, et seq.). The Bullard-Plawecki Employee Right to Know Act covers all employers in Michigan who have four (4) or more employees. The purpose of the Act is to allow employees access to their personnel records and to limit what may be contained in personnel records. The Act defines a personnel record as "a record kept by the employer that identifies the employee, to the extent that the record is used or has been used or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action."

According to the Act, a personnel record must not include any of the following:

- Employee references supplied to an employer if the identity of the person making the reference would be disclosed;
- Materials relating to the employer's staff planning with respect to more than 1 employee, including salary increases, management bonus plans, 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 that relates to an investigation of criminal activity by the employer;
- Records limited to grievance investigations which are kept separately and not used for the purposes set forth in the Act's definition of a personnel record; 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 pursuant to this provision may be entered into a personnel record if entered not more than 6 months after the date of the occurrence or the date the fact becomes known.

Personnel record information which is not included in the personnel record but should have been as required by the Act may not be used by the employer in a judicial or quasi-judicial proceeding. However, personnel record information which, in the opinion of the judge in a judicial proceeding or in the opinion of the hearing officer in a quasi-judicial proceeding,

was not intentionally excluded in the personnel record, may be used by the employer in the judicial or quasi-judicial proceeding, if the employee agrees or if the employee has been given a reasonable time to review the information. Any material which should have been included in the personnel record may be used at the request of the employee.

An employer may not gather or keep a record of an employee's association, political activities, publications, or communications of nonemployment activities, except if the information is submitted in writing by or authorized to be kept or gathered, in writing, by the employee to the employer. This prohibition on records does not apply to activities that occur on the employer's premises or during the employee's working hours with that employer that interfere with the performance of the employee's duties or duties of other employees. Any such record which is kept by the employer shall be part of the personnel record.

If an employer has reasonable cause to believe that an employee is engaged in criminal activity that might result in loss or damage to the employer's property or disruption of the employer's business operation, and the employer is engaged in an investigation, then the employer may keep a separate file of information relating to the investigation. Upon completion of the investigation or after 2 years, whichever comes first, the employee must be notified that an investigation was or is being conducted of the suspected criminal activity. Upon completion of the investigation, if disciplinary action is not taken, the investigative file and all copies of the material in it must be destroyed.

If an employer violates the Act, an employee may commence an action in Circuit Court to compel compliance. Proper venue is either in the Circuit Court for the County in which the complainant resides, the Circuit Court for the County in which the complainant is employed, or the Circuit Court for the County in which the personnel record is maintained. Failure to comply with an order of the court may be punished as contempt. In addition, the court shall award an employee prevailing in an action pursuant to the Act the following damages:

(a) For a violation of the Act, actual damages plus costs; or,
(b) For a willful and knowing violation of the Act, $200.00 plus costs, reasonable attorney's fees, and actual damages.

EMPLOYMENT PRACTICES GUIDELINE

Personnel Files – Employee Right to Review and Correct Record

Pursuant to the Bullard-Plawecki Employee Right to Know Act, an employer, upon written request which describes the personnel, must provide an employee with an opportunity to periodically review at reasonable intervals, generally not more than 2 times in a calendar year or as otherwise provided by law or a collective bargaining agreement, the employee's personnel record if the employer has a personnel record for that employee. The review must take place at a location reasonably near the employee's place of employment and during normal office hours. If a review during normal office hours would require an employee to take time off from work with the employer, then the employer must provide some other time for the review. The employer may allow the review to take place at another time or location that would be more convenient to the employee.

After review, an employee may obtain a copy of the information or part of the information contained in the personnel record. An employer may charge a fee for providing a copy of information contained in the personnel record. The fee shall be limited to the actual incremental cost of duplicating the information. If an employee demonstrates that he or she is unable to review his or her personnel record at the employer's offices, then the employer, upon the employee's written request, must mail a copy of the requested record to the employee.

If there is a disagreement with information contained in a personnel record, removal or correction of that information may be mutually agreed upon by the employer and the employee. If an agreement is not reached, the employee may submit a written statement explaining the employee's position. The statement shall not exceed 5 sheets of 8-1/2-inch by 11-inch paper and must be included when the information is divulged to a third party and as long as the original information is a part of the file.

If either the employer or employee knowingly places in the personnel record information which is false, then the employer or employee, whichever is appropriate, can take legal action to have that information expunged.

EMPLOYMENT PRACTICES GUIDELINE

Personnel Files – Disclosure to Third Parties

The Bullard-Plawecki Employee Right to Know Act provides that an employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer's organization, or to a party who is not a part of a labor organization representing the employee, without written notice to the employee. The written notice must be by first-class mail to the employee's last known address and must be mailed on or before the day the information is divulged from the personnel record.

Such notice is not required if any of the following occur:

(a) The employee has specifically waived written notice as part of a written, signed employment application with another employer;
(b) The disclosure is ordered in a legal action or arbitration to a party in that legal action or arbitration; or,
(c) Information is requested by a government agency as a result of a claim or complaint by an employee.

Before releasing information to a third party, an employer must review a personnel record and delete disciplinary reports, letters of reprimand, or other records of disciplinary action that are more than 4 years old. This requirement does not apply to any of the following circumstances:

(a) The release is ordered in a legal action to a party in that legal action;
(b) The release is ordered in an arbitration to a party in that arbitration;
(c) The release is part of a record regarding the reason or reasons for, and circumstances surrounding, a separation of service of a law enforcement officer; or,
(d) The release is requested by the Michigan Commission on Law Enforcement Standards, a law enforcement training academy, or a law enforcement agency for the purpose of determining compliance with licensing standards and procedures under the Michigan Commission on Law Enforcement Standards Act, being MCL 28.601, et seq.

Many times, requests for information from personnel files are made under the Michigan Freedom of Information Act (FOIA). The Michigan Supreme Court has held, in *Bradley* v *Saranac Community Schools Board of Education*, 455 Mich 285; 565 NW2d 650 (1997), that personnel records are not generally exempt from disclosure under FOIA. Nonetheless, the exemptions in FOIA will still apply to certain records and information contained in a personnel file. Therefore, personnel records must be carefully reviewed before responding to a FOIA request. For instance, FOIA exempts from disclosure information of a personal nature if public disclosure of the information would constitute a clearly unwarranted

invasion of privacy. Michigan courts have held that public employee home addresses and telephone numbers are considered information of a personal nature, disclosure of which would constitute a clearly unwarranted invasion of privacy. All such information should be redacted when turning over a personnel file in response to a FOIA request. FOIA also exempts from disclosure social security numbers, medical records or information, and any other record or information specifically described and exempted from disclosure by statute. Consequently, the above-stated prohibition on release of disciplinary reports, letters of reprimand, or other records of disciplinary action that are more than 4 years old would apply to a request for a personnel file made under FOIA. On the other hand, salary information and performance appraisals are not considered information of a personal nature for purposes of FOIA and would generally need to be disclosed.

EMPLOYMENT PRACTICES GUIDELINE

Personnel Files – Medical Records

Under the Americans with Disabilities Act (ADA), any employment-related documentation containing medical information must be maintained in confidential files completely separate from the general personnel file. Medical information can be anything related to an employee's medical condition. It would include results from pre-employment physical examinations, information the employee provides to the employer about medications or medical history, medical certifications and recertifications under the Family and Medical Leave Act (FMLA), documents related to workplace injuries, and return to work slips containing any physical restrictions.

Access to such records must be limited. Ideally, such records will be stored in locked cabinets or kept in a locked room. Under the ADA, access to medical records and employee medical information is limited to the following:

- Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodation (but they may not need to know the underlying condition which brought about the need for the accommodation).
- First aid and safety personnel may be informed (when appropriate) if an employee's condition might require emergency treatment.
- Government officials investigating compliance must be provided relevant information upon request.
- Workers' compensation insurance carriers may receive information in compliance with state workers' compensation provisions.
- Nonsupervisory employees will almost never have a need to be informed of other employees' medical information.

In summary, employers have an obligation to protect employees' privacy by ensuring medical files are kept confidential, separate from the general personnel file, and in a secure location.

EMPLOYMENT PRACTICES GUIDELINE

Personnel Files – Driver Qualification File

Under the Federal Motor Carrier Safety Regulations, motor carriers (i.e., those who employ drivers of commercial motor vehicles (CMVs)) are required to maintain a qualification file for each of their drivers. The following items need to be included in that file:

Initial Driver Qualification File Documents

- **Driver's Application for Employment** – A driver must not drive a CMV unless an application for employment is completed and signed.
- **Copy of a Current and Valid Commercial Driver's License.**
- **Inquiry to Previous Employers: Safety Performance History Records Request** – Employers must investigate the driver's employment during the preceding three years. This investigation must be completed within 30 days of the date employment begins. Employer must retain a record of the request and all response documentation. The record must include the previous employer's name and address, the date the previous employer was contacted, and the information received about the driver from the previous employer. Failure to contact a previous employer, or of them to provide the required safety performance history information, must be documented.
- **Safety Performance History Records: Driver Correction or Rebuttal** (if applicable) – Employers must maintain a record of both the request for a driver's safety performance history and any related documentation, for example if a driver documents that information in the history is inaccurate.
- **Inquiry to State Agencies for 3-Year Driving Record** – Employers must contact State agencies for the driver's Motor Vehicle Record (MVR) for the past three years. Request must be made within 30 days of hire. MVR must be kept in the driver qualification file and updated annually.
- **Pre-Employment Drug and Alcohol Documents** – Until January 6, 2023, employers are required to conduct both electronic queries in the Federal Drug & Alcohol Clearinghouse and ask previous DOT-employers who have employed the driver at any time during the two years before the date of application about any previous drug and alcohol violations by the driver. Employer must maintain a written record of the information obtained or of the good faith efforts made to obtain the information. The file must also include a copy of the driver's written authorization for the employer to seek information about a driver's alcohol and controlled substances history as required under §391.23(f)(1). As of January 6, 2023, employers will only need to conduct an electronic query of the Clearinghouse. The Clearinghouse retains a record of every query an employer conducts, but employers may choose to maintain a separate copy in the driver qualification file.

- **Medical Examiner's Certificate or a Valid Medical Waiver Card** – All commercial drivers are required to pass a physical exam conducted by a licensed medical examiner at least once every 24 months. The employer must retain a copy of this certificate or a valid medical waiver card, if applicable. For CDL drivers, the employer must also obtain the CDLIS motor vehicle record from the current licensing State, if it contains medical certification status information, and place it in the driver qualification file.
- **Employer Note Verifying that Medical Examiner is Listed on National Registry of Certified Medical Examiners** – A note must be included in the driver qualification file to verify that the medical examiner is listed on the National Registry of Certified Medical Examiners.

Ongoing Updates

- **Inquiry to State Agencies for Driving Record – Annual** – Employers must contact State agencies annually for an updated copy of each driver's MVR.
- **Review of Driving Record – Annual** – At least once every 12 months, the employer must collect a current MVR from the State issuing a driver's license and review the MVR to determine whether the driver still meets the minimum requirements for safe driving, and to confirm they are not disqualified pursuant to 49 CFR §391.15. A note including the name of the person who performed this review, and the date must be retained in the file with the MVR.
- **Driver's Certification of Violations – Annual** – Until May 9, 2022, at least once every 12 months, drivers were required to submit a list of all convicted violations of motor vehicle traffic laws and ordinances during the previous 12 months. The Federal Motor Carrier Safety Administration eliminated this requirement as effective May 9, 2022. However, employers must retain all certificates of violations obtained before May 9, 2022, in the driver qualification file for 36 months from the document date.
- **Copy of a Current and Valid Commercial Driver's License**
- **Medical Examiner's Certificate or a Valid Medical Waiver Card** – All commercial drivers are required to pass a physical exam conducted by a licensed medical examiner at least once every 24 months. The employer must retain a copy of this certificate or a valid medical waiver card, if applicable. For CDL drivers, the employer must also obtain the CDLIS motor vehicle record from the current licensing State, if it contains medical certification status information, and place it in the driver qualification file.
- **Employer Note Verifying that Medical Examiner is Listed on National Registry of Certified Medical Examiners** – A note must be included in the driver qualification file to verify that the medical examiner is listed on the National Registry of Certified Medical Examiners.

EMPLOYMENT PRACTICES GUIDELINE

Personnel Files – Employee Evaluations

Performance evaluations can be highly effective tools for employers to let employees know how to succeed in their positions, lay the groundwork for discipline, and, if necessary, justify termination if the employment relationship is not working out. However, if not done correctly, they can also be the best evidence used by a plaintiff's lawyer to demonstrate that there was something wrong with or unlawful about a termination. One of the first things an employee's attorney will ask for in any wrongful termination or employment discrimination lawsuit is the employee's personnel file. Specifically, he or she will be looking to see whether any employee evaluations were conducted of the employee. Unfortunately, in many cases, the employee evaluations hurt the employer more than they help it. The employee evaluations may use biased terms or stereotypes, or they may directly contradict the reasons the employer now gives for terminating the employee.

Following are some suggestions for limiting the potential adverse effects of employee evaluations:

1. Do Not Destroy the At-Will Employment Relationship If It Exists. Most non-union employees are considered at-will employees. This means they can quit at any time, for any reason, and the employer can fire them at any time, for any reason that is not illegal. Illegal reasons for termination include discrimination or retaliation.

   An employer can undo this principle by promising employees job security in some way. If enough statements are made indicating that an employee will not be fired, has job tenure, or a "long career" at the employer, a court might decide that the employee has an implied contract of employment, by which the employer must have good cause to terminate the relationship. These types of statements are often made in the course of evaluating an employee's work. Employers should stick to talking about the employee's performance—that is, how the employee has performed in the past and what goals and requirements the employer expects the employee to meet in the future—rather than making promises about what will happen in order to avoid compromising the at-will employment relationship.

2. Do Not Undermine Potential Terminations. If an employer fires an employee, the employee's performance evaluations must support—or at the very least not contradict—the reason the employer gives for the termination. Therefore, it is important for employers to write thorough, honest evaluations. If a termination is anticipated, the evaluation should spell out the problem. Positive evaluations should be earned, not caused by glossing over poor performance or misconduct.

3. Do Not Harass or Discriminate. Any sign of bias or stereotyping in an evaluation is inappropriate and can lead to serious trouble. This can be done inadvertently. For instance, criticizing a female employee's assertiveness or an older employee's inability to master new technology may potentially sound prejudicial to a jury. Instead of speaking in generalities, focus on facts and try to give specific examples when criticizing job performance.

4. Do Not Retaliate. When an employee has complained about discrimination, harassment, or another violation of law, an employer must be especially careful. If the employer takes any action that the employee might view as punishment for making the complaint—including giving the employee a negative performance evaluation—the employee might view it as retaliation. It is unlawful to retaliate against an employee for complaining about discrimination or another violation of the law to the employer or a government agency.

   This does not mean that an employer cannot give an employee in this situation a negative evaluation if it is warranted. However, the employer must be prepared to back up its negative evaluation with documents and evidence supporting its assessment, particularly if they predate the employee's complaint.

5. Do Not Forget to Document. An annual performance evaluation should not be a substitute for regular supervision and evaluation of an employee's performance throughout the year. If an employer carefully documents employee performance throughout the year, it will have the information it needs to prepare an accurate, effective evaluation. Documentation shows that an employer's evaluation is grounded in objective, job-related facts, not illegal considerations such as discrimination or retaliation.

6. Be Consistent and Fair. Discrimination claims start when employers treat employees in the same situation differently. Employers should use the same standards and procedures to review everyone's performance and conduct. Different positions may have different criteria, but generally all employees in the same job categories should be treated similarly.

Completed performance evaluations should be signed by both the supervisor and the employee to signify that the supervisor has gone over it with the employee. As a record that may be used relative to the employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action, a copy of the performance evaluation should be placed in the employee's personnel file.

_____ County Road Commission
Employee Performance Appraisal Instructions

1. The appraising supervisor is to give the employee a performance rating on each performance factor. Any performance factor with a performance rating of “Needs Improvement” or “Unsatisfactory Performance” requires additional comments.

2. The appraising supervisor is to give the employee an overall performance rating on each performance factor, considering all aspects of the employee’s performance, including the relative importance of each of the performance factors. The appraising supervisor shall select the performance rating that most accurately describes the overall performance of the employee during the evaluation period. An overall performance rating of “Needs Improvement” or “Unsatisfactory Performance” requires additional comments.

3. Upon completion of the performance appraisal, the appraising supervisor must sign and date the form and submit it to their department head for review.

4. The department head will review the completed performance appraisal and sign, date, and return it to the appraising supervisor. Signature of the performance appraisal indicates concurrence with the content of the performance appraisal and any recommended actions.

5. Upon receipt of the approved performance appraisal, the appraising supervisor will schedule a meeting with the employee to review the performance appraisal.

6. Once the performance appraisal has been reviewed with the employee, the employee is to sign and date the performance appraisal, which confirms that the appraisal has been discussed with him/her.

7. The original performance appraisal form will be made part of the employee’s permanent personnel file.

_____ County Road Commission

Employee Performance Appraisal

Employee Name: _____ Hire Date: _____

Job Classification: _____ Evaluation Type: _____

PERFORMANCE RATINGS

Exceeds Expectations (EE) – Work performance is consistently above the standard of performance for the position.
Meets Expectations (ME) – Work performance consistently meets the standard of performance for the position.
Needs Improvement (NI) – Work performance does not consistently meet the standard of performance for the position.
Unsatisfactory Performance (UP) – Work performance is inadequate and inferior to the standard required for the position.

PERFORMANCE FACTORS

RESPONSIBILITY □ EE □ ME □ NI □ UP

Demonstrates ownership of assigned work; accepts responsibility for performance; accepts new assignments; exercises good judgment according to essential functions of the job and the work assigned.

COMMENTS:

DEPENDABILITY □ EE □ ME □ NI □ UP

Reliability in being available for work; punctual; acceptable overall attendance record; can be relied upon regarding task completion and follow-up.

COMMENTS:

MAINTENANCE AND CARE OF EQUIPMENT □ EE □ ME □ NI □ UP

Cares for the appearance and maintenance of Road Commission equipment according to established policies and procedures.

COMMENTS:

SAFETY □ EE □ ME □ NI □ UP

Adheres to all safety policies and procedures and performs job duties in a safe manner.

COMMENTS:

QUALITY OF WORK □ EE □ ME □ NI □ UP

Performs work competently and accurately; displays pride and professionalism in work.

COMMENTS:

PRODUCTIVITY □ EE □ ME □ NI □ UP

Produces a significant volume of work efficiently in a specified period of time.

COMMENTS:

WORK ETHIC □ EE □ ME □ NI □ UP

Demonstrates self-motivation, commitment, initiative, cooperation, and a positive attitude.

COMMENTS:

JOB KNOWLEDGE □ EE □ ME □ NI □ UP

Demonstrates clear understanding and ability to perform the essential functions of the job effectively. Learns and masters applicable new skills and procedures.

COMMENTS:

OVERALL PERFORMANCE RATING

After the rating of each factor has been recorded, assign a performance rating, from the categories below, which should reflect the employee's overall performance for the rating period.

□ Exceeds Expectations □ Meets Expectations □ Needs Improvement* □ Unsatisfactory Performance*

*Supporting comments are required for performance ratings of "Needs Improvement" or "Unsatisfactory Performance".

RECOMMENDATION:

□ Continue in present position □ Extend probationary period □ Other: _____

ADDITIONAL COMMENTS:

SIGNATURES

This report is based on my observation and/or knowledge. Signature acknowledges review and discussion of the evaluation with employee.

_____	_____
Supervisor's Signature	Date
_____	_____
Department Head's Signature	Date

I have read and discussed this appraisal with my supervisor, and I understand its contents. My signature means that I have been advised of my performance status and does not necessarily imply that I agree or disagree with either the appraisal or the contents.

_____	_____
Employee's Signature	Date

_____ County Road Commission
Non-Union Employee Performance Appraisal Instructions

1. The appraising supervisor is to give the employee a performance rating on each performance factor. Any performance factor with a performance rating of “Needs Improvement” or “Does Not Meet Expectations” requires additional comments.

2. Upon completion of the performance appraisal, the appraising supervisor must sign and date the form and submit it to their department head for review.

3. The department head will review the completed performance appraisal and sign, date, and return it to the appraising supervisor. Signature of the performance appraisal indicates concurrence with the contents of the performance appraisal and any recommended actions.

4. Upon receipt of the approved performance appraisal, the appraising supervisor will schedule a meeting with the employee to review the performance appraisal.

5. During the meeting the supervisor and employee will work together to establish SMART goals for the coming year by completing the Annual Performance Goals form.

6. Once the performance appraisal has been reviewed with the employee, the employee is to sign and date the performance appraisal, which confirms that the appraisal has been discussed with him/her.

7. The original performance appraisal form will be made part of the employee’s permanent personnel file.

_____ County Road Commission
Non-Union Employee Performance Appraisal

Employee Name: _____ Hire Date: _____

Position Title: _____ Evaluation Type: _____

Previous Rating: _____ Date of Previous Rating: _____

PERFORMANCE RATINGS

Consistently Exceeds Expectations (5) – Employee is consistently an exceptional performer and far exceeds expectations. All job requirements and objectives were achieved well above expectations. Accomplishments were also made in unexpected areas.
Often Exceeds Expectations (4) – Employee often exceeds expectations. Performance is clearly above established expectations. This individual is often the "go to" person who not only exceeds expectations but is seen by others as a pivotal performer.
Successfully Achieves Expectations (3) – Employee fully meets the expectations of the position and may on occasion exceed expectations. The employee performs well and requires little guidance with performing the job.
Needs Improvement (2) – Employee meets some of the job expectations, but performance does not meet all the requirements and is below the level expected of a proficient employee. An individual in this level generally requires greater than usual time and attention by the supervisor. This could also be a new employee (less than one year) or recently promoted to a new position with new responsibilities. Greater growth and development in the role can and are in the process of being achieved.
Does Not Meet Expectations (1) – Employee does not meet the expectations required of the position. Performance at this level clearly unacceptable and cannot continue.

SECTION 1: PERFORMANCE FACTORS

BUDGET MANAGEMENT Rating: _____
Provides cost effective stewardship of all public resources. Understands fiscal policies and procedures and implements them in an effective and efficient manner.

COMMENTS:

COMMUNICATION Rating: _____
Demonstrates competence in expressing ideas verbally and in writing. Actively listens to suggestions and feedback from others and responds appropriately. Presents information clearly and concisely and can communicate effectively in all situations.

COMMENTS:

DECISION MAKING/PROBLEM SOLVING Rating: _____
Uses good judgment when evaluating a problem. Analyzes risks and identifies consequences. Makes appropriate decisions in a timely manner.

COMMENTS:

INTERPERSONAL SKILLS
Demonstrates the ability to cooperate, work and communicate with co-workers, supervisors, and/or outside contacts.

COMMENTS:

JOB KNOWLEDGE Rating: _____
Demonstrates clear understanding and ability to perform the essential functions of the job effectively. Learns and masters applicable new skills and procedures.

COMMENTS:

PRODUCTIVITY Rating: _____
Produces a significant volume of work efficiently in a specified period of time.

COMMENTS:

QUALITY OF WORK Rating: _____
Performs work competently and accurately; displays professionalism in work.

COMMENTS:

SAFETY Rating: _____
Contributes to a safe working environment; performs duties in a clean and safe manner. Brings safety concerns to appropriate parties; takes initiative to resolve when possible.

COMMENTS:

TASK AND PROJECT MANAGEMENT Rating: _____
Establishes attainable objectives and timelines, establishes, and communicates priorities, recognizes and responds effectively to unexpected situations; handles crucial situations and pressures calmly and effectively; accepts unexpected assignments and responds well to tight deadlines.

COMMENTS:

SECTION 2: BEHAVIORAL TRAITS

DEPENDABILITY Rating: _____

Demonstrates dependability on the job and is responsive to the needs of the department; punctual; ensures work responsibilities are covered when absent.

COMMENTS:

INITIATIVE/SELF-DEVELOPMENT Rating: _____

Displays enthusiasm, energy, and inventiveness in fulfilling responsibilities. Takes initiative for self-development; demonstrates an ability to learn on the job. Takes advantage of professional development opportunities. Seeks new and challenging assignments.

COMMENTS:

ORGANIZATIONAL COMMITMENT AND ADAPTABILITY Rating: _____

Adheres to established policies; accepts and follows direction; responds cooperatively to change and expends extra effort as required. Initiates changes to policies and procedures where appropriate and through proper channels.

COMMENTS:

RESPONSIBILITY Rating: _____

Meets task deadlines and work commitments. Fulfills work obligations in a timely and satisfactory manner. Takes responsibility for personal actions and performance.

COMMENTS:

SECTION 3: SUPERVISORY FACTORS (*Supervisory employees ONLY)*

EMPLOYEE MANAGEMENT Rating: _____

Effectively delegates work and responsibility to appropriate staff, clearly communicates goals and expectations; ensures staff are kept informed of relevant information, engages in two-way communication; effectively handles personnel issues; recognizes the achievements of others; routinely provides constructive and on-going feedback on job performance; completes annual performance appraisals in a timely manner; applies policies and procedures equitably to staff.

COMMENTS:

LEADERSHIP Rating: _____

Directs, motivates and appropriately influences others to achieve the relevant mission; serves as credible role model, displaying and instilling a positive attitude; sets high standards for self, group and others; builds a strong sense of teamwork, purpose and group identity; encourages subordinate input and participation; makes effective decisions and exercises discretion consistent with relevant policy, regulation, unit responsibilities and goals; ability to facilitate necessary change.

COMMENTS:

TRAINING AND DEVELOPMENT Rating: _____

Identifies training needs, provides educational/training opportunities to ensure employee success; develops capabilities of staff.

COMMENTS:

PERFORMANCE SUMMARY RATING

SECTION 1: PERFORMANCE FACTORS	**Rating**
Budget Management	
Communication	
Decision Making/Problem Solving	
Interpersonal Skills	
Job Knowledge	
Productivity	
Quality of Work	
Safety	
Task and Project Management	
SECTION 2: BEHAVIORAL TRAITS	
Dependability	
Initiative/Self-Development	
Organizational Commitment/Adaptability	
Responsibility	
SECTION 3: SUPERVISORY FACTORS	
Employee Management	
Leadership	
Training/Development	
TOTALS	
OVERALL PERFORMANCE RATING Supervisory (total/16) Non-Supervisory (Total/13)	

SIGNATURES

This report is based on my observation and/or knowledge. Signature acknowledges review and discussion of the evaluation with employee.

_____	_____
Supervisor's Signature	Date
_____	_____
Department Head's Signature	Date

I have read and discussed this appraisal with my supervisor, and I understand its contents. My signature means that I have been advised of my performance status and does not necessarily imply that I agree or disagree with either the appraisal or the contents.

_____	_____
Employee's Signature	Date

_____ County Road Commission

Annual Performance Goals

Employee Name: _____ Supervisor: _____

Position Title: _____ Performance Year: _____

During an employee's annual performance appraisal, the supervisor and the employee should identify at least three (3) SMART (specific, measurable, achievable, realistic, time-bound) goals that will be accomplished by the employee during the next review period. The supervisor and the employee should also review and discuss the previous year's goals.

PREVIOUS YEAR'S PERFORMANCE GOALS

GOAL 1:
GOAL 2:
GOAL 3:

PERFORMANCE GOALS

GOAL 1:
GOAL 2:
GOAL 3:

SIGNATURES

Signatures indicate that the employee and supervisor have discussed and reviewed this document.

_____ _____

Supervisor's Signature Date

_____ _____

Employee's Signature Date

IV. EMPLOYEE HIRING

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Employee Hiring – Non-Discrimination

Federal and state statutes make it unlawful to not hire an individual on the basis of race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, disability, age, genetic information, height, weight, or marital status. Likewise, an employer may not use an employment practice that causes a disparate impact on the basis of any of these protected categories, unless that practice is shown to be job related for the position in question and consistent with business necessity. This includes all recruitment and hiring practices.

Federal and state laws make it unlawful for an employer to print, circulate, post, mail or otherwise cause to be published a statement, advertisement, notice or sign which indicates a preference, limitation and/or specification based on religion, race, color, national origin, age, sex (including pregnancy, sexual orientation, or gender identity), height, weight, marital status, genetic information, or disability. Employers are not prohibited from including statements that affirm equal opportunity.

Requiring a job applicant to fill out an application form is not unlawful if the practice is applied equally to all applicants without regard to an unlawful basis. The practice of requiring a completed employment application, when applied consistently, is considered a fair and reasonable business practice of neutral and nondiscriminatory impact. However, such applications must be screened consistently, with the same standards applied to everyone applying for the same position.

Any hiring practices that have an especially negative effect on applicants of a certain race, color, religion, sex, national origin, or disability status may be problematic. Some examples are as follows:

- Requiring applicants to be within a certain height or weight range;
- Requiring applicants to pass a physical agility test;
- Requiring employees to live within a certain geographic region; and,
- Broadly excluding applicant with criminal records.

Employers that utilize such hiring practices must ensure that such hiring practices are necessary for safe and effective job performance. Any tests administered must be reasonably designed and administered to achieve a legitimate business purpose (for example, the speed, strength, or agility required to perform a job).

An employer may also want to determine if there are other selection practices that would meet its needs and have less of a negative effect on applicants. For example, a residency requirement may be intended to ensure that employees are familiar with the area and able

to quickly respond to service calls. Instead of imposing a residency restriction, an employer might consider requiring that applicants be familiar with the geographic region the road commission serves and be able to respond quickly to after-hours service requests.

An employer may be required to reasonably accommodate applicants who need assistance because of a medical condition or religious beliefs. For example, an employer may need to help a person with carpal tunnel syndrome fill out an application, or it may need to reschedule an interview originally scheduled for a religious holiday if the applicant's religious beliefs prevent him or her from working on that day.

Reopening an application period to gather more candidates for a particular position may violate discrimination statutes. For instance, an employer generally should not use a new period for accepting applications to encourage the application of a better-qualified male if a qualified female applied for the position in a timely manner.

In some instances, employers require applicants to reapply after a certain period if favorable action has not been taken on their applications. Generally, such a requirement is allowed as long as it is not applied in a discriminatory fashion.

Under limited circumstances, employers may be required to gather information that might otherwise be unlawful under the ELCRA, Title VII, and other statutes. Documentation required by Title VI, the Federal Motor Carrier Safety Regulations (FMCSRs), and the Immigration Reform and Control Act, 8 USC Section 1324a, et seq., all require gathering otherwise prohibited data. Employers must use care to gather **ONLY** the information required by the controlling statute or regulation, restrict access to this information, and require collection only after the employer has made a conditional offer of employment.

EMPLOYMENT PRACTICES GUIDELINE

Employee Hiring – General Application Considerations

Application forms should commonly ask job candidates for the following kinds of information:

- **General biographical information**. This type of data usually includes name, address, phone number, type of work desired, date available, salary requested.
- **Education**. Typical educational listings might cover school, college or other special training completed; degrees, number of years of attendance; location of institutions.
- **Work experience**. Applications for CDL positions will need to ask for a more extensive employment history than applications for other positions. Most applications ask for the names and addresses of the last three or four employers, positions held, starting and leaving dates, rates of pay, names of immediate supervisors, reason for leaving, permission to contact former employers.
- **References**. Commonly requested reference information includes names, addresses, and phone numbers of acquaintances—other than past employers or relative—who will give character references.
- **Applicant's statement and signature**. Most forms have a statement for the applicant to sign acknowledging that the employer has the right to verify the information on the application and certifying that the information is correct to the best of the applicant's knowledge.

Employers should make sure that nothing on the form could imply that they are screening people out based on a protected category. Any question not directly related to the job is best left off the application. To determine whether a question on an application form is discriminatory, employers should ask these three questions:

- ✓ Does this question tend to screen out minorities, females, qualified individuals with disabilities, people over 40 years old, or people of certain religions?
- ✓ Is this information necessary to determine the candidate's job skills and employment capabilities?
- ✓ Are there other nondiscriminatory ways of getting this information?

All applicants should be required to complete a written application, and it should be placed in their personnel file if hired.

Rejecting job applicants because they have falsified their employment application is virtually always an unassailable practice. Employers may insist on truthful answers to lawful employment application questions, as long as they do so evenhandedly and consistently. A misstatement of material fact on an application form is a sufficient nondiscriminatory reason for a refusal to hire.

EMPLOYMENT PRACTICES GUIDELINE

Employee Hiring – Prohibited Questions

Age

- Avoid asking: "How old are you?" "What is your date of birth?" "How old are your children?" "When did you graduate from high school (or college)?"
- Better to ask: "Are you 18 years of age or older?" "If underage, do you have the necessary work permit?"

Arrest Record

- Avoid asking: "Have you ever been arrested?"
- Better to ask: "Have you ever been convicted of a crime?"
- Michigan law prohibits employers from asking about misdemeanor arrests that did not lead to conviction. However, employers may ask about convictions for misdemeanors and arrests and convictions for felonies.

Bankruptcy and Credit Matters

- Avoid asking: "Have you ever filed for bankruptcy or been declared bankrupt?" "What is your financial status?" "Do you own a home or car?" "Have you ever had your wages garnished?" "Do you have good credit?"

Children and Child Care

- Avoid asking: "Do you have any children?" "How old are your children?" "Have you made provisions for childcare?" "Do you plan to have children?"
- Employers who question applicants about children could face charges of sex discrimination, age discrimination, or discrimination based on wage garnishment for child support.
- Better to ask: "Can you handle the last-minute changes in work scheduling our job responsibilities demand?" "The position requires someone with dependable job attendance and the ability to work overtime. Can you meet these requirements?"

Citizenship/Immigration Reform and Control Act (ICRA)

- Avoid asking: "Of what country are you a citizen?" "Are you a naturalized or native-born citizen?" "Are your parents or spouse naturalized or native-born citizens?"
- Better to ask: "Are you legally authorized to work in the United States?"

- Although the IRCA requires employers to verify an applicant's identity and right to work in the United States, it also bars discrimination based on national origin and citizenship status. Under the IRCA, employers cannot discriminate against citizens or aliens who have permanent resident or temporary resident status, who have been admitted to the United States as refugees under the law, or who have been granted asylum under the law.

Criminal Convictions

- Employers can ask: "Have you ever been convicted of a felony or misdemeanor?" But they should explain that a "yes" answer is not automatic grounds for rejection. Instead, employers should consider the relationship between the type, number, and recentness of convictions and the applicant's fitness for the particular job. For instance, a drunk driving conviction would have relevance for a truck driving job.

Disability

- Avoid asking: "Do you have a disability?" "What medications are you currently taking?" "Have you filed any workers' compensation claims?" "Have you ever been treated for any of the following diseases …?" "Do you now or have you ever had a drug or alcohol problem?"
- Employers can ask about an individual's ability to perform essential job-related functions, so long as these questions focus on the job and not on the individual's disability.
- Employers can also ask what types of accommodations a person might need during the application process or to perform an essential job-related function, if a disability is obvious or voluntarily disclosed by the applicant; otherwise, no discussion about accommodation should occur until after a job offer has been extended.

Education

- Employers can ask about an applicant's academic, vocational, or professional education and schools attended.

Height and Weight

- Avoid asking for an applicant's height or weight.

Marital Status

- Avoid asking: "Are you married, single, divorced, widowed, or separated?" "Do you prefer to be identified as Mrs., Miss, or Ms.?" "What is your maiden name?" "What is your spouse's name and occupation?"

National Origin

- Avoid asking: “Where were you born?” “Where were your parents born?” “What language do you speak at home?”
- Avoid asking any questions about an applicant’s lineage, ancestry, or nationality.
- Documents required by the IRCA may only be collected after a conditional offer of employment has been made.

Organizations

- Avoid asking for the names of organizations to which an applicant belongs if the information would reveal the race, color, religion, national origin, or ancestry of the members of the organization.

Photograph

- Avoid asking for a copy of the applicant’s photograph before making a conditional offer of employment.

Race or Color

- Avoid asking: “What is your race, color, or national origin?” Also avoid indirect questions that might reveal protected information. For example, “What is your eye and hair color?” “What is your complexion?”

Religion

- Avoid asking: “What is your religious denomination or affiliation?” “What church do you attend?” “Do you observe any religious holidays?” “Are you available to work on Saturdays and Sundays?”
- Better to ask: “This job requires you to work overtime occasionally, including overnight and on weekends. Will you be able to do that?”

Salary

- Avoid asking: “What is the lowest salary you will accept?”
- Better to ask: “What are your salary expectations?”

EMPLOYMENT PRACTICES GUIDELINE

Employee Hiring – Federal Motor Carrier Safety Regulations Requirements

The federal motor carrier safety regulations (FMCSRs) impose some special rules when hiring for a CDL driving position. Specifically, the application for employment must be made on a form furnished by the prospective employer. Each application form must be completed by the applicant, must be signed by him or her and must contain the following information:

(1) The name and address of the prospective employer;
(2) The applicant's name, address, date of birth, and social security number;
(3) The addresses at which the applicant has resided during the 3 years preceding the date on which the application is submitted;
(4) The date on which the application is submitted;
(5) The issuing driver's license authority, number, and expiration date of each unexpired commercial motor vehicle operator's license or permit that has been issued to the applicant;
(6) The nature and extent of the applicant's experience in the operation of motor vehicles, including the type of equipment (such as buses, trucks, truck tractors, semi-trailers, full trailers, and pole trailers) which he/she has operated;
(7) A list of all motor vehicle accidents in which the applicant was involved during the 3 years preceding the date the application is submitted, specifying the date and nature of each accident and any fatalities or personal injuries it caused;
(8) A list of all violations of motor vehicle laws or ordinances (other than violations involving only parking) of which the applicant was convicted or forfeited bond or collateral during the 3 years preceding the date the application is submitted;
(9) A statement setting forth in detail the facts and circumstances of any denial, revocation, or suspension of any license, permit, or privilege to operate a motor vehicle that has been issued to the applicant, or a statement that no such denial, revocation, or suspension has occurred;
(10) (i) A list of names and addresses of the applicant's employers during the 3 years preceding the date the application is submitted,
(ii) The dates he or she was employed by that employer,
(iii) The reason for leaving the employ of that employer,
(iv) Whether the
(a) Applicant was subject to the FMCSRs while employed by that previous employer,
(b) Job was designated as a safety function in any DOT regulated mode subject to alcohol and controlled substances testing requirements as required by 49 CFR part 40;

(11) For those drivers applying to operate a commercial motor vehicle, a list of the names and addresses of the applicant's employers during the 7-year period preceding the 3 years contained in paragraph (10) above for which the applicant was an operator of a commercial motor vehicle, together with the dates of employment and the reasons for leaving such employment; and,
(12) The following certification and signature line, which must appear at the end of the application form and be signed by the applicant:

This certifies that this application was completed by me, and that all entries on it and information in it are true and complete to the best of my knowledge.

Date: _____ *Applicant's Signature:* _____

The prospective employer may require an applicant to provide information in addition to the information required above on the application form.

Before an application is submitted, the prospective employer must inform the applicant that the information he/she provides may be used, and the applicant's previous employers will be contacted, for the purpose of investigating the applicant's safety performance history information. The prospective employer must also notify the driver in writing of his/her due process rights regarding information received as a result of these investigations. Specifically, the prospective employer must expressly notify drivers with Department of Transportation regulated employment during the preceding three years – via the application form or other written document prior to any hiring decision – that he or she has the following rights regarding the investigative information that will be provided to the prospective employer:

(i) The right to review information provided by previous employers;
(ii) The right to have errors in the information corrected by the previous employer and for that previous employer to re-send the corrected information to the prospective employer;
(iii) The right to have a rebuttal statement attached to the alleged erroneous information if the previous employer and the driver cannot agree on the accuracy of the information.

Drivers who have previous Department of Transportation regulated employment history in the preceding three years and wish to review previous employer-provided investigative information must submit a written request to the prospective employer, which may be done at any time, including when applying, or as late as 30 days after being employed or being notified of denial of employment. The prospective employer must provide this information to the applicant within five (5) business days of receiving the written request. If the prospective employer has not yet received the requested information from the previous employer(s), then the five-business days deadline will begin when the prospective employer receives the requested safety performance history information. If the driver has

not arranged to pick up or receive the requested records within thirty (30) days of the prospective employer making them available, the prospective employer may consider the driver to have waived his/her request to review the records.

EMPLOYMENT PRACTICES GUIDELINE

Employee Hiring – General Interview Considerations

Interviews are widely used by employers as a selection tool. An interview offers an opportunity to clear up questions raised by an applicant's resume; by providing a chance for in-depth, on-the-spot questioning, interviews also can help verify a candidate's claimed skills and experience. Interviews allow those in charge of hiring to size up intangible factors, like personality and communication skills, that can distinguish applicants who appear the same on paper. However, if not done carefully, interviews can result in potential liability for employers. The person conducting the interview can easily, if too relaxed, make statements that might be deemed discriminatory or would create an implied employment contract or constitute intentional misrepresentation. Special care needs to be taken to ensure that discriminatory questions are not asked in the interview.

Successful interviewing requires preparation, good listening, and thorough understanding of the job to be filled and the minimum qualifications of candidates. The hiring interview has three objectives:

- To assess the applicant;
- To describe the job and working conditions; and,
- To create goodwill for the employer whether or not the applicant is hired.

Some suggestions for making the interview as productive as possible are as follows:

1. **Make a list of questions that directly relate to the job's responsibilities.** Either have a job description available or list the key responsibilities of the position and create a list of questions that relate to those responsibilities.
2. **Ask open-ended, behavioral questions.** Ask for specific examples of past performance and behavior, with questions such as "tell me about a time when you . . ."
3. **Do not talk too much.** The interview is mostly about the applicant, so listen attentively. Pay attention to non-verbal cues such as posture, alertness, dress, and personal grooming. Leave time at the end for the candidate to ask questions to provide insight about the Road Commission.
4. **Have a prepared list of questions to ask of all candidates.** It is helpful to ask the same basic questions of all interviewees so that their answers can be compared later. Additionally, this helps to ensure that the questions are appropriate in nature.
5. **Understand what should not be asked.** Keep interview questions focused on the job, work environment, and only peripherally involved with an applicant's personal life. This helps to avoid questions centered on age, race, gender, national origin, religion, marital status, height, weight, genetic information, or disability.

6. **While being polite and professional, do not be too friendly.** Keep all of the questions job-related. If an interview gets too friendly, it is difficult to make a hiring decision based on whether the person is truly qualified for the job versus being very likeable.

Inquiries about overtime, working at home, weekend work, and travel often blur the line between job requirements and private lifestyles. Employers can and should alert candidates to job requirements that may cut into their personal lives. But if an interviewer asks only married women or older men about whether they could handle overtime and travel demands, discrimination charges could result. Rephrase questions to emphasize characteristics of the position rather than the candidate: "The job requires x. Will you be able to do x?" If a candidate indicates some personal obstacles, discuss them in a business-like manner.

Notes during interviews can be very helpful for the interviewer to remember later what a given candidate said during his/her interview. However, such notes should remain as neutrally worded as possible and stick as closely as possible to what is actually said during the interview. That is because the notes need to be retained as part of the hiring process and may be subject to later disclosure if an employment discrimination claim is brought concerning the hiring decision that is ultimately made.

Application for Employment for CDL Drivers

Careful and thoughtful completion of this application is an important step in our consideration of individuals for employment. Please complete the entire application. Print in ink. Ask for an extra piece of paper if you need to clarify any responses. Your application must also specify the position for which you are applying. Stating that you will do "Anything" is indefinite and may result in your application not being accepted by the employer. Your application will be considered for sixty (60) days.

Logo

Today's Date	**Time**	
Last Name	**First Name**	**Middle Name**
Email:		
Social Security # *	**Date of Birth ***	**Telephone #**
Current Address		**Dates of Residency**
City	**State**	**Zip**

All Other Addresses During the Last 3 Years

Previous Addresses	**Dates of Residency**
1.	
2.	
3.	

Job(s) Applied For:

1. **Rate of Pay Expected: $_____ per _____**

2. **Rate of Pay Expected: $_____ per _____**

Do you want to work: ☐ **Full-Time** ☐ **Part-Time**	**If applying only for part-time, what days and hours?**
Have you ever applied for work with us before? ☐ **Yes** ☐ **No**	**If yes, when?**

Do you have any skills, qualifications, or experience which you feel especially fit you for work with us?

*The Federal Motor Carrier Safety Regulations (49 CFR 392.21(b)(2)) that CDL applicants provide their SS# and date of birth.

U.S. Armed Forces Services? ☐ **Yes** ☐ **No**	
Branch	**Duties**
Rank at time of Enlistment	**Rank at time of Discharge**
Were you honorably discharged? ☐ **Yes** ☐ **No**	**If not, please explain:** *(An other than honorable discharge will not be an automatic bar to employment.)*
Are you able to do the job for which you are applying? ☐ **Yes** ☐ **No**	**If not, please explain:**
Have you ever been convicted of a crime? ☐ **Yes** ☐ **No**	**If yes, explain when, where, and the nature of the offense:** *(Conviction of a crime will not be an automatic bar to employment.)*
Are you authorized to work in the U.S.? ☐ **Yes** ☐ **No**	**If hired, when can you start?**

EDUCATION				
School	**Name of School**	**Highest Grade Completed or Degree Obtained**	**City/State**	**Course of Study**
Grammar				
High School				
College				
Other				

DRIVER INFORMATION

List the issuing State, number, and expiration date of each commercial motor vehicle operator's license or permit you have held during the last three (3) years:

State	Number	Type of CDL (A or B)	Endorsements (T, N or X)	Restrictions (L, Z, E or O)	Expiration Date

List all violations of motor vehicle laws or ordinances (other than violations involving only parking) of which you were convicted or forfeited bond or collateral during the last three (3) years:

Date	Description

List all motor vehicle accidents in which you were involved during the last three (3) years, specifying the date and nature of each accident and any fatalities or personal injuries it caused:

State	Description	Fatalities or Personal Injuries

Please describe the nature and extent of your experience in the operation of motor vehicles, including the type of equipment (such as buses, trucks, truck tractors, semi-trailers, full trailers, and pole trailers) which you have operated:

Have you ever been disqualified under the Federal Motor Carrier Safety Regulations?

☐ **Yes** ☐ **No**

Have you ever been convicted of driving while under the influence of alcohol, a narcotic drug, amphetamines or methamphetamines or derivatives thereof?

☐ **Yes** ☐ **No**

Have you ever tested positive, or refused to test, on any pre-employment drug test administered by an employer to which you applied for, but did not obtain, safety-sensitive work covered by DOT drug and alcohol testing rules?

☐ **Yes** ☐ **No**

Have you experienced the denial, revocation, or suspension of any license, permit or privilege to operate a motor vehicle that has been issued to you?

☐ **Yes** ☐ **No**

If "yes" to any of the above, please set forth in detail all facts and circumstances:

PRIOR WORK EXPERIENCE

** NOTICE TO APPLICANT**

The information you provide in response to this question may be used, and your prior employers may be contacted, for the purpose of investigating your background as required by State and/or Federal Motor Carrier Safety Regulations. You are hereby notified that you have the following rights regarding the investigative information that will be provided to us pursuant to 49 CFR 391.23 (d) and (e):

1) The right to review information provided by previous employers;

2) The right to have errors in the information corrected by the previous employer and for that previous employer to re-send the corrected information to the prospective employer;

3) The right to have a rebuttal statement attached to the alleged erroneous information, if the previous employer and the driver cannot agree on the accuracy of the information.

I HAVE READ AND UNDERSTAND THESE RIGHTS.

Applicant's Signature_____

Please list the names and addresses of your employers during the last 10 years, together with the dates of employment and the reasons for leaving such employment:

Last Employer	
Name	**Dates of Employment**
Address	**Position Held**
Supervisor Name	**Phone**
Starting Pay	**Final Pay**
Applicant was subject to FMCSRs while employed by above employer? ☐ **Yes** ☐ **No**	**Job was designated as safety sensitive function in any DOT regulated mode subject to alcohol and controlled substances testing as required by 49 CFR Part 40?** ☐ **Yes** ☐ **No**
Reason for leaving	

Second to Last Employer	
Name	**Dates of Employment**
Address	**Position Held**
Supervisor Name	**Phone**
Starting Pay	**Final Pay**
Applicant was subject to FMCSRs while employed by above employer? ☐ **Yes** ☐ **No**	**Job was designated as safety sensitive function in any DOT regulated mode subject to alcohol and controlled substances testing as required by 49 CFR Part 40?** ☐ **Yes** ☐ **No**
Reason for leaving	

Third to Last Employer	
Name	**Dates of Employment**
Address	**Position Held**
Supervisor Name	**Phone**
Starting Pay	**Final Pay**
Applicant was subject to FMCSRs while employed by above employer? ☐ **Yes** ☐ **No**	**Job was designated as safety sensitive function in any DOT regulated mode subject to alcohol and controlled substances testing as required by 49 CFR Part 40?** ☐ **Yes** ☐ **No**
Reason for leaving	

Fourth to Last Employer	
Name	**Dates of Employment**
Address	**Position Held**
Supervisor Name	**Phone**
Starting Pay	**Final Pay**
Applicant was subject to FMCSRs while employed by above employer? ☐ **Yes** ☐ **No**	**Job was designated as safety sensitive function in any DOT regulated mode subject to alcohol and controlled substances testing as required by 49 CFR Part 40?** ☐ **Yes** ☐ **No**
Reason for leaving	

Fifth to Last Employer	
Name	**Dates of Employment**
Address	**Position Held**
Supervisor Name	**Phone**
Starting Pay	**Final Pay**
Applicant was subject to FMCSRs while employed by above employer? ☐ **Yes** ☐ **No**	**Job was designated as safety sensitive function in any DOT regulated mode subject to alcohol and controlled substances testing as required by 49 CFR Part 40?** ☐ **Yes** ☐ **No**
Reason for leaving	

Sixth to Last Employer	
Name	**Dates of Employment**
Address	**Position Held**
Supervisor Name	**Phone**
Starting Pay	**Final Pay**
Applicant was subject to FMCSRs while employed by above employer? ☐ **Yes** ☐ **No**	**Job was designated as safety sensitive function in any DOT regulated mode subject to alcohol and controlled substances testing as required by 49 CFR Part 40?** ☐ **Yes** ☐ **No**
Reason for leaving	

*****Attach additional pages as may be necessary to include all previous employers during the last 10 years.***

BUSINESS REFERENCES		
Name	**Address/Telephone #**	**Occupation**

APPLICANT'S CERTIFICATION AND AGREEMENT

Please Read Carefully:

1. Certification of Truthfulness. I certify that all statements on this Application for Employment are made truthfully and without evasion, and further understand and agree that such statements may be investigated and if found to be false will be sufficient reason for not being employed or if employed will result in my dismissal.

2. Authorization for Employment / Educational Information. I authorize the references listed in the Application for Employment, and any prior employer, educational institution, or any other persons or organizations to give the _____ County Road Commission any and all information, or any other pertinent information, they may have, personal or otherwise, and release all parties from all liability for any damage that may result from furnishing any lawful information to the County Road Commission. I hereby waive written notice that employment information is being provided by any person or organization.

3. Employment at Will. If I am hired, in consideration of my employment, I agree to abide by the rules and policies of the _____ County Road Commission, including any change made from time to time, and agree that, subject to the provisions of any written agreement to the contrary, my employment and compensation can be terminated with or without cause, and with or without notice, at any time, at the option of either the_____ County Road Commission or myself. I understand that no manager or other representative of the _____ County Road Commission, other than the Managing Director, has any authority to enter into any agreement for employment for any specific or indefinite period of time, or to make any agreement contrary to the foregoing. Any such agreement made by the Managing Director must be made in writing to be effective.

4. Authorization to Work. If I am selected for hire, I will be offered employment provided I verify that I am authorized to work as required by the Immigration Reform and Control Act of 1986.

5. Need for Accommodation. If I am a person with a disability who requires an accommodation to perform the job, I must notify the _____ County Road Commission of that need within 182 days after I knew or reasonably should have known that an accommodation was needed. Failure to do so will bar me under state but not federal law from alleging that the _____ County Road Commission has not accommodated me as required by law.

6. Criminal Records Check. I agree to execute an authorization for the _____ County Road Commission to secure criminal conviction history from the appropriate law enforcement agency should the County Road Commission determine it is necessary to do so.

7. Release of Medical Information. I authorize every medical doctor, physician or other healthcare provider to provide any and all information, including but not limited to, all medical reports, laboratory reports, x-rays or clinical abstracts relating to my previous health history or employment in connection with any examination, consultation, test or evaluation. I hereby release every medical doctor, healthcare personnel and every other person, firm, officer, corporation, association, organization, or institute which shall comply with the authorization or request made in this respect from any and all liability. I understand that this release will not be sent to my physician or other healthcare provider until a job offer has been made.

8. Physical Exam and Drug and Alcohol Testing. I agree that if a job offer is made to me I will, before commencing employment, take a physical exam and authorize the _____ County Road Commission or its designated agent(s) to withdraw specimen(s) of my blood, urine or hair for chemical analysis. One purpose of this analysis is to determine or exclude the presence of alcohol, drugs or other substances. I understand the decisions concerning my employment will be made as a result of this test. I further authorize any physician or entity conducting such testing to release the results of such testing to the _____County Road Commission.

9. Psychological / Physical Testing. If offered employment, I agree to submit to any psychological or physical testing which may be necessary to determine my ability to perform the job for which I am being considered. I further authorize any physician or entity conducting such medical examination to release the results of such examination to the _____ County Road Commission.

10. Driving Record Check. If applying for a position that requires driving a _____ County Road Commission vehicle, I authorize the _____ County Road Commission and its agents the authority to make investigations and inquiries of my driving record.

11. Fringe Benefits. In accepting employment with the _____ County Road Commission, I agree to accept all fringe benefits when eligible as provided now or in the future. I understand that it is my responsibility to provide documentation for verification of eligibility for fringe benefits as well as information regarding mailing address, telephone numbers or contact arrangements, withholding exemptions and dependent information. The _____ County Road Commission shall rely on the most recent information for all purposes.

12. Credit Report. I understand that the_____ County Road Commission or its agents may make an investigative inquiry whereby information is obtained through interviews with my neighbors, friends and others with whom I am acquainted. This inquiry includes information as to my character, general reputation, personal characteristics and mode of living. I understand that I have the right to make a written request within a reasonable period of time to receive additional detailed information about the nature and scope of the investigation.

13. Consideration of Employment. I understand that my application will be considered pursuant to the _____ County Road Commission's normal procedures for a period OF SIXTY (60) DAYS. IF I AM STILL INTERESTED IN EMPLOYMENT THEREAFTER, I MUST REAPPLY.

14. Limitation of Action. I agree that I shall not commence any action or other legal proceeding related to my employment or the termination thereof more than six (6) months after the event complained of, and I voluntarily waive any statute of limitations which is longer to the contrary.

I HAVE READ AND UNDERSTAND ITEMS #1 THROUGH #14 ABOVE, AND ACKNOWLEDGE THAT WITH MY SIGNATURE BELOW.

THIS CERTIFIES THAT THIS APPLICATION WAS COMPLETED BY ME, AND THAT ALL ENTRIES ON IT AND INFORMATION IN IT ARE TRUE AND COMPLETE TO THE BEST OF MY KNOWLEDGE.

_____ _____

Date Signature

APPLICATION FOR EMPLOYMENT (Non-CDL)

CAREFUL AND THOUGHTFUL COMPLETION OF THIS APPLICATION IS AN IMPORTANT STEP IN OUR CONSIDERATION OF INDIVIDUALS FOR EMPLOYMENT. PLEASE COMPLETE THE ENTIRE APPLICATION. PRINT IN INK. ASK FOR AN EXTRA PIECE OF PAPER IF YOU NEED TO CLARIFY ANY RESPONSES. YOUR APPLICATION MUST ALSO SPECIFY THE POSITION FOR WHICH YOU ARE APPLYING. STATING THAT YOU WILL DO ANYTHING IS INDEFINITE AND MAY RESULT IN YOUR APPLICATION NOT BEING ACCEPTED BY THE EMPLOYER. YOUR APPLICATION WILL BE CONSIDERED FOR SIXTY (60) DAYS.

TODAY'S DATE:	**TIME:**

NAME: _____
(LAST) (FIRST) (MIDDLE)

E-MAIL ADDRESS:	**TELEPHONE #**

CURRENT ADDRESS: _____ _____	**LENGTH OF TIME AT THIS ADDRESS:**
PREVIOUS ADDRESS: _____ _____	**LENGTH OF TIME AT THIS ADDRESS:**

Job(s) Applied For:

	1. _____ Rate of Pay Expected: $_____ per _____
	2. _____ Rate of Pay Expected: $_____ per _____

Do you want to work: FULL-TIME PART-TIME?

If applying only for part-time, what days and hours?	_____ _____

Have you ever applied for work with us before? YES NO If yes, when?

Do you have any skills, qualifications or experiences which you feel would especially fit you for work with us? _____
_____
_____
_____
_____

U.S. ARMED FORCES SERVICE? YES NO	
Branch:	Duties:
Rank or rating at time of enlistment:	Rating at time of discharge:
Were you honorably discharged? YES NO If not, please explain: _____ _____ (An other than honorable discharge will not be an automatic bar to employment.)	
Are you able to do the job for which you are applying? YES NO If not, please explain: _____ _____	
Are you 18 years of age or older? YES NO	
Have you ever been convicted of a crime? YES NO If yes, explain when, where, and the nature of the offense: _____ _____ (Conviction of a crime will not be an automatic bar to employment.)	
Are you authorized to work in the United States? YES NO	
If hired, when can you start? _____	

EDUCATION

SCHOOL	NAME OF SCHOOL	HIGHEST GRADE COMPLETED OR DEGREE OBTAINED	CITY / STATE	COURSE OF STUDY
GRAMMAR				
HIGH SCHOOL				
COLLEGE				
OTHER				

PRIOR WORK EXPERIENCE

Name, Address, and Phone Number of Employer	Dates of Employment		Reason for Leaving	Type of Work Done and Supervisor Name	Starting Pay	Final Pay
	From	To				

BUSINESS REFERENCES

Name	Address / Telephone Number	Occupation

APPLICANT'S CERTIFICATION AND AGREEMENT

PLEASE READ CAREFULLY:

1. Certification of Truthfulness. I certify that all statements on this Application for Employment are made truthfully and without evasion, and further understand and agree that such statements may be investigated and if found to be false will be sufficient reason for not being employed or if employed will result in my dismissal.

2. Authorization for Employment / Educational Information. I authorize the references listed in the Application for Employment, and any prior employer, educational institution, or any other persons or organizations to give the _____ County Road Commission any and all information, or any other pertinent information, they may have, personal or otherwise, and release all parties from all liability for any damage that may result from furnishing any lawful information to the_____ County Road Commission. I hereby waive written notice that employment information is being provided by any person or organization.

3. Employment at Will. If I am hired, in consideration of my employment, I agree to abide by the rules and policies of the _____ County Road Commission, including any change made from time to time, and agree that, subject to the provisions of any written agreement to the contrary, my employment and compensation can be terminated with or without cause, and with or without notice, at any time, at the option of either the _____ County Road Commission or myself. I understand that no manager or other representative of the _____ County Road Commission, other than the Managing Director, has any authority to enter into any agreement for employment for any specific or indefinite period of time, or to make any agreement contrary to the foregoing. Any such agreement made by the Managing Director must be made in writing to be effective.

4. Authorization to Work. If I am selected for hire, I will be offered employment provided I verify that I am authorized to work as required by the Immigration Reform and Control Act of 1986.

5. Need for Accommodation. If I am a person with a disability who requires an accommodation to perform the job, I must notify the _____County Road Commission of that need within 182 days after I knew or reasonably should have known that an accommodation was needed. Failure to do so will bar me under state but not federal law from alleging that the _____ County Road Commission has not accommodated me as required by law.

6. Criminal Records Check. I agree to execute an authorization for the _____County Road Commission to secure criminal conviction history from the appropriate law enforcement agency should the County Road Commission determine it is necessary to do so.

7. Release of Medical Information. I authorize every medical doctor, physician or other healthcare provider to provide any and all information, including but not limited to, all medical reports, laboratory reports, x-rays or clinical abstracts relating to my previous health history or employment in connection with any examination, consultation, test or evaluation. I hereby release every medical doctor, healthcare personnel and every other person, firm, officer, corporation, association, organization or institute which shall comply with the authorization or request made in this respect from any and all liability. I understand that this release will not be sent to my physician or other healthcare provider until a job offer has been made.

8. Physical Exam and Drug and Alcohol Testing. I agree that if a job offer is made to me I will, before commencing employment, take a physical exam and authorize the _____ County Road Commission or its designated agent(s) to withdraw specimen(s) of my blood, urine or hair for chemical analysis. One purpose of this analysis is to determine or exclude the presence of alcohol, drugs or other substances. I understand the decisions concerning my employment will be made as a result of this test. I further authorize any physician or entity conducting such testing to release the results of such testing to the_____ County Road Commission.

9. Psychological / Physical Testing. If offered employment, I agree to submit to any psychological or physical testing which may be necessary to determine my ability to perform the job for which I am being considered. I further authorize any physician or entity conducting such medical examination to release the results of such examination to the _____County Road Commission.

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12. Credit Report. I understand that the _____ County Road Commission or its agents may make an investigative inquiry whereby information is obtained through interviews with my neighbors, friends and others with whom I am acquainted. This inquiry includes information as to my character, general reputation, personal characteristics and mode of living. I understand that I have the right to make a written request within a reasonable period of time to receive additional detailed information about the nature and scope of the investigation.

13. Consideration of Employment. I understand that my Application will be considered pursuant to the _____ County Road Commission's normal procedures for a period OF SIXTY (60) DAYS. IF I AM STILL INTERESTED IN EMPLOYMENT THEREAFTER, I MUST REAPPLY.

14. Limitation of Action. I agree that I shall not commence any action or other legal proceeding related to my employment or the termination thereof more than six (6) months after the event complained of, and I voluntarily waive any statute of limitations which is longer to the contrary.

I HAVE READ AND UNDERSTAND ITEMS #1 THROUGH #14 ABOVE, AND ACKNOWLEDGE THAT WITH MY SIGNATURE BELOW.

THIS CERTIFIES THAT THIS APPLICATION WAS COMPLETED BY ME, AND THAT ALL ENTRIES ON IT AND INFORMATION IN IT ARE TRUE AND COMPLETE TO THE BEST OF MY KNOWLEDGE.

_____ _____

Date Applicant's Signature

SAMPLE INTERVIEW QUESTIONS

1. What do you know about the Road Commission and why do you want to work here?
2. Why are you the best person for this job?
3. What skills and strengths can you bring to this position?
4. Can you tell me about your current job?
5. Why are you leaving (or have you left) your current (or last) job?
6. Can you tell me about a time when you had a disagreement with a supervisor or colleague? How did you handle it?
7. Do you work best alone or on a team?
8. How would your co-workers describe you?
9. How would your supervisor describe you?
10. How do you handle stress and pressure?
11. In your most recent job, was there a time when you had to overcome a significant challenge?
12. What are your goals for the future?
13. What are your salary expectations?
14. Do you have any questions about working for the Road Commission?

NEW HIRE PAPERWORK

Employee Name: _____

Date of Hire: _____

Job Title: _____

Department: _____

- ☐ Personnel file created.
- ☐ Confidential medical file created.
- ☐ Driver qualification file created (if applicable).
- ☐ Reference checks completed.
- ☐ Background check results received and reviewed.
- ☐ Drug test results received and reviewed (if applicable).
- ☐ Physical exam results received and reviewed (if applicable).
- ☐ I-9 documents reviewed.
- ☐ Employee information entered in payroll system.
- ☐ State new hire reporting completed.

Received from Employee:

- ☐ Application form.
- ☐ Authorizations for background check, physical & drug screen.
- ☐ Federal tax withholding form.
- ☐ Direct deposit form.
- ☐ Employee policy acknowledgment(s).
- ☐ Employee personal information sheet and emergency contact form.
- ☐ Benefit enrollment forms.

V. EMPLOYMENT SCREENING

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Employment Screening – Fair Credit Reporting Act (FCRA)

Conducting thorough pre-employment background checks is critical to hiring suitable employees who are qualified for their positions. However, any employer who obtains a background check for employment purposes from a third party is covered by the Fair Credit Reporting Act (FCRA). The FCRA helps individuals make sure their credit reports are fair and accurate and that their credit information remains at least somewhat private. Background screening reports are considered "consumer credit reports" for purposes of the FCRA.

The FCRA gives several rights to consumers, including the following:

- The right to informed consent before a pre-employment background check is performed;
- The right to review background check information and correct any mistakes;
- The right to be informed when information from a pre-employment background check about them is used to make decisions that adversely affect them; and,
- The right to appeal adverse decisions made based on the data in their pre-employment background checks when they believe the information used to make the decision is inaccurate.

The following steps should be followed to ensure compliance with the requirements of the FCRA:

1. Provide written notice in a stand-alone document to the applicant or employee that a background check will be conducted and the information will be used when making employment decisions.
2. If an investigative report that includes personal interviews concerning a person's character, general reputation, personal characteristics, and lifestyle will be conducted, notify the applicant or employee of this in writing and include a statement that the individual has a right to request additional disclosures and a summary of the scope and substance of the investigative report.
3. Obtain the applicant's or employee's written consent to obtain the background check and/or investigative report.
4. Provide certification to the company that is providing the background check information that you have obtained the individual's permission, complied with all FCRA requirements, and will not discriminate or otherwise misuse the information in the report.
5. If a decision is made to take an adverse action based on the background check information, provide the individual with a notice of pre-adverse action that includes a copy of the background check results and a copy of A Summary of Your Rights Under the Fair Credit Reporting Act.

6. Allow the individual at least five business days to dispute the information in the background check before making a final employment decision.
7. Make a final decision. If an adverse action is taken, provide the applicant or employee with a final notice of adverse action that includes the following:
    - The name, address, and phone number of the consumer reporting company that supplied the report;
    - A statement that the company that supplied the report did not make the decision to take the unfavorable action and cannot give specific reasons for it; and,
    - A notice of the person's right to dispute the accuracy or completeness of any information the consumer reporting company furnished, and to obtain a free report from the company if the person asks for it within 60 days.

Forms designed to assist employers in complying with these requirements are included in this chapter.

EMPLOYMENT PRACTICES GUIDELINE

Employment Screening – EEOC Considerations

It is not generally unlawful for an employer to ask questions about an applicant's or employee's background or to require a background check. However, any time an employer uses an applicant's or employee's background information to make an employment decision, regardless of how it acquires the information, the employer must comply with federal and state laws that protect applicants and employees from discrimination. That includes discrimination based on race, color, national origin, sex (including pregnancy, sexual orientation, or gender identity), disability, age, genetic information, height, weight, or marital status.

In all cases, an employer should make sure that it is conducting background checks on an equal basis. All applicants should be treated similarly. An employer should not ask medical questions of an applicant before a conditional offer of employment has been made. Once an employee has started a job, medical questions should not be asked unless the employer has objective evidence that the employee is unable to do the job or poses a safety risk because of a medical condition.

Any background information an employer receives from any source must not be used to discriminate in violation of federal law. This means that an employer should:

- Apply the same standards to everyone, regardless of their race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, disability, age, genetic information, height, weight, or marital status. For example, if an employer does not reject applicants of one ethnicity with certain financial histories or criminal records, it cannot reject applicants of other ethnicities because they have the same or similar financial histories or criminal records.
- Take special care when basing employment decisions on background problems that may be more common among people of a certain race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, disability, age, genetic information, height, weight, or marital status. For example, employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or another protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee. In legal terms, the policy or practice has a "disparate impact" and is not "job related and consistent with business necessity."
- Be prepared to make exceptions for problems revealed during a background check that were caused by a disability. For example, if an employer is inclined not to hire a person because of a problem caused by a disability, it should allow the person to demonstrate his or her ability to do the job – despite the negative background information – unless doing so would cause significant financial or operational difficulty.

Employers can consider some criminal records when they make the final decision about hiring. However, Michigan law prohibits employers from asking about misdemeanor arrests that did not lead to convictions. MCL 37.2205a. Specifically, an employer is prohibited from making or maintaining a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result. Employers may ask about convictions for misdemeanors and arrests and convictions for felonies. When considering criminal histories, employers cannot treat people differently because of their protected status. For example, an employer cannot refuse to hire a qualified minority individual with a felony conviction but hire equally qualified or less qualified non-minority individuals with similar felony convictions.

An employer that considers criminal records in hiring decisions should assess whether the record is relevant to the job. An employer can assess the relevance of a person's criminal history and how it relates to the risks and responsibilities of the job. To do so, the employer should consider:

1. The nature and seriousness of the offense/crime;
2. The time that has passed since the criminal offense or completion of the sentence; and,
3. The nature of the job.

An employer cannot refuse to hire people simply because they have been arrested. The fact that a person was arrested is not proof that they committed a crime. There are situations where an employer can explore the person's conduct leading to the arrest and ask them to explain the circumstances. Then the employer can decide whether the conduct is a reason not to hire them or to make another employment decision.

Any personnel or employment records an employer makes or keeps (including all application forms, regardless of whether the applicant was hired, and other records related to hiring) must be preserved for at least two years after the records were made, or after a personnel action was taken, whichever comes later. If the applicant or employee files a charge of discrimination, then the employer must maintain the records until the case is concluded.

EMPLOYMENT PRACTICES GUIDELINE

Employment Screening – Federal Motor Carrier Safety Act Requirements

Pursuant to 49 CFR 391.23, there are several investigations and inquiries a prospective employer must make with respect to each CDL driver it employs. Specifically, the prospective employer must make:

(1) An inquiry, within 30 days of the date the driver's employment begins, to each driver's licensing authority where the driver held or holds a motor vehicle operator's license or permit during the preceding 3 years to obtain that driver's motor vehicle record.
(2) An investigation of the driver's safety performance history with Department of Transportation (DOT) regulated employers during the preceding three years.

A copy of the motor vehicle record(s) obtained in response to the inquiry or inquiries to each driver's licensing authority required by paragraph (1) above must be placed in the driver qualification file within 30 days of the date the driver's employment begins and retained for at least three (3) years. If no motor vehicle record is received from a driver's licensing authority to submit this response, the prospective employer must document a good faith effort to obtain such information. The inquiry to a driver's license authority must be made in the form and manner each authority prescribes.

Replies to the investigations of the driver's safety performance history required by paragraph (2) above, or documentation of good faith efforts to obtain the investigative data, must be placed in the driver qualification file within 30 days of the date the driver's employment begins. Any period of time required to exercise the driver's due process rights to review the information received, request a previous employer to correct or include a rebuttal, is separate and apart from this 30-day requirement to document investigation of the driver safety performance history data.

The investigation may consist of personal interviews, telephone interviews, letters, or any other method for investigating that the prospective employer deems appropriate. Each prospective employer must make a written record with respect to each previous employer contacted or good faith efforts to do so. The record must include the previous employer's name and address, the date the previous employer was contacted, or the attempts made, and the information received about the driver from the previous employer. Failures to contact a previous employer, or of them to provide the required safety performance history information, must be documented. The record must be retained for at least three (3) years. For drivers with no previous employment experience working for a DOT-regulated employer during the preceding three years, documentation that no investigation was possible must be placed in the driver investigation history file within the required 30 days of the date the driver's employment begins.

The prospective employer must investigate, at a minimum, the following information from all previous employers of the applicant that employed the driver to operate a commercial motor vehicle within the previous three years:

(1) General driver identification and employment verification information.
(2) The date, location, number of injuries, number of fatalities, and whether hazardous materials, other than fuel spilled from the fuel tanks of motor vehicles involved in the accident, were released for accidents involving the driver that occurred in the three-year period preceding the date of the employment application.

Prior to January 6, 2023, prospective employers were also required to investigate the following information from all previous DOT regulated employers that employed the driver within the previous three years from the date of the employment application, in a safety-sensitive function that required alcohol and controlled substance testing as specified by 49 CFR part 40:

(1) Whether, within the previous three years, the driver had violated the alcohol and controlled substances prohibitions under 49 CFR part 382 and 49 CFR part 40.
(2) Whether the driver failed to undertake or complete a rehabilitation program prescribed by a substance abuse professional (SAP).
(3) For a driver who had successfully completed a SAP's rehabilitation referral, and remained in the employ of the referring employer, information on whether the driver had the following testing violation subsequent to completion of the referral:
    i) Alcohol tests with a result of 0.04 or higher alcohol concentration;
    ii) Verified positive drug tests;
    iii) Refusals to be tested (including verified adulterated or substituted drug test results).

As of January 6, 2023, prospective employers no longer need to make these inquiries of previous employers. Instead, they must use the Drug and Alcohol Clearinghouse to comply with these requirements. However, if an applicant who is subject to follow-up testing has not successfully completed all follow-up tests, the employer must request the applicant's follow-up testing plan directly from the previous employer. If an applicant was subject to an alcohol and controlled substance testing program under the requirements of a DOT mode other than the Federal Motor Carrier Safety Administration (FMCSA), the prospective employer must request the alcohol and controlled substances information required above directly from those employers regulated by a DOT mode other than FMCSA.

A prospective employer must provide to the previous employer the driver's consent meeting the requirements of 49 CFR 40.321(b) for the release of the above-described information. If the driver refuses to provide this consent, the prospective employer must not permit the driver to operate a commercial motor vehicle for that employer.

Previous employers must:

(1) Respond to each request for information within 30 days after the request is received. If there is no safety performance history information to report for that driver, previous employers are nonetheless required to send a response confirming the non-existence of any such data, including the driver identification information and dates of employment.
(2) Take all precautions reasonably necessary to ensure the accuracy of the records.
(3) Provide specific contact information in case a driver chooses to contact the previous employer regarding correction or rebuttal of the data.
(4) Keep a record of each request and the response for one year, including the date, the party to whom it was released, and a summary identifying what was provided.

The release of information by the previous employer may take any form that reasonably ensures confidentiality, including letter, facsimile, or e-mail. The previous employer must take all precautions reasonably necessary to protect the driver safety performance history records from disclosure to any person not directly involved in forwarding the records.

Drivers who have previous DOT regulated employment history in the preceding three years and wish to review previous employer-provided investigative information must submit a written request to the prospective employer, which may be done at any time, including when applying, or as late as 30 days after being employed or being notified of denial of employment. The prospective employer must provide this information to the applicant within five (5) business days of receiving the written request. If the prospective employer has not yet received the requested information from the previous employer(s), then the five-business days deadline will begin when the prospective employer receives the requested safety performance history information. If the driver has not arranged to pick up or receive the requested records within thirty (30) days of the prospective employer making them available, the prospective employer may consider the driver to have waived his/her request to review the records.

Drivers wishing to request correction of erroneous information in records received by the prospective employer must send the request for correction to the previous employer that provided the records to the prospective employer. The previous employer must either correct and forward the information to the prospective employer or notify the driver within 15 days of receiving a driver's request to correct the data that it does not agree to correct the data. If the previous employer corrects and forwards the data as requested, that employer must also retain the corrected information as part of the driver's safety performance history record and provide it to subsequent prospective employers when requests for this information are received. If the previous employer corrects the data and forwards it to the prospective employer, there is no need to notify the driver.

Drivers wishing to rebut information in records received from the previous employer must send the rebuttal to the previous employer with instructions to include the rebuttal in the driver's safety performance history. Within five business days of receiving a rebuttal from a driver, the previous employer must:

(1) Forward a copy of the rebuttal to the prospective employer.
(2) Append the rebuttal to the driver's information in the employer's appropriate file, to be included as part of the response for any subsequent investigating prospective employers for the duration of the three-year data retention requirement.

The driver may submit a rebuttal initially without a request for correction or subsequent to a request for a correction.

The prospective employer must use the information provided by previous employers only as part of deciding whether to hire the driver. The prospective employer must take all precautions reasonably necessary to protect the records from disclosure to any person not directly involved in deciding whether to hire the driver.

No action or proceeding for defamation, invasion of privacy, or interference with a contract that is based on the furnishing or use of the information described above may be brought against an employer investigating the information of an individual under consideration for employment as a commercial motor vehicle driver or a person who has provided such information. These protections do not apply to persons who knowingly furnish false information or who are not in compliance with the procedures specified for these investigations.

EMPLOYMENT PRACTICES GUIDELINE

Employment Screening – Medical Examiner's Certificates for CDL Employees

For CDL employees, the employer must obtain an original or copy of the employee's medical examiner's certificate, verify that the driver was certified by a medical examiner listed on the National Registry of Certified Medical Examiners as of the date of issuance of the medical examiner's certificate, and place the records in the driver qualification file, before allowing the driver to operate a commercial motor vehicle.[1]

Additionally, using the Commercial Driver's License Information System (CDLIS) motor vehicle record obtained from the current licensing state, the employer should verify and document in the driver qualification file the following information before allowing the driver to operate a commercial motor vehicle:

(1) The type of operation the driver self-certified that he or she will perform, i.e., non-excepted interstate, excepted interstate, non-excepted intrastate, or excepted intrastate.
(2) Through June 22, 2025, that the driver was certified by a medical examiner listed on the National Registry of Certified Medical Examiners as of the date of the medical examiner's certificate issuance.

If the driver provided the employer with a copy of the current medical examiner's certificate that was submitted to the state, the employer may use a copy of that medical examiner's certificate as proof of the driver's medical certification for up to 15 days after the date it was issued.

In the event of a conflict between the medical certification information provided electronically by the Federal Motor Carrier Safety Administration (FMCSA) and a paper copy of the medical examiner's certificate, the medical certification information provided electronically by FMCSA shall control.

A person must not operate a commercial motor vehicle unless he or she is medically certified as physically qualified to do so and, when on-duty, has on his or her person the original, or a copy, of a current medical examiner's certificate (or a valid medical waiver issued by the State of Michigan) that he or she is physically qualified to drive a commercial motor vehicle. Grandfather Rights Cards are no longer valid. If the driver has submitted a current medical examiner's certificate to the State documenting that he or she meets the physical qualification requirements of the Federal Motor Carrier Safety Regulations (FMCSRs), then he or she no longer needs to carry on his or her person the medical examiner's certificate, or a copy, for more than 15 days after the date it was issued as valid proof of medical certification.

The maximum period of time for which a medical examiner's certificate may be issued is two years.

[1]Pursuant to the Michigan Motor Carrier Safety Act, 49 CFR 383.71(h) and all of 49 CFR parts 382, 391, 392, and 393 apply to a commercial motor vehicle owned and operated by a unit of government and its employees. This includes the provisions on physical qualifications and examinations.

EMPLOYMENT PRACTICES GUIDELINE

Employment Screening – Drug & Alcohol Clearinghouse

Employers of CDL drivers are required to conduct queries of the Federal Motor Carrier Safety Administration (FMCSA) Drug & Alcohol Clearinghouse (Clearinghouse) to check if current or prospective employees are prohibited from performing safety-sensitive functions due to an unresolved drug and alcohol program violation. The Clearinghouse is a secure online database that gives employers real-time information about CDL driver drug and alcohol program violations. A query is an electronic check of a driver's record in the Clearinghouse. There are two types of queries, i.e., full queries and limited queries.

A full query allows the employer to see detailed information about any drug and alcohol violations in a driver's Clearinghouse record. All pre-employment queries must be full queries. An employer must obtain the driver's electronic consent in the Clearinghouse prior to the release of detailed violation information during the full query. Drivers who are not registered with a verified CDL in the Clearinghouse, or who have selected "U.S. Mail" as their preferred contact method, will be sent a letter about the consent request. This letter can take 2-3 weeks to arrive. To avoid delays in the hiring process, employers can encourage queried drivers to register for the Clearinghouse, if needed, and log in to respond to the consent request. Once a driver has provided his or her consent, the query will be conducted, and the employer can log in to the Clearinghouse to view the full details in the driver's Clearinghouse record.

A limited query allows an employer to determine if an individual driver's Clearinghouse record has any information about resolved or unresolved drug and alcohol violations but does not release any specific violation information contained in the driver's Clearinghouse record. Employers must annually query the Clearinghouse for each driver they currently employ. Limited queries require only a general driver consent, which is obtained outside the Clearinghouse. This general consent is not required on an annual basis; it may be effective for more than one year. However, the limited consent must specify the timeframe for which the driver is providing consent. If the limited query determines that there is no violation information in the driver's Clearinghouse record, the results will show "Driver Not Prohibited." If information related to a drug and alcohol program violation is present in the driver's Clearinghouse record, a notice stating "Record(s) Found; Full Query Needed" appears. In that event, a full query must be completed within 24 hours, or the driver must be removed from safety-sensitive functions. The employer would click "Send Consent Request" in the Clearinghouse to generate a request and obtain the driver's electronic consent to conduct a full query.

If a driver or prospective driver fails to provide consent for full and/or limited queries as required above, he or she cannot perform and/or must be removed from safety-sensitive functions.

In addition to querying the Clearinghouse, employers are required to report driver drug and alcohol program violations in the Clearinghouse. An employer may designate a third-party administrator in the Clearinghouse to assist with meeting these reporting requirements; however, the employer retains ultimate responsibility for compliance.

Specifically, employers must report an alcohol confirmation test with a concentration of 0.04 or higher, a refusal to test for alcohol, a refusal to test for controlled substances not requiring a determination by the Medical Review Officer (MRO), or actual knowledge of a drug or alcohol violation (meaning the employer's direct observation of the employee, information provided by a previous employer, a traffic citation for driving a CMV while under the influence of alcohol or controlled substances, or an employee's admission of prohibited alcohol or controlled substance use. Additionally, employers must report certain parts of the return-to-duty process following a positive test, namely a negative return-to-duty test result and the date the driver's follow-up testing plan is successfully completed. Employers must report this information by the close of the third business day following the date on which the employer obtained the information.

EMPLOYMENT PRACTICES GUIDELINE

Employment Screening – E-Verify

E-Verify is an internet-based system that compares information entered by an employer from an employee's Form I-9, Employment Eligibility Verification, to records available to the U.S. Department of Homeland Security (DHS) and the Social Security Administration (SSA) to confirm employment eligibility. A Presidential Executive Order and subsequent Federal Acquisition Regulation (FAR) rule required federal contractors to use E-Verify to electronically verify the employment eligibility of employees working under covered federal contracts. The E-Verify Federal Contractor Rule only affects federal contractors who were awarded a new contract on or after the effective date of the rule, September 8, 2009, that includes the FAR E-Verify clause (found at 48 CFR Subpart 22.18). Some existing federal contracts were also bilaterally modified to include the FAR E-Verify clause after the effective date of the rule.

The E-Verify Federal Contractor Rule requires certain federal prime contractors to require their subcontractors to use E-Verify when:

- The prime contract includes the FAR E-Verify clause;
- The subcontract is for commercial or noncommercial services or construction;
- The subcontract has a value of more than $3,500; and,
- The subcontract includes work performed in the United States.

State and local governments which are awarded a federal contract that includes the FAR E-Verify clause are only required to use E-Verify for new hires and existing non-exempt employees who are working directly under a covered contract.

Employers whose contracts are exempt from the E-Verify Federal Contractor Rule are not required to enroll in E-Verify. A contract is considered exempt if any one of the following applies:

- It is for fewer than 120 days.
- It is valued at less than the simplified acquisition threshold (currently $250,000.00).
- All work is performed outside the United States.
- It includes only commercially available off-the-shelf items and related services.

An employer may voluntarily enroll in E-Verify at any time but may not create cases for existing employees unless the employer holds a federal contract that includes the FAR E-Verify clause and is enrolled in E-Verify as a "Federal Contractor with the FAR E-Verify clause."

Federal contractors are not required to verify employees who normally perform support work such as general company administration or indirect or overhead functions and do not perform any substantial duties applicable to the contract. They also should not verify employees previously confirmed as authorized to work in E-Verify and continuing in employment with the same employer.

Federal contractors not currently enrolled in E-Verify must:

- Enroll as a federal contractor in E-Verify within 30 calendar days of the award date of a contract that contains the FAR E-Verify clause.
- Begin to use E-Verify to verify all newly hired employees who are working within the United States within 90 calendar days of the enrollment date.
- Create a case for each existing employee assigned to the contract within 90 calendar days of enrolling in E-Verify or within 30 calendar days of the employee's assignment to the contract, whichever date is later; or,
- If the federal contractor chooses to verify the entire workforce, create a case for all existing employees within 180 calendar days of enrollment in E-Verify or within 180 days of notifying E-Verify of the decision to exercise this option.

Employers already enrolled in E-Verify, but not designated in E-Verify as a federal contractor subject to the FAR E-Verify clause, must follow the following instructions:

- **Do not re-enroll in E-Verify**. Instead, update the Company Information page in E-Verify to "Federal Contractor with FAR E-Verify clause" within 30 calendar days of the award of the federal contract that contains the FAR E-Verify clause.
- Create a case for each existing employee assigned to the contract within 90 calendar days of enrolling in E-Verify or within 30 calendar days of the employee's assignment to the contract, whichever date is later; or,
- If the federal contractor chooses to verify the entire workforce, create a case for all existing employees within 180 calendar days of enrollment in E-Verify or within 180 days of notifying E-Verify of the decision to exercise this option.

Enrollment must be completed within a single web session at the E-Verify Enrollment website (http://E-Verify.gov/employers/enrolling-in-e-verify). Before enrolling, employers should have the following information and be ready to provide it during the single web session:

- Company legal name;
- Employer identification number (also called a Federal Tax ID Number);
- Primary physical address from which company will access E-Verify;
- Mailing address (if different from the physical address);
- Hiring sites that will participate in E-Verify in each state;
- Total number of current employees;
- Company's North American Industry Classification System (NAICS) code;

- Contact information (name, phone number, email addresses) for company's Memorandum of Understanding (MOU) Signatory and Program Administrator; and,
- Unique Entity Identifier (UEI).

An employer that participates in E-Verify must not:

- Create a case for an employee in E-Verify before he or she accepts an offer of employment and completes Form I-9.
- Use E-Verify to discriminate against an employee on the basis of citizenship, immigration status, race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age, disability, or genetic information.
- Use E-Verify to verify an employee who is not a new hire, unless doing so under an exception that allows some employers with federal contracts to use E-Verify to verify existing employees.
- Terminate or take any other adverse action against an employee (such as denying work, delaying training, withholding pay, or otherwise assuming that the employee is not authorized to work) because of the employee's decision to take action to resolve a mismatch or because your mismatch case is still pending with DHS or SSA.
- Use E-Verify for reverification of an existing employee whose temporary employment authorization has expired. The employer must complete Section 3 of Form I-9 when reverification is required.
- Specify or request which Form I-9 documentation the employee must present.

E-Verify works by comparing the information employees provide for Form I-9, Employment Eligibility Verification, against records available to SSA and DHS. Generally, if the information matches, the employee's case receives an Employment Authorized result in E-Verify. If the information does not match, the case will receive a Tentative Nonconfirmation (Mismatch) result, and the employer must give the employee an opportunity to take action to resolve the mismatch. E-Verify identifies the agency or agencies associated with the mismatch in a Further Action Notice.

Employers must complete the following steps in E-Verify within 10 federal government working days after issuance of the mismatch result:

- Notify the employee of their mismatch as soon as possible within the 10 days.
- Give the employee a copy of the Further Action Notice.
- Review the Further Action Notice with the employee in private and have them confirm whether the information listed at the top is correct.
    - If the information is incorrect, close the case and select the statement indicating the information was not correct. After the case is closed, create a new case for the employee with the correct information.
    - If the information is correct, proceed to the next step.

- The employee will decide whether to take action on the mismatch. Tell the employee they have 10 days from issuance of the mismatch to notify you whether they will take action to resolve the mismatch.
- If the employee does not give their decision by the end of the 10th federal government working day after E-Verify issued the mismatch, then close the case.

Employers may not terminate, suspend, delay training, withhold or lower pay, or take any other adverse action against an employee because of the mismatch, until the mismatch becomes a Final Nonconfirmation. If the employee chooses not to take action on the mismatch, the employer may terminate employment with no civil or criminal penalty. The case can be treated as a Final Nonconfirmation and the employer should close the case in E-Verify.

AUTHORIZATION TO OBTAIN A CONSUMER REPORT/BACKGROUND CHECK

Pursuant to the Fair Credit Reporting Act, I hereby authorize the _____ County Road Commission and its designated agents and representatives to conduct a comprehensive review of my background through a consumer report and/or an investigative consumer report to be generated for employment, promotion, reassignment or retention as an employee. I understand that the scope of the consumer report/investigative consumer report may include, but is not limited to, the following areas: verification of Social Security number; current and previous residences; employment history, including all personnel files; education; references; credit history and reports; criminal history, including records from any criminal justice agency in any or all federal, state or county jurisdictions; birth records; motor vehicle records, including traffic citations and registration; and any other public records.

I, _____, authorize the complete release of these records or data pertaining to me that an individual, company, firm, corporation or public agency may have. I hereby authorize and request any present or former employer, school, police department, financial institution or other persons having personal knowledge of me to furnish the _____ County Road Commission or its designated agents with any and all information in their possession regarding me in connection with an application of employment. I am authorizing that a photocopy of this authorization be accepted with the same authority as the original.

I understand that, pursuant to the Fair Credit Reporting Act, if any adverse action is to be taken based upon the consumer report, a copy of the report and a summary of the consumer's rights will be provided to me.

_____ _____

Signature Date

Preliminary Notice of Adverse Action

[Date]

[Applicant's Name]

[Applicant's Address]

Dear [Applicant's Name],

Enclosed is a consumer report that we requested in connection with your application for employment with the _____ County Road Commission. In accordance with the Fair Credit Reporting Act (FCRA), also enclosed is a copy of your rights under the Act.

Due, in part, to the contents of this consumer report, a decision is pending regarding your application for employment. As required under the FCRA, we are notifying you in advance of any adverse action being taken.

You have the right to dispute the accuracy of the information in this report by contacting the consumer reporting agency listed below directly. The consumer reporting agency did not, however, make this employment decision and cannot provide specific reasons for the decision.

[Consumer Reporting Agency Name]

[Consumer Reporting Agency Address]

[Toll-free phone number of Consumer Reporting Agency]

Sincerely,

_____ County Road Commission Representative

Enclosures:

Copy of Consumer Agency Report

A Summary of Your Rights Under the Fair Credit Reporting Act
(https://files.consumerfinance.gov/f/201504_cfpb_summary_your-rights-under-fcra.pdf)

Para informacion en espaniol, visite www.consumer finance.gov/learnmore o escribe a la Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC20552.

A Summary of Your Rights Under the Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies. There are many types of consumer reporting agencies, including credit bureaus and specialty agencies (such as agencies that sell information about check writing histories, medical records, and rental history records). Here is a summary of your major rights under the FCRA. **For more information, including information about additional rights, go to www.consumerfinance.gov/learnmore or write to: Consumer Financial Protection Bureau, 1700 G Street N.W., Washington, DC 20552.**

- **You must be told if information in your file has been used against you.** Anyone who uses a credit report or another type of consumer report to deny your application for credit, insurance, or employment - or to take another adverse action against you - must tell you, and must give you the name, address, and phone number of the agency that provided the information.

- **You have the right to know what is** in **your file.** You may request and obtain all the information about you in the files of a consumer reporting agency (your "file disclosure"). You will be required to provide proper identification, which may include your Social Security number. In many cases, the disclosure will be free. You are entitled to a free file disclosure if:
  - a person has taken adverse action against you because of information in your credit report;
  - you are the victim of identity theft and place a fraud alert in your file;
  - your file contains inaccurate information as a result of fraud;
  - you are on public assistance;
  - you are unemployed but expect to apply for employment within 60 days.

  In addition , all consumers are entitled to one free disclosure every 12 months upon request from each nationwide credit bureau and from nationwide specialty consumer reporting agencies. See www.consumerfinance.gov/learnmore for additional information.

- **You have the right to ask for a credit score.** Credit scores are numerical summaries of your credit-worthiness based on information from credit bureaus. You may request a credit score from consumer reporting agencies that create scores or distribute scores used in residential real property loans, but you will have to pay for it. In some mortgage transactions, you will receive credit score information for free from the mortgage lender.

- **You have the right** to **dispute incomplete or inaccurate information.** If you identify information in your file that is incomplete or inaccurate, and report it to the consumer reporting agency, the agency must investigate unless your dispute is frivolous. See www.consumerfinance.gov/learnmore for an explanation of dispute procedures.

- **Consumer reporting agencies must correct or delete inaccurate, incomplete, or unverifiable information.** Inaccurate, incomplete, or unverifiable information must be removed or corrected, usually within 30 days. However, a consumer reporting agency may continue to report information it has verified as accurate.

- **Consumer reporting agencies may not report outdated negative information.** In most cases, a consumer reporting agency may not report negative information that is more than seven years old, or bankruptcies that are more than 10 years old.

- **Access to your ftle is limited.** A consumer reporting agency may provide information about you only to people with a valid need -- usually to consider an application with a creditor, insurer, employer, landlord, or other business. The FCRA specifies those with a valid need for access.

- **You must give your consent for reports to be provided to employers.** A consumer reporting agency may not give out information about you to your employer, or a potential employer, without your written consent given to the employer. Written consent generally is not required in the trucking industry. For more information, go to www.consumerfinance.1?o v/learnmore.

- **You many limit "prescreened" offers of credit and insurance you get based on information in your credit report.** Unsolicited "prescreened" offers for credit and insurance must include a toll-free phone number you can call if you choose to remove your name and address from the lists these offers are based on. You may opt out with the nationwide credit bureaus at 1-888-5-0PTOUT (1-888-567-8688).

- **You may seek damages from violators.** If a consumer reporting agency, or, in some cases, a user of consumer reports or a furnisher of information to a consumer reporting agency violates the FCRA, you may be able to sue in state or federal court.

- **Identity theft victims and active duty military personnel have additional rights.** For more information, visit www.consumerfinance.gov/learnmore.

States may enforce the FCRA, and many states have their own consumer reporting laws. In some cases, you may have more rights under state law. For more information, contact your state or local consumer protection agency or your state Attorney General. For information about your federal rights, contact:

TYPE OF BUSINESS:	CONTACT:
l .a. Banks, savings associations, and credit unions with total assets of over $10 billion and their affiliates	a. Consumer Financial Protection Bureau 1700 G Street, **N.W.** Washington, DC 20552
b. Such affiliates that are not banks, savings associations, or credit unions also should list,	b. Federal Trade Commission: Consumer Response Center - FCRA

in addition to the CFPB:	Washington, DC 20580 (877) 382-4357
2. To the extent not included in item 1 above: a. National banks, federal savings associations, and federal branches and federal agencies of foreign banks b. State member banks, branches and agencies of foreign banks (other than federal branches, federal agencies, and Insured State Branches of Foreign Banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act c. Nonmember Insured Banks, Insured State Branches of Foreign Banks, and insured state savings associations d. Federal Credit Unions	 a. Office of the Comptroller of the Currency Customer Assistance Group 1301 McKinney Street, Suite 3450 Houston, TX 77010-9050 b. Federal Reserve Consumer Help Center P.O. Box. 1200 Minneapolis, MN 55480 c. FDIC Consumer Response Center 1100 Walnut Street, Box #11 Kansas City, MO 64106 d. National Credit Union Administration Office of Consumer Protection (OCP) Division of Consumer Compliance and Outreach (DCCO) 1775 Duke Street Alexandria, VA 22314
3. Air carriers	Asst. General Counsel for Aviation Enforcement & Proceedings Aviation Consumer Protection Division Department of Transportation 1200 New Jersey Avenue, S.E. Washington, DC 20590
4. Creditors Subject to the Surface Transportation Board	Office of Proceedings, Surface Transportation Board Department of Transportation 395 E Street, S.W. Washington, DC 20423
5. Creditors Subject to the Packers and Stockyards Act, 1921	Nearest Packers and Stockyards Administration area supervisor
6. Small Business Investment Companies	Associate Deputy Administrator for Capital Access United States Small Business Administration 409 Third Street, S.W., 8th Floor Washington, DC 20416
7. Brokers and Dealers	Securities and Exchange Commission 100 F Street, N.E.

	Washington, DC 20549
8. Federal Land Banks, Federal Land Bank Associations, Federal Intermediate Credit Banks, and Production Credit Associations	Farm Credit Administration 1501 Farm Credit Drive McLean, VA 22102-5090
9. Retailers, Finance Companies, and All Other Creditors Not Listed Above	FTC Regional Office for region in which the creditor operates or Federal Trade Commission: Consumer Response Center - FCRA Washington, DC 20580 (877) 382-4357

Final Notice of Adverse Action

[Date]

[Applicant's Name]

[Applicant's Address]

Dear [Applicant's Name],

Thank you for applying for a position with the _____ County Road Commission. Regretfully, due to information obtained through a consumer report while processing your application, we are unable to approve your application at this time.

Under the Fair Credit Reporting Act (FCRA), you have the right to dispute the accuracy or completeness of any of the information the consumer reporting agency furnished us, for which you must contact them directly. Likewise, you are entitled by law to obtain the report used in this decision within sixty (60) days of this notice.

To obtain the consumer report you have the right to contact the consumer reporting agency directly via the following methods:

[Consumer Reporting Agency Name]

[Consumer Reporting Agency Address]

[Toll-free phone number of Consumer Reporting Agency]

The consumer reporting agency which furnished the consumer report did not make the ultimate decision to deny your application and cannot, by law, give specific reasons for it.

Sincerely,

_____ County Road Commission Representative

SAFETY PERFORMANCE HISTORY RECORDS REQUEST

PART 1: TO BE COMPLETED BY PROSPECTIVE EMPLOYEE

I, (Print Name) _____ _____
First M.I. Last Social Security Number

Hereby authorize: _____
Date of Birth

Previous Employer: _____ Email: _____

Street: _____ Telephone: _____

City, State, Zip: _____ Fax No.: _____

To release and forward the information requested by section 3 of this document concerning my Alcohol and Controlled Substances Testing records within the previous 3 years from _____.
(employment application date)

To: Prospective Employer: _____

Attention: _____ Telephone: _____

Street: _____

City, State, Zip: _____

In compliance with §40.25(g) and 391.23(h), release of this information must be made in a written form that ensures confidentiality, such as fax, email, or letter.

Prospective employer's fax number: _____

Prospective employer's email address: _____

_____ _____
Applicant's Signature Date

This information is being requested in compliance with §40.25(g) and 391.23.

PART 2: TO BE COMPLETED BY PREVIOUS EMPLOYER

ACCIDENT HISTORY

The applicant named above was employed by us. Yes ☐ No ☐

Employed as _____ from (m/y) _____ to (m/y) _____

1. Did he/she drive motor vehicle for you? Yes ☐ No ☐ If yes, what type? Straight Truck ☐ Tractor-Semitrailer ☐ Bus ☐ Cargo Tank ☐ Doubles/Triples ☐ Other (Specify) _____

2. Reason for leaving your employ: Discharged ☐ Resignation ☐ Lay Off ☐ Military Duty ☐
If there is no safety performance history to report, check here ☐, sign below and return.

ACCIDENTS: Complete the following for any accidents included on your accident register (§390.15(b)) that involved the applicant in the 3 years prior to the application date shown above, or check ☐ here if there is no accident register data for this driver.

	Date	Location	# Injuries	# Fatalities	Hazmat Spill
1.					
2.					
3.					

Please provide information concerning any other accidents involving the applicant that were reported to government agencies or insurers or retained under internal company policies: _____

Any other remarks:

Signature: _____

Title: _____ Date: _____

PREVIOUS EMPLOYER – COMPLETE PAGE 2 PART 3

PART 3:	TO BE COMPLETED BY PREVIOUS EMPLOYER

DRUG AND ALCOHOL HISTORY

If driver was not subject to Department of Transportation testing requirements while employed by this employer, please check here ☐, fill in the dates of employment from _____ to _____, complete bottom of Part 3, sign, and return.

Driver was subject to Department of Transportation testing requirements from _____ to _____.

1. Has this person had an alcohol test with the result of 0.04 or higher alcohol concentration?
   YES ☐ NO ☐
2. Has this person tested positive or adulterated or substituted a test specimen for controlled substances?
   YES ☐ NO ☐
3. Has this person refused to submit to a post-accident, random, reasonable suspicion, or follow-up alcohol or controlled substance test?
   YES ☐ NO ☐
4. Has this person committed other violations of Subpart B of Part 382, or Part 40?
   YES ☐ NO ☐
5. If this person has violated a DOT drug and alcohol regulation, did this person complete a SAP-prescribed rehabilitation program in your employ, including return-to-duty and follow-up tests? If yes, please send documentation back with this form.
   YES ☐ NO ☐
6. For a driver who successfully completed a SAP's rehabilitation referral and remained in your employ, did this driver subsequently have an alcohol test result of 0.04 or greater, a verified positive drug test, or refuse to be tested?
   YES ☐ NO ☐

In answering these questions, include any required DOT drug or alcohol testing information obtained from prior previous employers in the previous 3 years prior to the application date shown on page 1.

Name: _____

Company: _____

Street: _____

City, State, Zip: _____ Telephone: _____

Part 3 Completed by (Signature): _____ Date: _____

PART 4a:	TO BE COMPLETED BY PROSPECTIVE EMPLOYER

This form was (check one) ☐ Faxed to previous employer ☐ Mailed ☐ Emailed ☐ Other _____

By: _____ Date: _____

PART 4b:	TO BE COMPLETED BY PROSPECTIVE EMPLOYER

Complete below when information is obtained.

Information received from: _____

Recorded by: _____ Method: ☐ Fax ☐ Mail ☐ Email ☐ Telephone

Date: _____ ☐ Other _____

INSTRUCTIONS TO COMPLETE THE SAFETY PERFORMANCE HISTORY RECORDS REQUEST

PAGE 1 PART 1: Prospective Employee
- Complete the information required in this section
- Sign and date
- Submit to the Prospective Employer

PAGE 2 PART 4a: Prospective Employer
- Complete the information
- Send to Previous Employer

PAGE 1 PART 2: Previous Employer
- Complete the information required in this section
- Sign and date
- Turn form over to complete SIDE 2 SECTION 3

PAGE 2 PART 3: Previous Employer
- Complete the information required in this section
- Sign and date
- Return to Prospective Employer

PAGE 2 PART 4b: Prospective Employer
- Record receipt of the information
- Retain the form

RECORDS REQUEST FOR
DRIVER/APPLICANT SAFETY PERFORMANCE HISTORY

This request is made by the driver/applicant in compliance with the Department of Transportation regulations.

§391.23(i)(2) Drivers who have previous Department of Transportation regulated employment history in the preceding three years, and wish to review previous employer-provided investigative information must submit a written request to the prospective employer, which may be done at any time, including when applying, or as late as thirty (30) days after being employed or being notified of denial of employment. The prospective employer must provide this information to the applicant within five (5) business days of receiving the written request. If the prospective employer has not yet received the requested information from the previous employer(s), then the five-business-days deadline will begin when the prospective employer receives the requested safety-performance history information. If the driver has not arranged to pick up or receive the requested records within thirty (30) days of the prospective employer making them available, the prospective motor carrier may consider the driver to have waived his/her request to review the records.

PART 1: COMPLETED BY THE DRIVER/APPLICANT

TO:

Prospective Employer: _____

Street/P.O. Box: _____

City, State, Zip: _____ Telephone # _____

FROM:

Driver/Applicant: _____ Social Security/I.D. # _____

Street: _____

City, State, Zip: _____ Telephone # _____

I am submitting this written request to obtain copies of my Department of Transportation Safety Performance History for the preceding three years. I understand, for records requested from a prospective employer, that I must arrange to pick up or receive the requested records within thirty (30) days of the records being made available or I have waived my request to review the records.

This information should be: ☐ sent to me at the above address.
☐ I will arrange to pick up.

Driver/Applicant Signature: _____ Date: ____/____/____ (M D Y)

PART 2: COMPLETED BY THE PROSPECTIVE EMPLOYER

The information must be provided to the applicant within five (5) business days of receiving the written request. If the prospective employer has not yet received the requested information form the previous employer(s), then the five-business-days deadline will begin when the prospective employer receives the requested safety performance history information.

Information supplied to:

Name: _____

Street: _____

City, State, Zip: _____

Comments: _____

_____

By:

_____ _____ Release Date: ____/____/____

Signature/person providing information Telephone # (M D Y)

COPY 1 PROSPECTIVE EMPLOYER

Driver Consent for Annual Limited Query

I, _____, hereby provide consent to _____ County Road Commission (Road Commission) to conduct an annual limited query to the Federal Motor Carrier Safety Administration (FMCSA) Drug and Alcohol Clearinghouse (Clearinghouse) to determine whether drug or alcohol violation information about me exists in the Clearinghouse.

If the limited query shows that information exists in the Clearinghouse about me, the Road Commission must conduct a full query within 24 hours of conducting the limited query. In that event, FMCSA will not disclose that information to the Road Commission without first obtaining additional specific consent from me. I understand that I will then need to register and consent for the full query.

I further understand that if I refuse to provide consent for the Road Commission to conduct a limited query, and/or a full query if later required, the Road Commission must prohibit me from performing safety-sensitive functions, including driving a commercial motor vehicle, as required by FMCSA's drug and alcohol program regulations.

This consent is valid for a period of **five years** or until my employment with the Road Commission is terminated, whichever occurs first.

_____ _____

Driver Signature Date

_____

Driver Name (Printed)

Further Action Notice

Tentative Nonconfirmation (TNC)

(U.S. Department of Homeland Security (DHS))

Employee's Last Name, First Name	**Employee's Social Security Number**
Employee's A-Number	**Employee's Document Number**
Date of DHS Tentative Nonconfirmation	**Case Verification Number**
Reason for this Notice:	

Your employer, , participates in E-Verify. E-Verify compares the information that you provided on your Form I-9 (Employment Eligibility Verification) with Social Security Administration (SSA) and Department of Homeland Security (DHS) records to confirm that you are authorized to work in the United States.

Why you received this notice:

You received this Further Action Notice from because it appears that some of the information that your employer entered into E-Verify does not match the records that DHS currently has for you. This does not necessarily mean you gave incorrect information to your employer, or that you are not authorized to work in the United States. There are several reasons why your information may not have matched – you can read more about those reasons online (www.e-verify.gov/employees/tentative-nonconfirmation-tnc-overview).

Next, you will need to take a few steps before E-Verify can let your employer know that you are authorized to work in the United States.

What you need to do:

1. **Review your information at the top of this page.** Let know if there are any errors. Your employer will be able to close this case and input your information in E-Verify again with the correct information, hopefully resolving this case. If your information is correct, move to step 2.

2. **Decide if you want to take action to resolve this case**. If your information above is correct, then you can choose to take action to correct your record so that DHS records reflect that you are authorized to work in the United States.

If you decide not to take action to resolve this case, E-Verify will be unable to confirm that you are authorized to work in the United States and your employer can terminate your employment.

For information on employee rights and responsibilities visit www.e-verify.gov/employees/employee-rights-and-responsibilities.

Taking action to resolve a case:

You have **8 Federal Government working days** to contact DHS from the date your employer sends your case in E-Verify. Your employer must give you a Referral Date Confirmation, which will tell you the date by which you must contact DHS.

Contact DHS:

To take action to resolve this case, call DHS at 888-897-7781 (TTY: 800-877-8339). A representative will help you work through the details of your case.

Have this Further Action Notice open when you call DHS, so that you can refer to it. The DHS representative may ask you for additional information or documents to resolve your case. If you need help in another language, be sure to ask for an interpreter.

Contact your State Motor Vehicles Agency (if instructed by DHS):

If you provided your employer a state driver's license or state identification card and DHS was unable to resolve your case, you may need to contact the state motor vehicles agency that issued your driver's license or state identification card.

To check on the status of your case, visit myE-Verify at https://myeverify.uscis.gov/.

Please indicate below whether or not you intend to dispute this case.

I choose to: (check one)			
☐	**I will take action to resolve this E-Verify case. I understand that I have until ____ to take action.**		
☐	**I will not take action to resolve this E-Verify case. I understand that if I do not take action E-Verify will be unable to confirm that I am authorized to work in the United States and my employer may terminate my employment.**		
Employee's Signature		**Date**	

Report Discrimination

To report employment discrimination based upon your citizenship, immigration status, or national origin, contact the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER) at 800-255-7688 (TTY:800-237-2515). For more information, visit IER's website at www.justice.gov/ier.

VI. FAIR LABOR STANDARDS ACT

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Fair Labor Standards Act (FLSA) – General Requirements

The Fair Labor Standards Act (FLSA) covers all public agency employees of a State, a political subdivision of a State, or an interstate government agency. The FLSA requires employers to:

- Pay all covered nonexempt employees, for all hours worked, at least the Federal minimum wage of $7.25 per hour effective as of July 24, 2009 (however, the minimum wage rate in Michigan is $10.10 effective January 1, 2023—Michigan employers must pay at least this hourly rate);
- Pay at least one and one-half times the employees' regular rates of pay for all hours worked over 40 in the workweek;
- Comply with youth employment standards; and,
- Comply with the recordkeeping requirements.

The FLSA applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. Averaging of hours over two or more weeks is not permitted. Normally, overtime pay earned in a particular workweek must be paid on the regular pay day for the pay period in which the wages were earned.

Covered employees must be paid for all hours worked in a workweek. In general, "hours worked" includes all time an employee must be on duty, or on the employer's premises or at any other prescribed place of work, from the beginning of the first principal activity of the workday to the end of the last principal work activity of the workday. Also included is any additional time the employee is allowed (i.e., suffered or permitted) to work.

The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not impair the employee's right to compensation for compensable overtime hours that are worked.

Employers are not required to pay overtime wages to employees who meet the exemption requirements for Executive, Administrative, or Professional occupations.

Under certain prescribed conditions, employees of a local government agency may receive compensatory time off, at a rate of not less than one and one-half hours for each overtime hour worked, instead of cash overtime pay. Compensatory time may be provided pursuant

to the applicable provisions of a collective bargaining agreement or, in the case of employees not covered by a collective bargaining agreement, an agreement or understanding arrived at between the employer and employee before the performance of overtime work. Under Michigan law, an employer must allow employees a total of at least 10 days of leave per year without loss of pay before offering them compensatory time in lieu of overtime pay. Law enforcement, fire protection, and emergency response personnel and employees engaged in seasonal activities may accrue up to 480 hours of compensatory time; all other state and local government employees may accrue up to 240 hours. An employee must be permitted to use compensatory time on the date requested unless doing so would "unduly disrupt" the operations of the agency. Payment for compensatory time must be at the regular rate earned by the employee at the time the employee receives such payment. Upon termination of employment, compensatory time must be paid at a rate of compensation not less than either (a) the average regular rate received by such employee during the last 3 years of the employee's employment, or (b) the final regular rate received by such employee, whichever is higher.

Wages required by the FLSA are due on the regular payday for the pay period covered. Deductions made from wages for such items as cash or merchandise shortages, employer-required uniforms, and tools of the trade, are not legal to the extent that they reduce the wages of employees below the minimum rate required by the FLSA or reduce the amount of overtime pay due under the FLSA.

While the FLSA does set some basic minimum wage and overtime pay standards and regulates the employment of minors, there are a number of employment practices which the FLSA does not regulate. For example, the FLSA does not regulate:

- Vacation, holiday, severance, or sick pay;
- Meal or rest periods, holidays off, or vacations;
- Premium pay for weekend or holiday work;
- Pay raises or fringe benefits; or,
- A discharge notice, reason for discharge, or immediate payment of final wages to terminated employees.

Also, the FLSA does not limit the number of hours in a day or days in a week an employee may be required or scheduled to work, including overtime hours, if the employee is at least 16 years old. These matters may be covered by a collective bargaining agreement between the employer and its bargaining unit employees or their authorized representatives.

The FLSA requires employers to keep records on wages, hours, and other items, as specified in Department of Labor (DOL) recordkeeping regulations. The records do not have to be kept in any particular form and time clocks need not be used. With respect to an employee subject to the minimum wage provisions or both the minimum wage and overtime provisions, the following records must be kept:

- Personal information, including employee's name, home address, occupation, sex, and birth date if under 19 years of age;

- Hour and day when workweek begins;
- Total hours worked each workday and each workweek;
- Total daily or weekly straight-time earnings;
- Regular hourly pay rate for any week when overtime is worked;
- Total overtime pay for the workweek;
- Deductions from or additions to wages;
- Total wages paid each pay period; and,
- Date of payment and pay period covered.

Section 15(a)(3) of the FLSA prohibits any retaliation against an employee because he or she has filed any complaint or instituted or caused to be instituted any proceeding under or related to the FLSA or has testified or is about to testify in any such proceeding. Employees are protected regardless of whether the complaint is made orally or in writing. Complaints made to the Wage and Hour Division of the DOL are protected, and most courts have ruled that internal complaints to an employer are also protected.

The FLSA allows the DOL or an employee to recover back wages and an equal amount in liquidated damages where minimum wage and overtime violations exist. Generally, a 2-year statute of limitations applies to the recovery of back wages and liquidated damages. A 3-year statute of limitations applies in cases involving willful violations. Remedies may be recovered through administrative procedures, litigation, and/or criminal prosecution.

EMPLOYMENT PRACTICES GUIDELINE

Fair Labor Standards Act (FLSA) – Hours Worked

The workweek ordinarily includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace. "Workday", in general, means the period between the time on any particular day when such employee commences his or her "principal activity" and the time on that day at which he or she ceases such principal activity or activities. The workday may therefore be longer than the employee's scheduled shift or hours. Work not requested but suffered or permitted to be performed is work time that must be paid by the employer. For example, an employee may voluntarily continue to work at the end of the shift to finish an assigned task or to correct errors. Such hours are work time and are compensable.

An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call, or who is allowed to leave a message where he or she can be reached, is generally not working while on call. Additional constraints on the employee's freedom could require this time to be compensated.

Rest periods of short duration, usually 20 minutes or less, are customarily paid for as working time. These short periods must be counted as hours worked. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished. Bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time. The employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he or she is required to perform any duties, whether active or inactive, while eating.

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time only if four criteria are met, namely: it is outside normal hours, it is voluntary, not job related, and no other work is concurrently performed.

The principles which apply in determining whether time spent in travel is compensable time depends upon the kind of travel involved, as follows:

- **Home to Work Travel:** An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.
- **Home to Work on a Special One Day Assignment in Another City:** An employee who regularly works at a fixed location in one city is given a special one-day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer

may deduct or not count that time the employee would normally spend commuting to the regular work site.

- **Travel That is All in a Day's Work:** Time spent by an employee in travel as part of their principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.
- **Travel Away from Home Community:** Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. The Wage and Hour Division does not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

Problems arise when employers fail to recognize and count certain hours worked as compensable hours for their non-exempt employees. This is generally not an issue with regard to FLSA-exempt employees who are paid on a salaried basis and are not entitled to overtime under the Act.

EMPLOYMENT PRACTICES GUIDELINE

Fair Labor Standards Act (FLSA) – Break Time for Nursing Mothers

A provision of the Patient Protection and Affordable Care Act ("PPACA") amended Section 7 of the Fair Labor Standards Act (FLSA) to require break time for nursing mothers. Specifically, employers are required to provide "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk." Employers are also required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."

Employers are required to provide a reasonable amount of break time to express milk as frequently as needed by the nursing mother. The frequency of breaks needed to express milk as well as the duration of each break will likely vary.

A bathroom, even if private, is not a permissible location under the Act. The location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing mother's use, it must be available when needed in order to meet the statutory requirement. A space temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient provided that the space is shielded from view and free from any intrusion from co-workers and the public.

Only employees who are not exempt from Section 7, which includes the FLSA's overtime pay requirements, are entitled to breaks to express milk. Neither federal nor state law currently mandate that an employer provide a FLSA-exempt employee with breaks to express milk.

Employers are not required under the FLSA to compensate nursing mothers for breaks taken for the purpose of expressing milk. However, where employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break time. In addition, the FLSA's general requirement that the employee must be completely relieved from duty or else the time must be compensated as work time applies.

Employers with fewer than 50 employees are not subject to the FLSA break time requirement if compliance with the provision would impose an undue hardship. Whether compliance would be an undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer's business. All employees who work for the covered employer, regardless of work site, are counted when determining whether this exemption may apply.

EMPLOYMENT PRACTICES GUIDELINE

Fair Labor Standards Act (FLSA) – Exemptions for Executive, Administrative, Professional, and Computer Employees

Section 13(a)(1) of the Fair Labor Standards Act (FLSA) provides an exemption from both the minimum wage and overtime pay for employees employed as bona fide executive, administrative, and professional employees. Section 13(a)(1) and Section 13(a)(17) also exempt 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 $684.00 per week. Employers may use nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis to satisfy up to 10 percent of the standard salary level. 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 of Labor's (DOL's) regulations.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $684.00 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and,
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among employees; determining the type of materials, supplies, machinery, equipment or tools to be used; controlling the flow and distribution of materials and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

The phrase "two or more other employees" means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more

employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

Factors to be considered in determining whether an employee's recommendations as to hiring, firing, advancement, promotion or any other change of status are given "particular weight" include, but are not limited to, whether it is part of the employee's job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive's recommendations must pertain to employees whom the executive customarily and regularly directs. An employee's recommendations may still be deemed to have "particular weight" even if a higher-level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

Administrative Exemption

To qualify for the administrative employee exemption, all the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $684.00 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and,
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

To meet the "directly related to management or general business operations" requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment. Work "directly related to management or general business operations" includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

The exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee's particular employment situation and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to, whether the employee has the authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the

business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; and whether the employee has authority to waive or deviate from established policies and procedures without prior approval. The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

The term "matters of significance" refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

Professional Exemption

To qualify for the professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $684.00 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and,
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

"Work requiring advanced knowledge" means work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

Fields of science or learning include law, medicine, accounting, actuarial computation, engineering, architecture, various types of physical, chemical and biological sciences, and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

The professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word "customarily" means the exemption may be available to employees in such professions

who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated **either** on a salary basis (as defined in the regulations) at a rate of not less than $684 per week **or**, if compensated on an hourly basis, at a rate of not less than $27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly situated skilled worker in the computer field performing the duties described below; and,
- The employee's primary duty must consist of:
    1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
    2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
    3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or,
    4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming, or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

EMPLOYMENT PRACTICES GUIDELINE

Fair Labor Standards Act (FLSA) – Salary Basis Requirement

To qualify for exemption from the overtime pay requirement as bona fide executive, administrative, and professional employees, employees generally must be paid at not less than $684.00 per week on a salary basis. Exempt computer employees must be paid at least $684.00 on a salary basis or an hourly basis at a rate not less than $27.63 an hour.

Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. Generally, if the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

Deductions from pay are permissible:

- For absences from work for one or more full days for personal reasons other than sickness or disability;
- For absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness;
- To offset amounts employees receive as jury or witness fees, or for military pay;
- For penalties imposed in good faith for infractions of safety rules of major significance; or,
- For unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.

Also, an employer is not required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

The employer will lose the exemption if it has an "actual practice" of making improper deductions from salary. Factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to:

- The number of improper deductions, particularly as compared to the number of employee infractions warranting deductions;
- The time period during which the employer made improper deductions;

- The number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and,
- Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

If an "actual practice" is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions.

Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions. Additionally, if an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

Although deductions for absences of less than one day are generally not permitted for exempt employees, there is an exception for public employers under certain circumstances. Specifically, an employee is not disqualified from being paid "on a salary basis" where a public employer has in place a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons because of illness or injury less than one workday when accrued leave is not used by an employee because:

1. Permission for its use has not been sought or has been sought and denied;
2. Accrued leave has been exhausted; or,
3. The employee chooses to use leave without pay.

If such a pay system is used, the employer must be sure to apply it consistently to all employees or run the risk that a court may hold that the leave system is not established pursuant to principles of public accountability. In order to establish the public accountability necessary to maintain the exemption, public employers should consider adoption of a policy on this issue.

EMPLOYMENT PRACTICES GUIDELINE

Fair Labor Standards Act (FLSA) – Youth Employment

In addition to its overtime provisions, the Fair Labor Standards Act (FLSA) also prohibits "oppressive child labor." "Oppressive child labor" is defined as employing a person between the ages of 16 and 18 in any occupation that the Department of Labor (DOL) finds and declares by order to be "particularly hazardous" for their employment or detrimental to their health or well-being. The DOL has determined that, except for occasional, incidental, and school bus driving, the occupations of motor vehicle driver and outside helper on any public road or highway are particularly hazardous for the employment of minors between the ages of 16 and 18. The Michigan Youth Employment Standards Act (YESA) similarly provides that a minor shall not be employed in, about, or in connection with an occupation that is hazardous or injurious to the minor's health or personal well-being. Michigan's administrative regulations specifically provide that no minor under 18 years old shall be employed in any occupation involving highway, bridge, and street construction.

YESA does not apply to several groups of teenagers provided proof of exemption is on file at the worksite. These groups include, but are not limited to:

- 16- and 17-year-olds who have completed requirements for high school graduation.
- 17-year-olds who have passed the GED test.
- Emancipated minors.

Teenage workers who are not exempt from YESA must have a work permit before beginning work. Work permits are available at www.michigan.gov/wagehour and from most schools or their administrative offices. A work permit is required even if the minor does not attend school.

The following hours of work requirements apply to minors:

- Minors 16 and 17 years old may work 24 hours per week when school is in session and 48 hours per week when school is not in session.
- 16- and 17-year-olds may not work before 6:00 a.m. or after 10:30 p.m. Sunday through Thursday and 11:30 p.m. on Friday and Saturday when school is in session and 11:30 p.m. 7 days per week when school is not in session.
- Minors are limited to working no more than 10 hours in a day with a weekly average of 8 hours per day.
- A minor may not work more than 6 days in a week.
- Workers less than 18 years of age may not work more than 5 hours without a documented 30-minute uninterrupted break.

A minor may not be employed unless the employer or another employee 18 years of age or older provides supervision. Supervision means being on the premises to direct and control the work of minors and to assist in case of an emergency.

EMPLOYMENT PRACTICES GUIDELINE

Fair Labor Standards Act (FLSA) – Michigan Payment of Wages & Fringe Benefits Act

The Michigan Payment of Wages and Fringe Benefits Act, MCL 408.471, et seq., regulates the payment of hourly wages, salaries, commissions, and certain fringe benefits (vacation pay, sick pay, etc.) as specified in written contracts or written policies. Specifically, the Payment of Wages and Fringe Benefits Act:

- Requires that an employee receive wages earned on a regular basis, either weekly, bi-weekly, semi-monthly, or monthly.
- Requires that an employee receive a retainable pay statement of wages indicating hours worked, gross wages paid, an itemization of deductions, and the dates for which the wages are paid.
- Requires that an employee receive compensation for fringe benefits earned according to a written contract or written policy such as payment for: a holiday, time off for sickness or injury, time off for vacation or personal reasons, bonuses, or authorized expenses incurred during employment.
- Prohibits deductions without authorization by law, a collective bargaining agreement, or written consent of an employee.
- Requires that an employee receive wages in cash, check, money order, or direct deposit. Direct deposit requires the full, free, and written consent of the employee, obtained without intimidation, coercion, or fear of discharge or reprisal for refusal to permit the deposit.
- Requires that an employee receive wages earned on the regular scheduled payday for the period in which the employee quits or is discharged.
- Allows employers to deduct overpayments of wages or fringe benefits due to mathematical or typographical errors under special conditions.
- Prohibits retaliation for employees who file a complaint or exercise a right protected by the Act.

Within 6 months after making an overpayment of wages or fringe benefits that are paid directly to an employee, an employer may deduct the overpayment from the employee's regularly scheduled wage payment without the written consent of the employee if all the following conditions are met:

(a) The overpayment resulted from a mathematical miscalculation, typographical error, clerical error, or misprint in the processing of the employee's regularly scheduled wages or fringe benefits;
(b) The miscalculation, error, or misprint described in subdivision (a) was made by the employer, the employee, or a representative of the employer or employee;

(c) The employer provides the employee with a written explanation of the deduction at least 1 pay period before the wage payment affected by the deduction is made;
(d) The deduction is not greater than 15% of the gross wages earned in the pay period in which the deduction is made;
(e) The deduction is made after the employer has made all deductions expressly permitted or required by law or a collective bargaining agreement, and after any employee-authorized deduction; and,
(f) The deduction does not reduce the regularly scheduled gross wages otherwise due the employee to a rate that is less than the greater of either the federal or Michigan minimum wage rate.

An employer shall pay fringe benefits on behalf of a deceased employee as designated by the terms set forth in a written contract, written policy, or written plan. An employer shall pay wages and any additional fringe benefits due a deceased employee to 1 or more of the following persons in the priority listed:

(a) The deceased employee's surviving spouse.
(b) The deceased employee's surviving children.
(c) The deceased employee's surviving mother or father.
(d) The deceased employee's surviving sister or brother.

If the employee has established a designee or designees by a signed statement filed with the employer before the employee's death and letters of administration are not required to be issued for the estate of the deceased employee, the employer shall make those payments to the designee or designees in the signed statement.

Fair Labor Standards Act Salary Basis Policy

It is the policy of the _____County Road Commission to comply with the salary basis requirements of the Fair Labor Standards Act (FLSA) for its FLSA-exempt employees. Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to the exceptions listed below, an FLSA-exempt employee must receive the full salary for any workweek in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work.

Deductions from pay are permissible:

- For absences from work for one or more full days for personal reasons other than sickness or disability;
- For absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness;
- To offset amounts employees receive as jury or witness fees, or for military pay;
- For penalties imposed in good faith for infractions of safety rules of major significance; or,
- For unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.

Also, the Road Commission is not required to pay the full salary in the initial or terminal week of employment or for weeks in which an FLSA-exempt employee takes unpaid leave under the Family and Medical Leave Act (FMLA). In these circumstances, either partial day or full day deductions may be made. The Road Commission has established a practice pursuant to principles of public accountability, and permissible under the FLSA, under which an employee's pay may be reduced for absences for personal reasons or because of an illness or injury of less than one full work day when accrued leave is not used by the employee because permission for its use has not been sought or has been sought or denied, accrued leave has been exhausted, or the employee chooses to use leave without pay.

If an employee believes that an improper deduction has been made to his or her salary, that employee should immediately report this information to the Road Commission's Managing Director. Reports of improper deductions will be promptly investigated. If it is determined that an

improper deduction has occurred, the employee will be promptly reimbursed for any improper deduction made by the Road Commission.

MICHIGAN DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
WAGE & HOUR DIVISION
517-322-1825
www.michigan.gov/wagehour

THE YOUTH EMPLOYMENT STANDARDS ACT, 1978 PUBLIC ACT 90

Work Activities Prohibited or Restricted by Law or Administrative Rule

WORK ACTIVITY	AGE 14/15	AGE 16/17	MCL OR RULE CITE
1. Alcoholic Beverages:			
Employed in Establishments Where Alcohol Sales are 50% or More of Total Sales	Prohibited	Prohibited	MCL 409.115
Employed Where Alcohol is Consumed in Establishments Where Alcohol Sales are Less than 50% of Total Sales	Prohibited	Permitted	MCL 409.115
Minors Cannot Sell, Serve, or Furnish Alcoholic Beverages; Liquor Control Commission Regulations, 1-866-893-2121	Prohibited	Prohibited	Liquor Control Commission
2. Clay Construction Products / Silica Refractory Products	Prohibited	Prohibited	R 408.6209(1)
3. Child Commercial Abusive Activities	Prohibited	Prohibited	MCL 409.114a
4. Confined Spaces	Prohibited	Permitted	R 408.6208(8)
5. Construction Operations:			
Involving Additions, Improvements, Excavation, Highway, Bridge, or Street Construction, Roofing, Wrecking, Demolition, and Ship Breaking Operations	Prohibited	Prohibited	R 408.6208(2)
Involving Cleanup (Not in Above Operations)	Prohibited	Permitted	R 408.6208 (1)
Non-Hazardous Construction Work for Charitable Housing Organization	Exempt	Exempt	MCL 409.119
6. Explosives	Prohibited	Prohibited	R 408.6208(3)
7. Extinguishment of Fires	Prohibited	Restricted	R 408.6209(11)
8. Hazardous Substances (see R 408.6204(a) for definition)	Prohibited	Prohibited	R 408.6208(5)
9. Hoisting Apparatus:			
Operation of	Prohibited	Prohibited	R 408.6208(11)(a)
Riding on	Prohibited	Prohibited	R 408.6208(11)(b)
Assisting in the Operation of	Prohibited	Prohibited	R 408.6208(11)(c)
Working Under	Prohibited	Permitted	R 408.6208(12)
10. Ladders and Scaffolding	Prohibited	Permitted	R 408.6209(10)
11. Logging and Sawmills	Prohibited	Prohibited	R 408.6209(5)
12. Mines and Quarries	Prohibited	Prohibited	R 408.6209(6)
13. Motor Vehicles	Prohibited	Prohibited	R 408.6208(13)
Outside Helpers	Prohibited	Prohibited	R 408.6208(14)
14. Ore Reduction, Casting Metals	Prohibited	Permitted	R 408.6209(7)
15. Power Driven:			
Bakery Machines	Prohibited	Prohibited	R 408.6208(9)(c)
Meat Processing Machines	Prohibited	Prohibited	R 408.6208(9)(f)
Paper Product Machines	Prohibited	Prohibited	R 408.6208(9)(d)
Metal Forming Machines	Prohibited	Prohibited	R 408.6208(9)(b)
Saws	Prohibited	Prohibited	R 408.6208(9)(e)
Woodworking Machines	Prohibited	Prohibited	R 408.6208(9)(a)
Tractors (Non-Agricultural)	Prohibited	Restricted	R 408.6208(10)(b)
Lawn Mowers & Cutters	Prohibited	Permitted	R 408.6209(8)
Earth Moving Equipment & Trenchers	Prohibited	Prohibited	R 408.6208(10)(a)
16. Radioactive Substances including Self-Luminous Compounds	Prohibited	Prohibited	R 408.6208(6)
17. Respiratory Equipment	Prohibited	Prohibited	R 408.6208(7)
18. Slaughtering, Meat Packing, and Rendering	Prohibited	Prohibited	R 408.6209(9)
19. Tanning (Animal Hides)	Prohibited	Prohibited	R 408.6209(4)
20. Welding	Prohibited	Permitted	R 408.6209(2)
Heat Treating, Brazing, and Soldering	Prohibited	Permitted	R 408.6209(3)

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DELEG is an equal opportunity employer/program.
Auxiliary aids, services and other reasonable accommodations are available, upon request, to individuals with disabilities.

MICHIGAN DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
WAGE & HOUR DIVISION
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www.michigan.gov/wagehour

THE YOUTH EMPLOYMENT STANDARDS ACT, 1978 PUBLIC ACT 90

Work Activities Prohibited or Restricted by Department Review under MCL 409.103

WORK ACTIVITY	AGE 14/15	AGE 16/17
1. Amusement Park/Recreational Establishment – No Assembly, Disassembly, or Operation of Rides; Age 16/17 may tend, i.e., Take Tickets, Board and Disembark Passengers.	Prohibited	Restricted
2. Bloodborne Pathogens Exposure	Prohibited	Prohibited
3. Boats and Other Watercraft	Prohibited	Prohibited
4. Conveyors (Belt), Work On or Near	Prohibited	Restricted
5. Firearms (Loaded), Any Gauge or Caliber including Air Powered	Prohibited	Prohibited
6. Garbage Cart – Easy Tipper	Prohibited	Prohibited
7. Gator Type Utility Vehicles (Not on a Public Road)	Prohibited	Permitted
8. Go-Cart Spotters	Prohibited	Permitted
9. Golf Carts (Not on a Public Road)	Prohibited	Permitted
10. Hot Grease or Oil (Exceeding 100 degrees Fahrenheit)	Prohibited	Prohibited
11. Kansmacker, Un-jamming, Servicing, or Repairing	Prohibited	Prohibited
12. Knives: Chef, Boning, Butcher, Meat Cleaver, Filet, Skinning, and Machete	Prohibited	Prohibited
13. Laminators, Used to Form a Multiple-Ply Product	Prohibited	Prohibited
14. Lawn Care Equipment (Power-Driven) – Mowers, Edgers, Weed Eaters, Hedger Clippers, Tillers, Wheelbarrows, Thatchers, and Aerators	Prohibited	Permitted
15. Life Guard (Certified)		
Swimming Pools and Water Amusement Parks	Permitted (15 only)	Permitted
Natural Bodies of Waters, Such as Lakes and Rivers	Prohibited	Prohibited
16. Pharmacies and Prescription Drug Delivery	Prohibited	Prohibited
17. Power Drills (Over 3/8" Chuck)	Prohibited	Prohibited
18. Propane (LP) Gas, Dispensing	Prohibited	Prohibited
19. Sewing Machines Used in a Manufacturing Process	Prohibited	Permitted
20. Snow Blower	Prohibited	Permitted
21. Tire Changer	Prohibited	Prohibited
22. Youth Peddling, Door-to-Door and Street Sales for Profit Making Companies including Mobile Sales Crews	Prohibited	Permitted

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_____ COUNTY ROAD COMMISSION
COMPENSATORY TIME POLICY

The Road Commission will allow eligible non-union, non-exempt employees under the Fair Labor Standards Act (FLSA) to earn compensatory time off in lieu of overtime pay, upon mutual agreement between the employee and the Road Commission before the overtime is worked. In order to be eligible, the employee must be allowed by the Road Commission to take at least 10 days off with pay each year, in addition to compensatory time.

In accordance with the FLSA, hours worked in excess of forty (40) hours per week constitutes overtime. All overtime worked during a given week must be recorded as either overtime pay or compensatory time earned (if eligible). All overtime worked must be approved by the employee's supervisor in advance. An employee who works overtime that has not been authorized in advance may be subject to disciplinary action.

Compensatory time off shall be given at the rate of one and one-half (1.5) hours for each hour of overtime worked. The Road Commission will allow eligible non-union, non-exempt employees to accrue compensatory time up to two hundred and forty (240) hours—which reflects one hundred and sixty hours (160) hours worked x 1.5. Compensatory time off may be used in quarter hour (.25) increments.

Usage of compensatory time is permitted at supervisor discretion. The employee must request to use earned compensatory time by giving his/her supervisor sufficient written notice in advance. Provided such advance written notice is given, the supervisor must grant the request as long as there is no undue disruption to the operations of the Road Commission. Supervisors should consider the impact on the operations of the Road Commission when granting or denying compensatory time usage. Efforts should be made to accommodate the employee request where possible.

If the employee is not permitted to take accrued compensatory time off within a reasonable period, upon a request by the employee, any compensatory time accrued may be paid at the employee's regular hourly rate in effect at the time of the request in the employee's next regular paycheck.

All compensatory time must be used or paid off before an employee transfers to another position. Upon separation, an employee must be paid for unused compensatory time at either the employee's final regular hourly rate or the average regular rate received by such employee during the last 3 years of the employee's employment, whichever is higher.

The Road Commission will provide an employee with a record of compensatory time earned by or paid to the employee in the statement of earnings for the period in which the compensatory time is earned or paid. The Road Commission will also provide 60 days' notice before cancellation of this policy.

AGREEMENT TO ACCEPT COMPENSATORY TIME OFF IN LIEU OF OVERTIME PAY

In accordance with the Fair Labor Standards Act (FLSA), and the _____ County Road Commission ("Road Commission") Compensatory Time Policy, eligible non-union, non-exempt employees are allowed, with the approval of the Managing Director, to accrue compensatory time off instead of receiving payment for overtime hours worked. Prior to the first time an employee earns compensatory time, this Agreement must be completed.

As an eligible non-union, non-exempt employee, by signing this Agreement, I agree to the following terms:

I freely and voluntarily agree to accept compensatory time off in lieu of overtime pay for overtime hours worked under the FLSA. I understand that I will accrue compensatory time at the rate of one and one-half hours for each overtime hour worked during a workweek. I understand that this compensatory time will not be counted as time worked for purposes of computing overtime or additional compensatory time.

I further understand that compensatory time may be accrued up to a maximum of 240 hours and must be used or paid in accordance with Road Commission policy and the law. I also understand that compensatory time may be preserved, used, and cashed out consistent with the provisions of Road Commission policy and the law.

EMPLOYEE:	**_____ COUNTY ROAD COMMISSION:**
_____	_____
Signature	Signature
_____	_____
Printed Name	Printed Name
_____	_____
Date	Date

REVOCATION OF AGREEMENT

Employee revocation

I hereby revoke my agreement to accept compensatory time off in lieu of overtime pay for overtime hours worked under the FLSA. I understand that I will no longer accrue compensatory time in lieu of overtime; rather, I will receive overtime pay for all hours worked over 40 in a workweek.

I understand that this will apply to the pay period after this is received by the Road Commission.

EMPLOYEE:

_____ Date _____

Signature

_____

Printed Name

Road Commission Receipt of Revocation

_____

Signature

_____

Printed Name

Date Revocation Received: _____

Road Commission revocation

I hereby revoke the agreement to provide compensatory time off in lieu of overtime pay for overtime hours worked under the FLSA to _____ [employee name].

_____ Date _____

Signature

_____

Printed Name

VII. EMPLOYEE PRIVACY

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Employee Privacy – Employer's Right to Search the Workplace

As governmental employees, public employees have the right to protection under the United States Constitution's Fourth Amendment provisions against unreasonable searches and seizures. In situations where a public employer wants to conduct a search of an employee's office or desk, the following questions must be addressed: (1) Does the employee have a reasonable expectation of privacy in his or her office, desk, computer, and filing cabinet; and (2) If such an expectation of privacy does exist, what standards must a supervisor follow to lawfully conduct a warrantless search of those areas?

The United States Supreme Court addressed these issues in the case of *O'Connor* v *Ortega*, 480 US 709 (1987). In that case, a public hospital administrator searched and seized personal items from the desk and files in the hospital office of a physician who was suspended for impropriety. The hospital had no policy in place that would limit the doctor or any employee's perception that they could store personal property and papers in their workspace. The Supreme Court upheld the search even though the hospital had no policy. The Supreme Court felt that because the search arose from a reasonable suspicion that the search of hospital property would produce evidence that the employee was guilty of misconduct and rule violations.

In *O'Connor*, the Supreme Court defined the workplace as work-related areas and items generally with the employer's control. Since the immediate case involved a hospital, cafeteria, offices, desks, and file cabinets, among other areas, as examples of what is part of the workplace. They also said that these areas remain part of the workplace even if an employee places personal items in them. The Supreme Court differentiated between the workplace and those personal items, such as an employee's personal luggage, handbag or briefcase that happen to be in the workplace. Absent any legitimate regulation or actual practice or procedure, an employee may have an expectation of privacy that the contents of the luggage, handbag or briefcase are secure.

Justice O'Connor in the opinion wrote:

> Balanced against the substantial government interests in the efficient and proper operation of the workplace are the privacy rights of public employees in the workplace that, while not insubstantial, are far less than those found at home or in some other situations . . . [T]he employer intrusions at issue here "involve a relatively limited invasion" of employee privacy. Government employees have offices for the sole purpose of facilitating the work of any agency. The employee may avoid exposing personal belongings at work by simply leaving them at home.

Justice Scalia, concurring, wrote:

> The case turns, therefore, on whether the Fourth Amendment was violated – i.e., whether the governmental intrusion was reasonable. It is here that the government's status as an employer, and the employment-related character of the search, become relevant. While as a general rule warrantless searches are per se unreasonable, we have recognized exceptions when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable . . ." Such "special needs" are present in the context of government employment. The government, like any other employer, needs frequent and convenient access to its desks, offices, and file cabinets for work-related purposes. I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules – searches of the sort that are regarded as reasonable and normal in the private-employer context – do not violate the Fourth Amendment.

Connor v *Ortega* established that, although a public employee may have a reasonable expectation of privacy, the employer may legally conduct a search if it serves to protect the employer's interests in ensuring that employees are performing the work of the agency properly and efficiently.

Public employers should adopt a policy and practice that specifically establishes management's authority to search and outlines what they may search. The policy and practice should be based in reasonableness and, in conducting the search, management should be sensitive about protecting an employee's privacy when it comes to personal property that may be subject to the search. Policies should include statements that there is no expectation of employee privacy in their use of any property owned and/or provided by the governmental entity nor for any property that is located in the workplace or used while in the course of the employee's duties regardless of ownership. This property would include electronic communications devices, computers and/or audio or visual recording devices.

EMPLOYMENT PRACTICES GUIDELINE

Employee Privacy – Wiretapping and Eavesdropping

Both Michigan and federal law regulate the ability of employers to record conversations and monitor online conversations in the workplace. Under Michigan law, listening to and recording someone else's conversation without their consent is prohibited. Specifically, MCL 750.539c provides:

> Any person who is present or who is not present during a private conversation and who wilfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than $2,000.00, or both.

Michigan courts have made a distinction between recording conversations that an individual personally is a part of and conversations of other individuals not including the individual recording. If an individual is a participant in a conversation, he or she is allowed to record that conversation and does not need to get the permission of the other participants involved in the conversation. The leading case is *Sullivan* v *Gray*, 117 Mich App 476; 324 NW2d 58 (1982), in which the Michigan Court of Appeals stated: "We believe the statutory language, on its face, unambiguously excludes participant recording from the definition of eavesdropping by limiting the subject conversation to the 'private discourse of others.'" The Michigan Court of Appeals has affirmed this interpretation of the statute several times, and the Michigan Supreme Court has not overruled *Sullivan*.

In 2019, however, a federal court in Michigan in the case of *AFT Michigan* v *Project Veritas*, 397 F Supp 3d 981 (ED Mich. 2019), declined to follow *Sullivan* and concluded that the Michigan legislature had not intended to exclude participants from the prohibition on recording. This has thrown some uncertainty on the long-standing interpretation of the statute allowing participant recording without consent. Nonetheless, most Michigan courts, including a subsequent Federal District Court in the case of *Fisher* v *Perron*, No. 20-12403, 2021 WL 103633 (ED Mich 2021), continue to recognize a participant recording exception to the Michigan eavesdropping statute.

In terms of monitoring any online communications, employers must ensure that any use of online monitoring tools complies with the Federal Wiretap Act (as amended by the Electronic Communications Privacy Act of 1986), which prohibits the live or real-time interception of the contents of wire, oral, and electronic communications, including telephone, email, text messages, and Internet chats, unless a statutory exception applies. Employers that use electronic monitoring tools in the workplace typically rely on employees' consent, which is an exception under both federal and state wiretap laws. Employers generally can infer employees' consent when employees use employer-

provided electronic equipment after receiving explicit notice of the employer's acceptable use policies and a statement that the employer will enforce such policies.

The Federal Stored Communications Act protects wire and electronic communications and records in electronic storage that are intended to be private. The Stored Communications Act would not prevent an employer from accessing communications stored on employer-provided wire or electronic communications services (e.g., emails) in a manner consistent with the employer's own policies that are clearly disclosed to employees. It would, however, require the employer to obtain permission from the employee to obtain communications that are stored elsewhere, such as on an employee's private social media account or personal email account with a third-party service provider. Violations are punishable by civil penalties including damages, injunctions, and attorneys' fees, as well as criminal penalties ranging from fines to imprisonment.

Employer policies should state that use of employer-provided equipment constitutes consent to monitoring such use and the content of any messages sent or received on the equipment or its systems. Such policies should be clear regarding the kinds of communications that are prohibited (e.g., excessive use of email for personal communications) so that the employer can properly infer consent to the monitoring of potentially unacceptable activity.

EMPLOYMENT PRACTICES GUIDELINE

Employee Privacy – Video Surveillance and GPS Tracking

Using video to record workers and workplaces is generally allowed in Michigan, but there are some federal and state laws that employers must be aware of when using cameras. As an initial matter, when conducting any sort of employee monitoring, an employer should consider whether such monitoring might violate an employee's reasonable expectation of privacy. For example, installing video cameras in a bathroom used by employees would almost certainly be considered an inappropriate monitoring. In addition, an employer should conduct video monitoring only if it serves a legitimate business interest.

There are certain instances when employee monitoring through video is specifically prohibited. For example, video surveillance that also records audio may implicate Michigan's prohibition on eavesdropping, which could lead to civil and criminal penalties for the employer. Michigan law specifically prohibits the willful use of a device to eavesdrop on a conversation without the prior consent of all parties. MCL 750.539c. So, employers should ensure that any video surveillance they are conducting in the workplace does not also pick up on any audio or sounds in that place.

Generally, employers need to bargain with the union before using video surveillance. However, the Michigan Employment Relations Commission (MERC) has held that public employers may be able to use video surveillance in certain areas of their operations without negotiating with the union. In *University of Michigan* -and- *University of Michigan Skilled Trades Union*, Case No. C10 H-192 (2011), MERC reviewed whether the employer had a duty to bargain over the placement of a hidden surveillance camera in the workplace. In that case, the employer discovered that an unauthorized room with a locked door had been constructed in a university building. The room contained a table, chairs, a refrigerator, a microwave, a TV and numerous items of personal property. The room was not an approved break area, and the employer had not approved its construction. The employer installed a hidden camera in the room and recorded the activities of two employees who were observed spending several hours per day sleeping or watching movies in the room. The two employees were terminated for misconduct. The union filed an unfair labor practice, alleging that the employer had a duty to bargain with regard to the installation of the hidden camera. MERC disagreed, holding that the employer's use of a hidden camera in an area that is not part of the working environment is within management's right to supervise its employees during work time and that the employer had no obligation to bargain with the union over the placement of the camera.

Notably, however, cameras should not be placed to monitor employees' union activities, including union meetings and conversations involving union matters. Additionally, employers may not use video monitoring in a manner meant to intimidate current or prospective union members.

There is no MERC case squarely deciding the issue of whether a public employer has a duty to bargain with its employees over the placement of GPS tracking on its vehicles. The Office of the General Counsel of the National Labor Relations Board has issued an advice memorandum finding that a private employer's use of a global positioning system (GPS) device to track an employee, that led to the employee's discharge, was a mandatory subject of bargaining but was not a material change to the employee's terms and conditions of employment and, therefore, the employer did not violate its duty to bargain under Section 8(a)(5) of the National Labor Relations Act. The facts leading to that advice memorandum were that the employer, a beverage distributor, suspected one of its unionized drivers was stealing time in violation of a work rule outlined in the employer's collective bargaining agreement (CBA) with the union. The employer, following past practice, hired a private investigator to follow the employee suspected of stealing time and installed a GPS on the employee's truck. The private investigator confirmed, mainly through personal observation, that the employee was taking personal detours and taking longer than necessary to complete routes. Therefore, the employer terminated the employee. When asked for guidance by an NLRB regional office, the Office of General Counsel concluded that, while installation of the GPS to monitor and to use to potentially discipline the employee was a mandatory subject of bargaining, the GPS installation was not a substantial material change triggering a duty to bargain with the union because: (1) the private investigator relied mainly on personal observation, consistent with the employer's past practice of conducting investigations of suspected employee misconduct; (2) the employer did not use information from the GPS separately from the investigator's personal observations to discipline the employee; and (3) information from the GPS did not significantly increase the likelihood that the employee would be disciplined.

MERC typically looks to federal precedent for guidance and would likely hold that a public employer has a duty to bargain over placement of GPS in its vehicles in Michigan. MERC has held that a public employer had a duty to bargain over placing cameras in its sanitation trucks which focus on the driver. *City of Bay City* -and- *Utility Workers Union of America, AFL-CIO, Local 542*, Case No. C18 I-091 (2019). In that case, however, MERC determined that the union could no longer demand to bargain over the issue because it was already covered by language in the CBA. Specifically, the CBA contained a management rights provision which stated that:

> Except when limited by the express provisions elsewhere in the Agreement, nothing in this Agreement shall restrict the City in the exercise of its functions of management under which it shall have, among others, the right to hire new employees and to direct the working force; to discipline, suspend, and discharge for cause; transfer or lay off employees; to create reasonable work rules; and to require employees to observe departmental rules and regulations. It is agreed that these enumerations of management prerogatives shall not be deemed to exclude other rights not enumerated.

A separate section of the CBA concerning working conditions provided:

> The City (the City Manager or his designated representatives) will make every effort to make working in the City of Bay City a safe and accident free environment. To that objective, the City commits to its employees a safe place to work and will see that all employees make working safely a top priority. All employees will be held accountable for the daily safety performance on the job and for using prescribed safety equipment.

MERC noted that the cameras were installed in the sanitation trucks as a safety measure and that the CBA required bargaining unit employees to use prescribed safety equipment.

An employer should provide notice to the union if it intends to install GPS devices on its vehicles. If an employer lets a union know that GPS devices are being installed on its trucks and the union fails to demand bargaining, then the union will be deemed to have waived any future right to bargain over that subject. If the union demands to bargain, then the employer should be prepared to discuss the placement of GPS devices on its vehicles with the union and the effect such devices might have on the bargaining unit and attempt to reach an agreement. There are numerous arguments to be made in favor of having GPS devices on employer vehicles, e.g., improving driver safety, helping to protect drivers from false claims made by third parties, and reducing operating costs through the creation of more efficient routes and prevention of theft.

EMPLOYMENT PRACTICES GUIDELINE

Employee Privacy – Internet Privacy Protection Act

The Internet Privacy Protection Act (IPPA) generally prohibits Michigan employers from gaining access to applicants' or employees' personal social media accounts. The IPPA, however, also permits employers to access employees' use of employer equipment and systems and allows for some investigations, under certain circumstances, of employees' personal social media accounts. Employers must exercise caution in accessing an employee's private social media account to make sure it is not violating the IPPA.

For purposes of the IPPA, an employer is defined as a "person, including a unit of state or local government, engaged in a business, industry, profession, trade, or other enterprise in this state and includes an agent, representative, or designee of the employer." The IPPA regulates an employer's access to an applicant's or employee's "personal internet account," which is defined as "an account created via a bounded system established by an internet-based service that requires a user to input or store access information via an electronic device to view, create, utilize, or edit the user's account information, profile, display, communications, or stored data." Accordingly, the IPPA applies not just to social media accounts but all internet-based accounts, including email and cloud storage accounts.

The IPPA specifically prohibits an employer from:

(a) Requesting an employee or an applicant for employment to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal internet account.
(b) Discharging, disciplining, failing to hire, or otherwise penalizing an employee or applicant for employment for failure to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal internet account.

At the same time, the IPPA specifically indicates that it does not prohibit an employer from doing any of the following:

(a) Requesting or requiring an employee to disclose access information to the employer to gain access to or operate any of the following:
    (i) An electronic communications device paid for in whole or in part by the employer.
    (ii) An account or service provided by the employer, obtained by virtue of the employee's relationship with the employer, or used for the employer's purposes.
(b) Disciplining or discharging an employee for transferring the employer's proprietary or confidential information or financial data to an employee's personal internet account without the employer's authorization.

(c) Conducting an investigation or requiring an employee to cooperate in an investigation in any of the following circumstances:
    (i) If there is specific information about activity on the employee's personal internet account, for the purpose of ensuring compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct.
    (ii) If the employer has specific information about an unauthorized transfer of the employer's proprietary information, confidential information, or financial data to an employee's personal internet account.
(d) Restricting or prohibiting an employee's access to certain websites while using an electronic communications device paid for in whole or in part by the employer or while using an employer's network or resources, in accordance with state and federal law.
(e) Monitoring, reviewing, or accessing electronic data stored on an electronic communications device paid for in whole or in part by the employer, or traveling through or stored on an employer's network, in accordance with state and federal law.

Notably, the IPPA does not prohibit or restrict an employer from complying with a duty to screen employees or applicants prior to hiring or to monitor or retain employee communications that is established under federal or state law. Also, the IPPA does not prohibit or restrict an employer from viewing, accessing, or utilizing information about an employee or applicant that can be obtained without any required access information or that is available in the public domain.

The IPPA does not appear to limit the ability of an employer to investigate reports made by coworkers about an employee's or applicant's social media postings. For instance, an employer is allowed to investigate a report by a coworker that an employee has created a social media post that threatens workplace violence or contains racially derogatory comments about the coworker. In such circumstances, the employer would be able to ask the employee involved for log-in credentials to investigate the alleged work-related misconduct.

The IPPA provides that any person who violates the above-stated prohibitions is guilty of a misdemeanor punishable by a fine of not more than $1,000.00. Additionally, an individual who is the subject of a violation of the IPPA may bring a civil action to enjoin a violation and may recover not more than $1,000.00 in damages plus reasonable attorney fees and court costs. However, the individual is required to first, not later than 60 days before filing a civil action for damages or 60 days before adding a claim for damages to an action seeking injunctive relief, make a written demand of the alleged violator for not more than $1,000.00. The written demand must include reasonable documentation of the violation. It is an affirmative defense to any such civil action that the employer acted to comply with the requirements of a federal law or a law of the State of Michigan.

EMPLOYMENT PRACTICES GUIDELINE

Employee Privacy – Freedom of Speech

Public employees do not forfeit all their First Amendment rights when accepting governmental employment. Public employees have a right to speak out on matters of public concern as long as the expression is not outweighed by the employer's interest in an efficient, disruption-free workplace.

The United States Supreme Court has recognized that public employers must protect their business and efficiency interests. The Court also acknowledged, however, in *Pickering* v *Board of Education*, 391 US 563 (1968), that "the threat of dismissal from public employment . . . is a potent means of inhibiting speech." The Court decided that public employees do not lose their free speech rights simply because they accept public employment. In that case, the Court ruled that high school officials violated the free speech rights of high school teacher, Marvin Pickering, when they discharged him for writing a letter to the editor critical of school board officials. The Court wrote, "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

In *Connick* v *Myers*, 461 US 138 (1983), the United States Supreme Court clarified the level of First Amendment protection for public employees in the workplace by explaining how courts should balance an employee's right to speak on matters of public importance against an employer's interests in a disruptive-free workplace. In that case, an assistant district attorney had objected to being transferred to another section of her office. After receiving notice of the transfer, she prepared and distributed a questionnaire to the office staff that in part raised the issue of whether their office was poorly run. Thereafter, her supervisor terminated her for refusing the transfer and for undermining his authority with the questionnaire. The Supreme Court held that the dismissal was constitutional. In applying the *Pickering* balancing test, the Supreme Court found that Myers in general was not speaking about matters of public concern, because her questionnaire mainly focused on internal office workings. Additionally, the Supreme Court determined that the questionnaire had the potential to hinder the efficient operation of the district attorney's office by questioning her supervisor's authority. Therefore, the Supreme Court concluded that the employer had legitimate reasons to fire Myers.

Under the *Pickering-Connick* test, employees must pass the threshold requirement of showing that their speech touched on a matter of public concern, defined as speech "relating to any matter of political, social or other concern to the community." Then they must show that their free speech interests outweigh the employer's efficiency interests. The public concern requirement has proven difficult for lower courts to apply. If an employee's speech relates more to a personal grievance than a matter of public importance, the employee has no viable First Amendment claim.

In 2006, the United States Supreme Court added another requirement for public employees who assert free-speech retaliation claims. In *Garcetti* v *Ceballos*, 547 US 410 (2006), the Supreme Court ruled that public employee speech made as part of routine job duties also has no First Amendment protection. The key inquiry is whether an employee's speech is part of her official job duties. Many lower courts have used a "core functions" test. In other words, if the employee's speech is part of the core functions of her job, the speech is not protected. The Supreme Court stated that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."

Public employers have to exercise caution whenever they are terminating an employee based on his or her speech. Disciplining a public employee for writing a letter to the editor as a citizen concerned about a political issue raises clear First Amendment questions. When a public employee speaks about an important issue unrelated to the job, he or she retains the same constitutional protections afforded the average citizen.

EMPLOYMENT PRACTICES GUIDELINE

Employee Privacy – Off-Duty Conduct

Generally, an employee's off-duty conduct is not something that should concern an employer. However, exceptions do exist if there is some relationship between the off-duty conduct and the employer's business and if misconduct outside of the workplace poses a risk for the employer's business. To determine whether there is any action that the employer can take regarding an employee's off-duty conduct, an employer should ask itself the following questions:

- Is there a relationship between the off-duty conduct of the employee and the performance of the employee's job?
- Does the employee's off-duty conduct put the employer's business in an unfavorable light with the public?
- Does the employee's conduct have a potential for harming the business?

The employer should consider:

- The employee's specific job duties and responsibilities.
- The employee's history with the employer.
- The effect on the public, coworkers, and the employer's reputation.
- The seriousness and notoriety of the allegations.

Michigan does not have any law in place prohibiting employers from taking job-related action based on a worker's off-duty conduct. Nonetheless, an employer should not take action against an employee for off-duty conduct unless it can establish a sufficient relationship between the off-duty conduct and the employee's ability to perform his or her job. In the case of union employees, the employer would have to demonstrate that it had just cause to take action because of the off-duty conduct.

Michigan law prohibits employers from asking about misdemeanor arrests that did not lead to conviction. However, employers may ask about convictions for misdemeanors and arrests and convictions for felonies. Employers should keep in mind that an arrest alone does not necessarily mean that an employee has committed a crime, and the employer should not assume that the employee committed the offense. Before taking action following an arrest, an employer should allow the employee the opportunity to explain the circumstances and should make a reasonable effort to determine whether the explanation is reasonable. An employer should make employment decisions based on the conduct underlying the arrest, if the conduct makes the employee unfit for his or her position. The conduct, not the arrest, is relevant for employment purposes.

The Michigan Bullard-Plawecki Employee Right to Know Act prohibits an employer from gathering or keeping a record of an employee's associations, political activities, publications, or communications of nonemployment activities, unless the information is

submitted in writing by or authorized to be kept or gathered, in writing, by the employee to the employer. This prohibition does not apply to activities that occur on the employer's premises or during the employee's working hours with the employer that interfere with the performance of the employee's duties or duties of other employees.

EMPLOYMENT PRACTICES GUIDELINE

Employee Privacy – Social Security Number Privacy Act

The Michigan Social Security Number Privacy Act, MCL 445.81, et seq., prohibits any person from intentionally doing any of the following with the social security number of an employee, student, or other individual:

(a) Publicly displaying all or more than 4 sequential digits of the social security number.
(b) With limited exceptions, using all or more than 4 sequential digits of the social security number as the primary account number for an individual.
(c) Visibly printing all or more than 4 sequential digits of the social security number on any identification badge or card, membership card, or permit or license.
(d) Requiring an individual to use or transmit all or more than 4 sequential digits of his or her social security number over the internet or a computer system or network unless the connection is secure, or the transmission is encrypted.
(e) Requiring an individual to use or transmit all or more than 4 sequential digits of his or her social security number to gain access to an internet website or a computer system or network unless the connection is secure, the transmission is encrypted, or a password or other unique personal identification number or other authentication device is also required to gain access to the internet website or computer system or network.
(f) Including all or more than 4 sequential digits of the social security number in or on any document or information mailed or otherwise sent to an individual if it is visible on or, without manipulation, from outside of the envelope or packaging.
(g) With limited exceptions, including all or more than 4 sequential digits of the social security number in any document or information mailed to a person, unless any of the following apply:
    i) State or federal law, rule, regulation, or court order or rule authorizes, permits, or requires that a social security number appear in the document.
    ii) The document is sent as part of an application or enrollment process initiated by the individual.
    iii) The document is sent to establish, confirm the status of, service, amend, or terminate an account, contract, policy, or employee or health insurance benefit or to confirm the accuracy of a social security number of an individual who has an account, contract, policy, or employee or health insurance benefit.
    iv) The document or information is mailed by a public body under any of the following circumstances:
        A. The document or information is a public record and is mailed in compliance with the Freedom of Information Act, MCL 15.231 to 15.246.
        B. The document or information is a copy of a public record filed or recorded with a county clerk or register of deeds office and is mailed by that office to a person entitled to receive that record.

C. The document or information is a copy of a vital record recorded as provided by law and is mailed to a person entitled to receive that record.

v) The document or information is mailed by or at the request of an individual whose social security number appears in the document or information or his or her parent or legal guardian.

vi) The document or information is mailed in a manner or for a purpose consistent with subtitle A or title V of the Gramm-Leach-Bliley Act, 15 USC 6801 to 6809; with the Health Insurance Portability and Accountability Act of 1996; or with section 537 or 539 of the Michigan Insurance Code of 1956, MCL 500.537 and 500.539.

These prohibitions do not apply to any use of all or more than 4 sequential digits of a social security number that is authorized or required by state or federal statute, or regulation, by court order or rule, or pursuant to legal discovery or process. Information or records that would disclose the social security number of an individual are specifically exempt from disclosure under Michigan's Freedom of Information Act.

It is not a violation of subsections (b) and (g) above to use all or more than 4 sequential digits of a social security number in the ordinary course of business to do any of the following:

- Verify an individual's identity, identify an individual, or do another similar administrative purpose related to an account, transaction, product, service, or employment or proposed account, transaction, product, service, or employment.
- Investigate an individual's claim, credit, criminal, or driving history.
- Detect, prevent, or deter identity theft or another crime.
- Lawfully pursue or enforce a person's legal rights, including, but not limited to, an audit, collection, investigation, or transfer of a tax, employee benefit, debt, claim, receivable, or account or an interest in a receivable or account.
- Lawfully investigate, collect, or enforce a child or spousal support obligation or tax liability.
- Provide or administer employee or health insurance or membership benefits, claims, or retirement programs or to administer the ownership of shares of stock or other investments.

An employer who obtains one or more social security numbers in the ordinary course of business must create a privacy policy that does at least all of the following concerning the social security numbers the employer possesses or obtains:

- Ensures to the extent practicable the confidentiality of the social security numbers.
- Prohibits unlawful disclosure of the social security numbers.
- Limits who has access to information or documents that contain social security numbers.
- Describes how to properly dispose of documents that contain the social security numbers.
- Establishes penalties for violation of the privacy policy.

The employer must publish the privacy policy in an employee handbook, in a procedures manual, or in one or more similar documents, which may be made available electronically.

Any person who intentionally violates the Michigan Social Security Number Privacy Act is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $1,000.00, or both. Additionally, an individual may bring a civil action against a person who violates the Act and may recover actual damages. If the violation was intentional, an individual may recover actual damages or $1,000.00, whichever is greater, as well as reasonable attorney fees. Except for good cause, not later than 60 days before filing a civil action, an individual must make a written demand to the person for the amount of his or her actual damages with reasonable documentation of the violation and the actual damages caused by the violation. However, an employer will not be liable for the conduct by an employee or agent of the employer in violation of a privacy policy, if the employer has taken reasonable measures to enforce its policy and to correct and prevent the reoccurrence of any known violations.

EMPLOYMENT PRACTICES GUIDELINE

Employee Privacy – Residency Requirements

Michigan's Residency Act, MCL 15.601, et seq., restricts public employers from requiring, by collective bargaining or otherwise, that a person reside within a specified geographic area or within a specified distance or travel time from his or her place of employment as a condition of employment or promotion by the public employer. However, a public employer may require, by collective bargaining agreement or otherwise, that a person reside within a specified distance from the nearest boundary of the public employer. That specified distance shall be 20 miles or another specified distance greater than 20 miles.

This latter allowed requirement does not apply to a person if the person is married and both of the following conditions are met:

(a) The person's spouse is employed by another public employer.
(b) The person's spouse is subject to a condition of employment or promotion that, if not for the Act, would require him or her to reside a distance of less than 20 miles from the nearest boundary of the public employer.

The Act does not apply if the person is a volunteer or paid on-call firefighter, an elected official, or an unpaid appointed official.

_____ County Road Commission

Employee Data Privacy Policy

Collection of Information

In the course of conducting Road Commission business and complying with federal, state, and local government regulations governing such matters as employment, tax, insurance, etc., the Road Commission must collect personal data from its employees. The nature of the personal data collected varies somewhat for each employee, depending on his/her employment responsibilities, citizenship, and other factors. The Road Commission collects personal data from its employees solely for business purposes, including those related directly to the employee's employment with the Road Commission, and those required by governmental agencies.

Data collected may include, without limitation, such things as:

- Employee's name
- Phone numbers
- Email address(es)
- Mailing address(es)
- Banking and other financial data
- Government identification numbers, e.g., Social Security number, driver's license number
- Date of birth
- Gender, race, and ethnicity
- Health and disability data
- Family-related data, e.g., marital status,
- Driving record
- Drug and alcohol program violations

The Road Commission will not knowingly collect or use personal data in any manner not consistent with this Policy, as it may be amended from time to time, and applicable laws.

Because the personal data collected by the Road Commission is necessary for business purposes, the employee is required to provide it and/or consent to its collection. An employee's refusal or failure to provide the requested personal data and/or consent to its collection may disqualify him/her from employment with the Road Commission and/or from receipt or enjoyment of certain Road Commission benefits.

Use of the Information the Road Commission Collects

The primary purposes for collection, storage and/or use of an employee's personal data include, but are not limited to:

- **Human Resources Management.** The Road Commission collects, stores, analyzes, and shares (internally) personal data in order to attract, retain and motivate a highly qualified workforce. This includes recruiting, compensation planning, succession planning, reorganization needs, performance assessment, training, employee benefit administration, compliance with applicable legal requirements, and communication with employees and/or their representatives.

- **Business Processes and Management.** Personal data is used to run the Road Commission's business operations including, for example, scheduling work assignments, managing Road Commission assets, reporting and/releasing data as required by law, and populating employee directories. Information may also be used to comply with government regulation.
- **Safety and Security Management.** The Road Commission uses such personal data as appropriate to ensure the safety and protection of employees, assets, resources, and communities.
- **Communication and Identification.** The Road Commission uses employees' personal data to identify them and to communicate with them.

Disclosure of Data

The Road Commission acts to protect employees' personal data and ensures that unauthorized individuals do not have access to employees' personal data by using security measures to protect such personal data. The Road Commission will not knowingly disclose, sell or otherwise distribute employees' personal data to any third party without the applicable employee's knowledge and, where appropriate, the employee's express written permission, except under the following circumstances:

- **Legal requests and investigations.** The Road Commission may disclose an employee's personal data when such disclosure is reasonably necessary (i) to prevent fraud; (ii) to comply with any applicable statute, law, rule or regulation; or (iii) to comply with a court order.
- **Third-party vendors and service providers.** The Road Commission may, from time to time, outsource services, functions, or operations of its business to third -party service providers. When engaging in such outsourcing, it may be necessary for the Road Commission to disclose an employee's personal data to those service providers, e.g., a payroll service or a benefits provider. In some cases, the service providers may collect personal data directly from the employee on the Road Commission's behalf. The Road Commission will work with any such providers to restrict how the providers may access, use and disclose employees' personal data.
- **Protection of the Road Commission and Other.** The Road Commission may release personal data when the Road Commission believes release is necessary to comply with the law; enforce or apply its policies and other agreements; or protect the rights, property, or safety of the Road Commission, its employees, or others. This disclosure will never, however, include selling, renting, sharing or otherwise disclosing employees' personal data for commercial purposes in violation of the commitments set forth in this Privacy Policy.

Security of Employees' Personal Data

The Road Commission employs reasonable security measures and technologies, such as password protection, encryption, physical locks, etc., to protect the confidentiality of employees' personal data. Only authorized employees have access to employees' personal data. Employees with such authorization are required to take the appropriate safeguards to protect such personal data. Paper and other hard copies containing personal data (or any other confidential information) is secured in a locked location when not in use. Computers and other access points are secured when not in use by logging out or locking. Passwords and user IDs are guarded and

not shared. When no longer necessary for business purposes, paper and hard copies are immediately destroyed using paper shredders or similar devices. Copies are not left in unsecured locations waiting to be shredded or otherwise destroyed. Unauthorized copies of documents or other tangible medium containing personal data are not made or distributed. Electronic files containing personal data are only stored on secure computers and not copied or otherwise shared with unauthorized individuals within or outside of the Road Commission.

The Road Commission will make reasonable efforts to secure personal data stored or transmitted electronically from hackers or other persons who are not authorized to access such personal data.

Compliance with this Employee Data Privacy Policy is important to the Road Commission. Any violation or potential violation of this Policy should be reported to the Director of Human Resources. The failure by any employee to follow these privacy policies may result in discipline up to and including discharge of the employee. Any questions or suggestions regarding this policy may also be directed to the Director of Human Resources.

Updating and Accessing an Employee's Personal Data

Employees must promptly inform the Road Commission when changes occur in the personal data they have provided so that the Road Commission can maintain accurate information about them. Although an employee may update or change his/her information, the Road Commission may maintain such personal data previously submitted in historical archives.

Electronic Mail Monitoring and Internet Usage Policy

The _____ County Road Commission recognizes its employees' need to be able to communicate efficiently with fellow employees and residents. Therefore, the Road Commission has installed an internal electronic mail (e-mail) system to facilitate the transmittal of business-related information within the Road Commission and with our residents.

The e-mail system is intended for business use only. The use of the Road Commission's e-mail system to solicit fellow employees or distribute non job-related information to fellow employees is strictly prohibited.

Management reserves the right to enter, search and/or monitor the Employer's e-mail system and the files/transmission of any employee without advance notice and consistent with applicable state and federal laws. Employees should expect that communications that they send and receive by the Employer's private e-mail system will be disclosed to management. Employees should not assume that communications that they send and receive by the Employer's e-mail system are private and confidential.

The Road Commission's policies against sexual and other types of harassment apply fully to the e-mail system. Therefore, employees are also prohibited from the display or transmission of sexually explicit images, messages, ethnic slurs, racial epithets or anything which could be construed as harassment or disparaging to others.

Employees shall not use unauthorized codes or passwords to gain access to others' files. All e-mail passwords must be made available to the Road Commission at all times.

Access to the internet is provided by the Road Commission to facilitate the assigned duties and responsibilities of Road Commission personnel. The use of the Internet facilities by an employee must be consistent with the following:

Internet users are required:

- To respect the privacy of other users; for example, users shall not intentionally seek information on, obtain copies of, or modify files or data, belonging to other users, unless explicit permission to do so has been obtained.
- To respect the legal protection provided to programs and data by copyright and license.
- To protect Road Commission data from unauthorized use or disclosure.
- To respect the integrity of the computing systems.
- To safeguard their accounts and passwords.

Unacceptable Use:

- Activities unrelated to Road Commission business.
- Activities unrelated to official assignments and/or job responsibilities.
- For any illegal purpose.
- To transmit threatening, obscene or harassing materials or correspondence.

- To receive materials construed as harassing or embarrassing to others.
- For unauthorized distribution of Employer data and information.
- To interfere with or disrupt network users, services or equipment.
- For private purposes of any nature.
- For solicitation for religious and political causes.
- For private advertising for products or services.
- For activity to foster personal gain.

Pursuant to the Electronic Communications Privacy Act of 1986 (18 USC 2510 et seq.), notice is hereby given that there are NO facilities provided by the Road Commission's system for sending or receiving private or confidential electronic communications. **Employees are hereby notified they have no expectation of privacy when using the Road Commission's information systems.**

The Road Commission will have access to all mail and user access requests and will monitor messages as necessary to assure efficient performance and appropriate use. The Road Commission reserves the right to log network use and monitor file server space utilization by users and assumes no responsibility or liability for files deleted. This policy is intended to be illustrative of the range of acceptable and unacceptable uses of the internet facilities and is not necessarily exhaustive.

Violation of this policy will result in disciplinary action, up to and including discharge.

SOCIAL SECURITY NUMBER PRIVACY POLICY

In the ordinary course of business, the _____ County Road Commission obtains the Social Security Numbers (SSNs) of applicants and employees for identification and tax-related purposes. To the extent practicable, the Road Commission shall maintain the confidentiality of applicants' and employees' SSNs. SSNs will be used by the Road Commission as follows:

1. The Road Commission will use SSNs in the process of producing payroll, including any state or federal filing requirements, and, if required, for establishing, confirming the status of, servicing, amending, or terminating an account, contract, policy, or employee benefit, or to confirm the SSN of an individual who has an account, contract, policy, or employee benefit.
2. The Road Commission may use an employee's SSN to perform background checks or to investigate an individual's claim, credit, criminal, or driving history.
3. The Road Commission may use an employee's SSN to detect, prevent, or deter identify theft or other crime.
4. The Road Commission may use an employee's SSN for any other administrative purpose related to employment.

Information or documents that contain SSNs shall be stored in a physically secure manner. Access to information or documents that contain applicants' and employees' SSNs shall be limited to [insert the following titles or others as may be appropriate: Managing Director, Finance Director, Personnel Director, Office Manager, Payroll Clerk, etc.].

All unlawful disclosure of applicants' and/or employees' SSNs is prohibited. No employee of the Road Commission shall unlawfully acquire, disclose, transfer, or use the SSN of an applicant or another employee. The Road Commission will not publicly display more than four (4) sequential digits of any SSN unless required in the course of processing state and federal reports for purposes of wage reporting. SSNs shall not be placed on identification cards, badges, time cards, employee rosters, bulletin boards, or any other materials or documents designed for public display.

Road Commission documents containing an individual's SSN shall only be mailed to a person when state or federal law, rule, regulation, or court or rule authorizes, permits or requires that a SSN appear in the document or where the document is mailed at the request of the individual. Documents containing SSNs that are sent through the mail shall not reveal the number through the envelope window, nor shall the number otherwise be visible from outside the envelope or package.

SSNs shall not be sent through e-mail unless the connection is secure or the number is encrypted. No individual shall be required to send his/her SSN through e-mail unless the connection is secure or the number is encrypted. SSNs shall not be stored on computers or other electronic devices that are not secured against unauthorized access.

Where a SSN is contained within a document subject to FOIA release, the SSN shall be redacted. Documents or other materials containing SSNs shall not be thrown away in the trash. They shall be discarded or destroyed only in a manner that protects their confidentiality, such as shredding.

Complaints concerning possible violation of this policy should be directed to the Managing Director. If the complaint is about the Managing Director, it should be directed to the Chair of the Road Commission Board. The recipient of the complaint and/or an appropriate designee will conduct an investigation. Any employee who is found to have violated this policy shall be subject to disciplinary action, up to and including discharge.

WORK RULES

For violation of any of the following rules, an employee shall be subject to penalties ranging from a formal written warning notice up to, and including, discharge:

A. Neglect of duty.
B. Insubordination or refusal to comply with employer's instructions, unless such instructions are injurious to the employee's safety and health.
C. Conduct described below:
    1. Immoral or indecent conduct.
    2. Conviction of a felony.
    3. Conviction of a misdemeanor involving moral turpitude while an employee of the Road Commission.
    4. Violation of local, state, or federal law which causes unfavorable publicity to the Road Commission, impairs the credibility of the employee to perform the employee's job, or is otherwise connected to Road Commission employment.
D. Intentional falsification of personnel records, payroll reports or other Road Commission records.
E. Theft, inappropriate removal or possession, intentional destruction, or defacing of Road Commission or the property of a fellow employee.
F. Deliberate or careless conduct endangering the safety of self or others, including fighting or the provocation or instigation of violence in the workplace.
G. Working under the influence of alcohol or illegal drugs.
H. Possession, distribution, sale, transfer or use of alcohol or illegal drugs in the workplace, while on duty or while operating employer-owned vehicles or equipment.
I. Abusive, threatening, or coercive treatment of another employee or a member of the public.
J. Sexual or other harassment.
K. Sabotaging another's work.
L. Making malicious, false, and harmful statements about others.
M. Publicly disclosing another's private information.
N. Possession of dangerous or unauthorized materials, such as explosives or firearms, in the workplace.
O. Any other offense of equal magnitude to the above.

When an employee engages in conduct in violation of these Work Rules and the conduct is committed off-duty and not on Road Commission property, the Road Commission may discipline the employee, up to and including discharge, whenever the conduct causes unfavorable publicity to the Road Commission, impairs the credibility of the employee to perform the employee's job or is otherwise connected to employment at the Road Commission. Conduct that is off-duty but on Road Commission property or that is directed toward Road Commission employees, representatives or property is always connected to employment at the Road Commission. Likewise, conduct that is on duty but off-Road Commission property is always connected to employment at the Road Commission.

VIII. HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA)

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Health Insurance Portability and Accountability Act (HIPAA) – General Requirements

The Health Insurance Portability and Accountability Act (HIPAA) defines what constitutes individually identifiable health information and how it should be protected from unauthorized uses and disclosures. HIPAA only applies to "covered entities," which are defined as: (1) health plans; (2) healthcare clearinghouses; and (3) healthcare providers that electronically transmit certain health information (and certain "business associates" of covered entities). Employers may be subject to the privacy regulations under HIPAA if they are considered a covered entity or business associate or through the administration of a group health plan.

HIPAA restricts the sharing and use of personal health information (PHI) by covered entities and business associates. However, HIPAA does not apply to health information contained in employment records held by a covered entity in its role as an employer. For employers who administer their own group health plan (and thus are covered entities), although HIPAA may apply to health information they acquire in their capacities as covered entities, it does not apply to health information they acquire in their roles as employers.

HIPAA does apply to an employer's request for health information from a covered entity. A covered entity may not disclose PHI to an employer without the employee's authorization or as otherwise allowed by law. This is also true where the employee is a member of the employer's self-administered group health plan; information maintained in that capacity may not be shared with human resources or an employee's managers, except as expressly authorized by the employee or applicable law.

The U.S. Department of Health & Human Services (HHS) has made it clear that HIPAA does not:

- Prevent an employer from asking for a doctor's note for an absence or about medical conditions;
- Affect an employer's ability to request information needed to administer benefit programs, such as healthcare coverage, workers' compensation claims, or sick leave;
- Cover all employee benefit information. For example, employee life insurance, disability and workers' compensation, and wellness programs are generally not covered under HIPAA;
- Cover protection of data maintained in employment records. HIPAA rules for employers only apply to medical or health plan records of employees participating as a member of the employer's healthcare plan.

Generally, employers, workers' compensation insurance carriers, physicians and other participants in the workers' compensation system may share health information with each other in connection with worker's compensation claims and appeals. HIPAA specifically allows three exemptions for workers' compensation-related matters:

1. If the disclosure is "[a]s authorized and to the extent necessary to comply with laws relating to workers' compensation or similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault." 45 CFR 164.512(l).
2. If the disclosure is required by state or other law, in which case the disclosure is limited to whatever the law requires. 45 CFR 164.512(a).
3. If the disclosure is for the purpose of obtaining payment for any health care provided to an injured or ill employee.

An employee's written authorization is not necessary for the disclosure if one of these exceptions applies.

Even when HIPAA does not apply, employers still have other legal obligations to protect the confidentiality of employee health information in their possession. For example, the Americans with Disabilities Act (ADA) requires employers that obtain disability-related medical information about an employee to maintain it in a confidential medical file that is kept separate from the employee's personnel file. Such information may be disclosed only in limited situations and to individuals specifically outlined in the regulations, i.e.:

- Supervisors and managers who need to know about necessary work restrictions or accommodations;
- First aid and safety personnel, if a disability might require emergency treatment; and,
- Government officials investigating compliance with the ADA.

Similarly, the Genetic Information Nondiscrimination Act (GINA) requires employers that acquire an employee's genetic information (although they generally should not request it) to treat it as a confidential medical record in a separate medical file. It can be maintained in the same confidential medical file as disability-related information. However, different rules regarding when and to whom genetic information may be disclosed apply—which do not include supervisors, managers, or first aid or safety personnel, but do include others not on the list for disclosure of disability-related information.

In order to ensure compliance with these privacy requirements, employers should maintain all employee health information in separate, confidential medical files with restricted access, and should implement clear policies, safeguards, and training to help employees understand and comply with the requirement.

Employers may disclose employee health information with an employee's express authorization (which should be in writing). Employers may also disclose such information

in response to subpoenas, court orders, or other legally authorized requests, but should examine such requests closely and limit disclosure of health information only to the extent specifically requested and authorized by the employee or applicable law.

EMPLOYMENT PRACTICES GUIDELINE

Health Insurance Portability and Accountability Act (HIPAA) – HIPAA Rules

There are five rules covered entities should pay close attention to when it comes to HIPAA compliance, namely:

Privacy and Personal Health Information Rule (45 CFR 164.530)

The HIPAA Privacy Rule protects individuals' medical records and other individually identifiable health information (collectively defined as "protected health information"). In addition to health information, PHI under HIPAA includes demographic and contact information, such as a name, address, and a social security number that relates to an individual's past, present, or future health status. The definition of PHI also encompasses information related to payments made for the provision of health care.

The Privacy Rule specifically defines with whom PHI can be shared without an individual's authorization. Primarily, covered entities and business associates can share PHI only in the following situations:

- With the person in question for treatment, billing, and healthcare operations;
- With descendants in the case of death;
- To a designated personal representative; or,
- In response to a court order.

The Privacy Rule also gives individuals rights over their PHI, including rights to examine and obtain a copy of their health records, to direct a covered entity to transmit to a third party an electronic copy of their PHI in an electronic health record, and to request corrections.

Electronic Security Rule (45 CFR 164.308)

The Electronic Security Rule requires physical, technical, and administrative safeguards be put into place to protect individuals' health information. The responsibility is placed on covered entities and their business associates to secure PHI in electronic form. Organizations are expected to take the necessary steps to ensure privacy, protect against threats, ensure employee compliance, and protect against prohibited electronic uses or disclosures. Compliance is taken very seriously, with penalties ranging up to $50,000.00 per violation and the potential of enforcement action in egregious cases.

Breach Notification Rule (45 CFR 164.400-414)

Under this Rule, covered entities and business associates are required to report any breach that compromises an individual's PHI. In the event of a breach, proper notification must

be made to affected individuals, and copies of the notifications must be submitted by the covered entity to the Secretary of HHS.

Administrative Simplification Rules (45 CFR 160, 162, and 164)

The Administrative Simplification provisions standardize the electronic exchange of healthcare information. National standards were set for electronic transactions, code sets, and unique identifiers. Employers must use their Employer Identification Number used for tax reporting as their identifier for all HIPAA transactions.

Enforcement Rule (45 CFR 164.308, 164.312, and 164.316)

This Rule contains provisions relating to compliance and investigations, the imposition of civil money penalties for violations of the HIPAA Administrative Simplifications Rules, and procedures for hearings. It expanded liability for business associates and instituted greater penalties for noncompliance. Additional rules prevent certain information from being shared about an employee's health plan when they pay for medical services out of pocket.

EMPLOYMENT PRACTICES GUIDELINE

Health Insurance Portability and Accountability Act (HIPAA) – Self-Insured Group Health Plans

A self-insured group health plan is one in which an employer assumes the financial risk for providing healthcare benefits to its employees as opposed to purchasing a "fully insured" plan from an insurance carrier. Typically, a self-insured employer will set up a special trust fund to earmark corporate and employee contributions or use general funds to pay incurred claims and either administer the plan themselves or, more commonly, retain the services of a third-party administrator. A self-insured group health plan can also include medical expense reimbursement flexible spending account plans (medical FSAs) and health reimbursement account plans (HRAs).

Most self-insured group health plans are subject to HIPAA compliance. Only if a group health plan is self-insured, self-administered, and the employer has fewer than fifty employees is the plan exempt from HIPAA compliance, provided medical FSAs and HRAs are also administered by the employer and not an outside third-party administrator. There are also situations where "partial compliance" is applicable, i.e., when neither the sponsor of a group health plan nor its insurance agent has any access to or transmits PHI electronically. If the employer has any access to PHI in administering its self-insured group health plan, then it will be subject to HIPAA compliance.

HIPAA compliance for self-insured health plans generally includes the following:

1. Appoint a Privacy and Security Officer

   Employers with self-insured group health plans have to appoint a HIPAA Privacy Officer and a HIPAA Security Officer. These positions can be performed by the same person and/or an existing member of the workforce. Their first role is to identify where, why, and to what extent PHI is created, received, maintained, or transmitted by the group health plan. This will likely involve many different departments such as IT, payroll, and HR.

2. Analyze Uses and Disclosures of PHI

   Once the discovery of PHI is complete, the Privacy and Security Officers should analyze uses and disclosures of PHI to ensure that they fall within those permitted by the Privacy Rule. Where necessary, the Privacy Officer may need to obtain authorizations from employees for some uses and disclosures of PHI that require them. Employers are not permitted to take retaliatory action or discriminate against employees who refuse to give their authorization.

3. Develop HIPAA-Compliant Privacy Policies

   The next stage of HIPAA compliance for self-insured group health plans is to develop HIPAA-compliant privacy policies establishing how PHI can be used and disclosed. This should take into account third-party administrators who, as Business Associates, also have to comply with the Security and Breach Notification Rules and elements of the Privacy Rule and with whom it will be necessary to enter into a HIPAA Business Associate Agreement.

4. Develop HIPAA-Compliant Security Policies

   One of the requirements of the HIPAA Security Rule is for covered entities to implement administrative, physical and technical safeguards to ensure the integrity of electronic PHI. In order to fulfill this requirement, Security Officers should conduct a risk assessment to identify any vulnerabilities that may lead to unauthorized access to electronic PHI, and, following a risk analysis, implement suitable measures and policies to address any vulnerabilities.

5. Develop a Breach Notification Policy

   Despite an employer's best efforts to achieve HIPAA compliance for self-insured group health plans, an unauthorized disclosure of PHI may occur. Self-insured group health plans should develop a breach notification policy in order to advise employees when this occurs. The policy should also cover any required notifications to HHS.

6. Train Employees

   In order to enforce the policies and ensure HIPAA compliance for self-insured group health plans, employee training is essential. Each employee should be given a notice of the plan's privacy practices which can be used to explain the importance of maintaining the integrity of PHI. Each employee should also be given a copy of the plan's sanctions policy that explains the consequences of failing to comply with the privacy, security, and breach notification policies.

Regardless of whether a self-insured group health plan operates under a self-insured group health plan or operates under a Health Maintenance Organization (HMO) or Preferred Provider Organization (PPO) model, the same requirements exist to ensure the privacy of employees' individually identifiable health information and security of electronic PHI.

HIPAA PRIVACY POLICY

Objective

The _____ County Road Commission ("Road Commission") hereby adopts a policy that protects the privacy and confidentiality of protected health information (PHI) whenever it is used by Road Commission representatives. The private and confidential use of such information will be the responsibility of all individuals with job duties requiring access to PHI in the course of employment.

Protected Health Information Defined

PHI refers to individually identifiable health information received by the Road Commission's group health plan or received by a health care provider, health plan or health care clearinghouse that relates to the past or present health of an individual or to payment of health care claims. PHI information includes all medical conditions, health status, claims experience, medical histories, physical examinations, genetic information and evidence of disability.

HIPAA Privacy Official

The Road Commission has designated _____ as the HIPAA Privacy Official, and any questions or issues regarding PHI should be presented to the HIPAA Privacy Official for resolution. The HIPAA Privacy Official is also charged with the responsibility for:

- Issuing procedural guidelines for access for PHI;
- Developing a list of personnel who will need access to PHI and the rights they have been granted with respect to PHI; and,
- Developing guidelines for describing how and when PHI will be maintained, used, transferred, or transmitted.

Activities Necessitating Use of PHI

Annually or more frequently as necessary, the Road Commission performs enrollment, changes in enrollment and payroll deductions; provides assistance in claims problem resolution and explanation of benefits issues; and assists in coordination of benefits with other providers. Some or all of these activities may require the use of transmission of PHI. Thus, all information related to these processes will be maintained in confidence, and employees will not disclose PHI from these processes for employment-related actions, except as provided by administrative procedures approved by the HIPAA Privacy Official.

Disclosures that do not qualify as PHI-protected disclosures include:

- Disclosure of PHI to the individual to whom the PHI belongs;
- Requests by providers for treatment or payment;
- Disclosures requested to be made to authorized parties by the individual PHI holder;
- Disclosures to government agencies for reporting or enforcement purposes; and,
- Disclosures to workers' compensation providers and those authorized by the workers' compensation providers.

Information regarding whether an individual is covered by a plan for claims processing purposes may be disclosed.

Information external to the health plan is not considered PHI if the information is being furnished for claims processing purposes involving workers' compensation or short- or long-term disability and medical information received to verify Americans with Disabilities Act (ADA) or Family and Medical Leave Act (FMLA) status.

Notice of Breach

The HIPAA Privacy Official will notify affected individuals in the event of a breach of confidentiality involving or potentially involving their unsecured health information and inform them of what steps they may need to take to protect themselves. In addition to notifying affected individuals, the Privacy Official will notify the Secretary of HHS by visiting the HHS website and filling out and electronically submitting a breach report form.

Complaints

The Privacy Official will be the Road Commission's contact person for receiving complaints. The Privacy Official, and/or his or her designee, will be responsible for investigating such complaints. Employees who are found to have used or disclosed PHI in violation of this HIPAA Privacy Policy will be subject to disciplinary action, up to and including termination from employment.

Records Retention

Personnel records and disclosures of PHI will be maintained for a period of six years as required by federal law unless a state law requires a longer retention period. Records that have been maintained for the maximum period will be destroyed in a manner to ensure that such data are not compromised in the future in accordance with the Road Commission's record destruction policy.

Non-Retaliation

The Road Commission shall not intimidate, threaten, coerce, discriminate against, or take any other form of retaliatory action against any person who has reported a HIPAA violation.

_____ County Road Commission

Notice of Privacy Practices

Privacy Official: _____

Address: _____

Telephone No. _____

E-Mail Address: _____

YOUR INFORMATION. YOUR RIGHTS. OUR RESPONSIBILITIES.

This notice describes how medical information about you may be used and disclosed and how you can get access to this information. **Please review it carefully.**

Your Rights

You have the right to:

- Get a copy of your health and claims records
- Correct your health and claims records
- Request confidential communication
- Ask us to limit the information we use
- Get a list of those with whom we've shared your information
- Get a copy of this privacy notice
- Choose someone to act for you
- File a complaint if you believe your privacy rights have been violated

Your Choices

You have some choices in the way that we use and share information as we:

- Answer coverage questions from your family and friends
- Provide disaster relief
- Market our services and sell your information

Our Uses and Disclosures

We may use and share your information as we:

- Help manage the health care treatment you receive
- Run our organization
- Pay for your health services
- Administer your health plan
- Help with public health and safety issues
- Do research
- Comply with the law
- Respond to organ and tissue donation requests and work with a medical examiner or funeral director
- Address workers' compensation, law enforcement, and other government requests
- Respond to lawsuits and legal actions

Your Rights

When it comes to your health information, you have certain rights. This section explains your rights and some of our responsibilities to help you.

Get a copy of health and claims records

- You can ask to see or get a copy of your health and claims records and other health information we have about you. Ask us how to do this.
- We will provide a copy or a summary of your health and claims records, usually within 30 days of your request. We may charge a reasonable, cost-based fee.

Ask us to correct health and claims records

- You can ask us to correct your health and claims records if you think they are incorrect or incomplete. Ask us how to do this.
- We may say "no" to your request, but we'll tell you why in writing within 60 days.

Request confidential communications

- You can ask us to contact you in a specific way (for example, home or office phone) or to send mail to a different address.
- We will consider all reasonable requests, and must say "yes" if you tell us you would be in danger if we do not.

Ask us to limit what we use or share

- You can ask us not to use or share certain health information for treatment, payment, or our operations.
- We are not required to agree to your request, and we may say "no" if it would affect your care.

Get a list of those with whom we've shared information

- You can ask for a list (accounting) of the times we've shared your health information for six years prior to the date you ask, who we shared it with, and why.
- We will include all the disclosures except for those about treatment, payment, and health care operations, and certain other disclosures (such as any you asked us to make). We'll provide one accounting a year for free but will charge a reasonable, cost-based fee if you ask for another one within 12 months.

Get a copy of this privacy notice

- You can ask for a paper copy of this notice at any time, even if you have agreed to receive the notice electronically. We will provide you with a paper copy promptly.

Choose someone to act for you

- If you have given someone medical power of attorney or if someone is your legal guardian, that person can exercise your rights and make choices about your health information.
- We will make sure the person has this authority and can act for you before we take any action.

File a complaint if you feel your rights are violated

- You can complain if you feel we have violated your rights by contacting us using the information on page 1.

- You can file a complaint with the U.S. Department of Health and Human Services Office for Civil Rights by sending a letter to 200 Independence Avenue, S.W., Washington, D.C. 20201, calling 1-877-696-6775, or visiting www.hhs.gov/ocr/privacy/hipaa/complaints/.
- We will not retaliate against you for filing a complaint.

Your Choices

For certain health information, you can tell us your choices about what we share. If you have a clear preference for how we share your information in the situations described below, talk to us. Tell us what you want us to do, and we will follow your instructions.

In these cases, you have both the right and choice to tell us to:

- Share information with your family, close friends, or others involved in payment for your care.
- Share information in a disaster relief situation.

If you are not able to tell us your preference, for example if you are unconscious, we may go ahead and share your information if we believe it is in your best interest. We may also share your information when needed to lessen a serious and imminent threat to health or safety.

In these cases, we *never* share your information unless you give us written permission:

- Marketing purposes
- Sale of your information

Other Uses and Disclosures

How do we typically use or share your health information?

We typically use or share your health information in the following ways:

- **Help manage the health care treatment you receive**
- We can use your health information and share it with professionals who are treating you.

Example: A doctor sends us information about your diagnosis and treatment plan so we can arrange additional services.

- **Run our organization**
  - We can use and disclose your information to run our organization and contact you when necessary.
  - We are not allowed to use genetic information to decide whether we will give you coverage and the price of that coverage. This does not apply to long term care plans.

    Example: We use health information about you to develop better services for you.

- **Pay for your health services**
  - We can use and disclose your health information as we pay for your health services.

    Example: We share information about you with your dental plan to coordinate payment for your dental work.

- **Administer your plan**
  - We may disclose your health information to your health plan sponsor for plan administration.

    Example: Our company contracts with us to provide a health plan, and we provide your company with certain statistics to explain the premiums we charge.

How else can we use or share your health information?

We are allowed or required to share your information in other ways – usually in ways that contribute to the public good, such as public health and research. We have to meet many conditions in the law before we can share your information for these purposes. For more information see: www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/index.html.

- **Help with public health and safety issues**
  - We can share health information about you for certain situations such as:
    - Preventing disease
    - Helping with product recalls
    - Reporting adverse reactions to medications
    - Reporting suspected abuse, neglect, or domestic violence
    - Preventing or reducing a serious threat to anyone's health or safety

- **Do research**
  - We can use or share information for health research.

- **Comply with the law**
  - We will share information about you if state or federal laws require it, including with the Department of Health and Human Services if it wants to see that we're complying with federal privacy law.

- **Respond to organ and tissue donation requests and work with a medical examiner or funeral director**
  - We can share health information about you with an organ procurement organization.
  - We can share health information with a coroner, medical examiner, or funeral director when an individual dies.

- **Address workers' compensation, law enforcement, and other government requests**
  - We can use or share health information about you:
    - For workers' compensation claims
    - For law enforcement purposes or with a law enforcement official
    - With health oversight agencies for activities authorized by law
    - For special government functions such as military, national security, and presidential protective services

- **Respond to lawsuits and legal actions**
  - We can share health information about you in response to a court or administrative order, or in response to a subpoena.

Our Responsibilities

- We are required by law to maintain the privacy and security of your protected health information.
- We will let you know promptly if a breach occurs that may have compromised the privacy or security of your information.
- We must follow the duties and privacy practices described in this notice and give you a copy of it.
- We will not use or share your information other than as described here unless you tell us we can in writing. If you tell us we can, you may change your mind at any time. Let us know in writing if you change your mind.

For more information see:
www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/noticepp.html

Changes to the Terms of this Notice

We can change the terms of this notice, and the changes will apply to all information we have about you. The new notice will be available upon request, and we will mail a copy to you.

Acknowledgement of Receipt

I acknowledge that I have received a copy of the _____ County Road Commission's Notice of Privacy Practices.

_____
Name (Print)

_____
Signature

_____
Date

Sample Business Associate Agreement Provisions

Words or phrases contained in brackets are intended as either optional language or as instructions to the users of these sample provisions.

Definitions

Catch-all definition:

The following terms used in this Agreement shall have the same meaning as those terms in the HIPAA Rules: Breach, Data Aggregation, Designated Record Set, Disclosure, Health Care Operations, Individual, Minimum Necessary, Notice of Privacy Practices, Protected Health Information, Required By Law, Secretary, Security Incident, Subcontractor, Unsecured Protected Health Information, and Use.

Specific definitions:

(a) Business Associate. "Business Associate" shall generally have the same meaning as the term "business associate" at 45 CFR 160.103, and in reference to the party to this Agreement, shall mean [Insert Name of Business Associate].

(b) Covered Entity. "Covered Entity" shall generally have the same meaning as the term "covered entity" at 45 CFR 160.103, and in reference to the party to this Agreement, shall mean [Insert Name of Covered Entity].

(c) HIPAA Rules. "HIPAA Rules" shall mean the Privacy, Security, Breach Notification, and Enforcement Rules at 45 CFR Part 160 and Part 164.

Obligations and Activities of Business Associate

Business Associate agrees to:

(a) Not use or disclose protected health information other than as permitted or required by the Agreement or as required by law;

(b) Use appropriate safeguards, and comply with Subpart C of 45 CFR Part 164 with respect to electronic protected health information, to prevent use or disclosure of protected health information other than as provided for by the Agreement;

(c) Report to covered entity any use or disclosure of protected health information not provided for by the Agreement of which it becomes aware, including breaches of unsecured protected health information as required at 45 CFR 164.410, and any security incident of which it becomes aware;

[The parties may wish to add additional specificity regarding the breach notification obligations of the business associate, such as a stricter timeframe for the business associate to report a potential breach to the covered entity and/or whether the business associate will handle breach notifications to individuals, the HHS Office for Civil Rights (OCR), and potentially the media, on behalf of the covered entity.]

(d) In accordance with 45 CFR 164.502(e)(1)(ii) and 164.308(b)(2), if applicable, ensure that any subcontractors that create, receive, maintain, or transmit protected health information on behalf of the business associate agree to the same restrictions, conditions, and requirements that apply to the business associate with respect to such information;

(e) Make available protected health information in a designated record set to the [Choose either "covered entity" or "individual or the individual's designee"] as necessary to satisfy covered entity's obligations under 45 CFR 164.524;

[The parties may wish to add additional specificity regarding how the business associate will respond to a request for access that the business associate receives directly from the individual (such as whether and in what time and manner a business associate is to provide the requested access or whether the business associate will forward the individual's request to the covered entity to fulfill) and the timeframe for the business associate to provide the information to the covered entity.]

(f) Make any amendment(s) to protected health information in a designated record set as directed or agreed to by the covered entity pursuant to 45 CFR 164.526, or take other measures as necessary to satisfy covered entity's obligations under 45 CFR 164.526;

[The parties may wish to add additional specificity regarding how the business associate will respond to a request for amendment that the business associate receives directly from the individual (such as whether and in what time and manner a business associate is to act on the request for amendment or whether the business associate will forward the individual's request to the covered entity) and the timeframe for the business associate to incorporate any amendments to the information in the designated record set.]

(g) Maintain and make available the information required to provide an accounting of disclosures to the [Choose either "covered entity" or "individual"] as necessary to satisfy covered entity's obligations under 45 CFR 164.528;

[The parties may wish to add additional specificity regarding how the business associate will respond to a request for an accounting of disclosures that the business associate receives directly from the individual (such as whether and in what time and manner the business associate is to provide the accounting of disclosures to the individual or whether the business associate will forward the request to the covered entity) and the timeframe for the business associate to provide information to the covered entity.]

(h) To the extent the business associate is to carry out one or more of covered entity's obligation(s) under Subpart E of 45 CFR Part 164, comply with the requirements of Subpart E that apply to the covered entity in the performance of such obligation(s); and

(i) Make its internal practices, books, and records available to the Secretary for purposes of determining compliance with the HIPAA Rules.

Permitted Uses and Disclosures by Business Associate

(a) Business associate may only use or disclose protected health information

[Option 1 – Provide a specific list of permissible purposes.]

[Option 2 – Reference an underlying service agreement, such as “as necessary to perform the services set forth in Service Agreement.”]

[In addition to other permissible purposes, the parties should specify whether the business associate is authorized to use protected health information to de-identify the information in accordance with 45 CFR 164.514(a)-(c). The parties also may wish to specify the manner in which the business associate will de-identify the information and the permitted uses and disclosures by the business associate of the de-identified information.]

(b) Business associate may use or disclose protected health information as required by law.

(c) Business associate agrees to make uses and disclosures and requests for protected health information

[Option 1] consistent with covered entity’s minimum necessary policies and procedures.

[Option 2] subject to the following minimum necessary requirements: [Include specific minimum necessary provisions that are consistent with the covered entity’s minimum necessary policies and procedures.]

(d) Business associate may not use or disclose protected health information in a manner that would violate Subpart E of 45 CFR Part 164 if done by covered entity [if the Agreement permits the business associate to use or disclose protected health information for its own management and administration and legal responsibilities or for data aggregation services as set forth in optional provisions (e), (f), or (g) below, then add “, except for the specific uses and disclosures set forth below.”]

(e) [Optional] Business associate may use protected health information for the proper management and administration of the business associate or to carry out the legal responsibilities of the business associate.

(f) [Optional] Business associate may disclose protected health information for the proper management and administration of business associate or to carry out the legal responsibilities of the business associate, provided the disclosures are required by law, or business associate obtains reasonable assurances from the person to whom the information is disclosed that the information will remain confidential and used or further disclosed only as required by law or for the purposes for which it was disclosed to the person, and the person notifies business associate of any instances of which it is aware in which the confidentiality of the information has been breached.

(g) [Optional] Business associate may provide data aggregation services relating to the health care operations of the covered entity.

Provisions for Covered Entity to Inform Business Associate of Privacy Practices and Restrictions

(a) [Optional] Covered entity shall notify business associate of any limitation(s) in the notice of privacy practices of covered entity under 45 CFR 164.520, to the extent that such limitation may affect business associate’s use or disclosure of protected health information.

(b) [Optional] Covered entity shall notify business associate of any changes in, or revocation of, the permission by an individual to use or disclose his or her protected health information, to the extent that such changes may affect business associate's use or disclosure of protected health information.

(c) [Optional] Covered entity shall notify business associate of any restriction on the use or disclosure of protected health information that covered entity has agreed to or is required to abide by under 45 CFR 164.522, to the extent that such restriction may affect business associate's use or disclosure of protected health information.

Permissible Requests by Covered Entity

[Optional] Covered entity shall not request business associate to use or disclose protected health information in any manner that would not be permissible under Subpart E of 45 CFR Part 164 if done by covered entity. [Include an exception if the business associate will use or disclose protected health information for, and the agreement includes provisions for, data aggregation or management and administration and legal responsibilities of the business associate.]

Term and Termination

(a) Term. The Term of this Agreement shall be effective as of [Insert effective date], and shall terminate on [Insert termination date or event] or on the date covered entity terminates for cause as authorized in paragraph (b) of this Section, whichever is sooner.

(b) Termination for Cause. Business associate authorizes termination of this Agreement by covered entity, if covered entity determines business associate has violated a material term of the Agreement [and business associate has not cured the breach or ended the violation within the time specified by covered entity]. [Bracketed language may be added if the covered entity wishes to provide the business associate with an opportunity to cure a violation or breach of the contract before termination for cause.]

(c) Obligations of Business Associate Upon Termination.

[Option 1 – if the business associate is to return or destroy all protected health information upon termination of the Agreement]

Upon termination of this Agreement for any reason, business associate shall return to covered entity [or, if agreed to by covered entity, destroy] all protected health information received from covered entity, or created, maintained, or received by business associate on behalf of covered entity, that the business associate still maintains in any form. Business associate shall retain no copies of the protected health information.

[Option 2—if the Agreement authorizes the business associate to use or disclose protected health information for its own management and administration or to carry out its legal responsibilities and the business associate needs to retain protected health information for such purposes after termination of the Agreement]

Upon termination of this Agreement for any reason, business associate, with respect to protected health information received from covered entity, or created, maintained, or received by business associate on behalf of covered entity, shall:

1. Retain only that protected health information which is necessary for business associate to continue its proper management and administration or to carry out its legal responsibilities;

2. Return to covered entity [or, if agreed to by covered entity, destroy] the remaining protected health information that the business associate still maintains in any form;

3. Continue to use appropriate safeguards and comply with Subpart C of 45 CFR Part 164 with respect to electronic protected health information to prevent use or disclosure of the protected health information, other than as provided for in this Section, for as long as business associate retains the protected health information;

4. Not use or disclose the protected health information retained by business associate other than for the purposes for which such protected health information was retained and subject to the same conditions set out at [Insert section number related to paragraphs (e) and (f) above under "Permitted Uses and Disclosures By Business Associate"] which applied prior to termination; and

5. Return to covered entity [or, if agreed to by covered entity, destroy] the protected health information retained by business associate when it is no longer needed by business associate for its proper management and administration or to carry out its legal responsibilities.

[The Agreement also could provide that the business associate will transmit the protected health information to another business associate of the covered entity at termination, and/or could add terms regarding a business associate's obligations to obtain or ensure the destruction of protected health information created, received, or maintained by subcontractors.]

(d) Survival. The obligations of business associate under this Section shall survive the termination of this Agreement.

Miscellaneous [Optional]

(a) [Optional] Regulatory References. A reference in this Agreement to a section in the HIPAA Rules means the section as in effect or as amended.

(b) [Optional] Amendment. The Parties agree to take such action as is necessary to amend this Agreement from time to time as is necessary for compliance with the requirements of the HIPAA Rules and any other applicable law.

(c) [Optional] Interpretation. Any ambiguity in this Agreement shall be interpreted to permit compliance with the HIPAA Rules.

Authorization for Release and/or Disclosure of Health Information

I authorize the disclosure of my personal health information to the persons/entities as described below. I understand this authorization is voluntary and made to confirm my directions. I understand that once the information is disclosed, it may be re-disclosed and no longer protected by federal privacy regulations. I hereby give permission to _____ to disclose my personal health information in the manner described herein.

PARTICIPANT'S INFORMATION:

Name: _____ Medical Record #: _____

Birthdate: _____ Contact Phone Number: _____ Request Date: _____

PHI MAY BE DISCLOSED BY:

Person/Facility: _____ Phone: _____ Fax #: _____

Address: _____

PHI MAY BE DISCLOSED TO:

Person/Facility: _____ Phone #: _____ Fax: #: _____

Address: _____

PERSONAL HEALTH INFORMATION TO BE DISCLOSED:

1. Specify records to be released and /or disclosed:

□ General Medical Information (from_____ to _____)

□ Information Regarding Specific Injury or Treatment (from _____ to _____)

□ X-Ray/Laboratory Results of (from _____ to _____)

□ Mental Health (from _____ to _____) Initials of Participant or Representative _____

□ Alcohol/Drug (from _____ to _____) Initials of Participant or Representative _____

□ HIV Test Results (from _____ to _____) Initials of Participant or Representative _____

□ Other (specify): _____

2. Your request will be deemed to include any information related to sexually transmitted disease, alcohol or drug use or treatment, or mental health/psychology/psychiatry that may be within your above request, unless you specifically state your objection here:

Right to Revoke: I understand that I may revoke this authorization in writing at any time. I understand my revocation will NOT affect any disclosures that occurred before _____ received and processed a written notice of revocation. I understand that if I did not specify duration and if I do not revoke it, this authorization will expire one year from the date of signature below.

ACKNOWLEDGEMENT

Please sign and date: I have had full opportunity to read and consider the contents of this authorization, and I confirm that the contents are consistent with my direction to _____ to release nonpublic personal health information. I understand that _____ will not condition treatment, payment, enrollment or eligibility for benefits on whether I sign this authorization.

By: _____ _____ _____

Participant's Name (Print) Participant's Signature Date

If you are not the participant, please also complete, sign and date below. Check the box that describes your relationship to the participant. Please attach proof or your relationship to the participant (e.g. Power of Attorney, Legal Guardian).

By: _____ _____ _____

Participant's Name (Print) Participant's Signature Date

□Parent of Minor Child □Legal Guardian □Power of Attorney □Executor □Other _____

MEDICAL INFORMATION CONFIDENTIALITY POLICY

The _____ County Road Commission strives to protect the privacy of its employees' medical information to the greatest possible extent. To that end, we provide the following guidelines regarding the confidentiality of medical information:

1. "Medical information" is any information, data, or documentation relating to an employee's mental or physical condition. The term includes, but is not limited to, oral, written, or digital information concerning an employee's mental or physical condition; medical records; dental records; disability records; workers' compensation records; medical leave records; genetic information; health insurance information; and/or information concerning visits or payments to any health care professional, hospital, emergency room, or other type of short – or – long-term health care facility.

2. Any medical information concerning employees will be maintained in separate, confidential medical files apart from regular personnel records. Only authorized employees will have access to such files.

3. Employees are hereby notified that medical information concerning employees is absolutely confidential under state and federal laws and may not be discussed at any time with any person under any circumstances, unless an employee needs to do so in order to carry out his or her job duties, or unless the person discussing the information is talking or otherwise communicating with the subject of the information at that person's invitation. If an employee is concerned about a possible medical condition on the part of a coworker, the employee must not discuss such concern with anyone other than his/her supervisor.

4. Any employee who is found to have discussed medical information about another employee with anyone else in violation of this policy, or who is found to have released such information without authorization, will be subject to severe disciplinary action, up to and possibly including immediate termination from employment. In addition, state and federal laws may subject such an employee to both civil and criminal action in a court of law.

IX. DRUGS & ALCOHOL

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Drugs & Alcohol – Drug-Free Workplace Act of 1988

The Drug-Free Workplace Act of 1988 requires all federal grant recipients and federal contractors (receiving a federal contract of $100,000 or more) to adopt a drug-free workplace by taking the following steps:

1. Publishing and distributing a statement to all employees notifying them that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the employer's workplace and specifying the actions that will be taken against employees for violations of the prohibition.

2. Establishing a drug-free awareness program to inform employees about-

   (a) The dangers of drug abuse in the workplace;
   (b) The employer's policy of maintaining a drug-free workplace;
   (c) Available drug counseling, rehabilitation, and employee assistance programs; and,
   (d) The penalties that may be imposed on employees for drug abuse violations.

3. Notifying employees that as a condition of employment they must-

   (a) Abide by the terms of the policy statement; and,
   (b) Notify the employer of any criminal drug statute conviction occurring in the workplace no later than 5 days after the conviction.

4. Notifying the contracting or granting agency within 10 days after receiving notice that an employee has been convicted of a criminal drug violation in the workplace.

5. Imposing a penalty on – or require satisfactory participation in a drug assistance or rehabilitation program by – any employee who is convicted of a reportable workplace drug conviction.

6. Making a good faith effort to maintain a drug-free workplace by meeting the requirements of the Act.

Failure to comply with the terms of the Drug-Free Workplace Act may result in a variety of penalties, including suspension or termination of grants/contracts and being prohibited from applying for future government funding.

EMPLOYMENT PRACTICES GUIDELINE

Drugs & Alcohol – Drug and Alcohol Prohibitions under the Federal Motor Carrier Safety Regulations (FMCSRs)

The Federal Motor Carrier Safety Regulations (FMCSRs) prohibit any driver of a commercial motor vehicle from reporting for duty or remaining on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. They also prohibit any driver of a commercial motor vehicle from performing safety-sensitive functions while using alcohol or within four (4) hours thereafter.

No driver of a commercial motor vehicle may report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any drug or substance identified in Schedule I. Additionally, no driver of a commercial motor vehicle may report for duty or remain on duty when the driver uses any non-Schedule I drug or substance, except when the use is pursuant to the instructions of a licensed medical practitioner who is familiar with the driver's medical history and has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle.

No driver of a commercial motor vehicle may report for duty, remain on duty or perform a safety-sensitive function if the driver tests positive or has adulterated or substituted a test specimen for controlled substances. No driver may refuse to submit to a required test under the FMCSRs.

For purposes of these prohibitions, "safety-sensitive functions" are defined by the regulations as meaning:

(1) All time at an employer or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the employer;
(2) All time inspecting equipment or inspecting, servicing, or conditioning any commercial motor vehicle at any time;
(3) All time spent at the driving controls of a commercial motor vehicle in operation;
(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth;
(5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded; and,
(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle.

A “refusal to submit to an alcohol or controlled substances test” means that a driver:

(1) Fails to appear for a test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable federal regulations, after being directed to do so by the employer;
(2) Fails to remain at the testing site until the testing process is complete. However, an employee who leaves the testing site before the testing process commences for a pre-employment test is not deemed to have refused to test;
(3) Fails to provide a urine specimen for any drug test required by the regulations. However, an employee who does not provide a urine specimen because he or she has left the testing site before the testing process commences for a pre-employment test is not deemed to have refused to test;
(4) In the case of a directly observed or monitored collection in a drug test, fails to permit the observation or monitoring of the driver’s provision of a specimen;
(5) Fails to provide a sufficient amount of urine when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure;
(6) Fails or declines to take a second test the employer or collector has directed the driver to take;
(7) Fails to undergo a medical examination or evaluation, as directed by the Medical Review Officer (MRO) as part of the verification process, or as directed by the employer. In the case of a pre-employment drug test, the employee is deemed to have refused to test on this basis only if the pre-employment test is conducted following a contingent offer of employment;
(8) Fails to cooperate with any part of the testing process (e.g., refuses to empty pockets when so directed by the collector, behaves in a confrontational way that disrupts the collection process, fails to wash hands after being directed to do so by the collector);
(9) For an observed collection, fails to follow the observer’s instructions to raise his/her clothing above the waist, lower clothing and underpants, and to turn around to permit the observer to determine if he/she has any type of prosthetic or other device that could be used to interfere with the collection process;
(10) Possesses or wears a prosthetic or other device that could be used to interfere with the collection process;
(11) Admits to the collector or MRO that he/she adulterated or substituted the specimen; or,
(12) Is reported by the MRO as having a verified adulterated or substituted test result.

For purposes of the drug testing requirements of the FMCSRs, a commercial motor vehicle is a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle is a:

- Combination vehicle (Group A) – Having a gross combination weight rating (GCWR) or gross combination weight (GCW) of 26,001 pounds or more, whichever is greater. The towed unit(s) must have a gross vehicle weight rating (GVWR) or gross vehicle weight (GVW) of more than 10,000 pounds, whichever is greater;

- Heavy straight vehicle (Group B) – Having a GVWR or GVW of 26,001 pounds or more, whichever is greater; or,
- Small vehicle (Group C) – Does not meet Group A or B requirements but is either designed to transport 16 or more passengers, including the driver, or of any size and is used in the transportation of hazardous materials.

EMPLOYMENT PRACTICES GUIDELINE

Drugs & Alcohol – Drug and Alcohol Testing under the Federal Motor Carrier Safety Regulations (FMCSRs)

There are six (6) types of testing required for drivers of commercial motor vehicles under the FMCSRs:

- Pre-employment
- Post-accident
- Random
- Reasonable suspicion
- Return-to-duty
- Follow-up

All employers subject to the FMCSRs must test for the following substances: marijuana, cocaine, phencyclidine (PCP), amphetamines (including methamphetamines, MDMA, and MDA), and opioids (including codeine, morphine, heroin, hydrocodone, hydromorphone, oxycodone, and oxymorphone). Marijuana, although legal under Michigan law, remains an illegal substance under federal law and is absolutely prohibited for drivers of commercial motor vehicles. With regard to any substance a driver may be taking pursuant to a valid prescription, the employee will have the opportunity to discuss same with the Medical Review Officer (MRO) and have the prescribing physician contact the MRO to determine if the medication can be changed to one that does not make the employee medically unqualified or does not pose a significant safety risk. If the employee does not have a valid prescription, detection of opioids over specified cutoff amounts will result in a positive test.

Pre-Employment Testing

Prior to the first time a driver performs safety-sensitive functions for an employer, the driver must undergo testing for controlled substances as a condition prior to doing so. No employer may allow a driver to perform safety-sensitive functions unless the employer has received a controlled substances test result from the MRO indicating a verified negative test result for that driver.

An employer is not required to administer a pre-employment controlled substances test if:

(1) The driver has participated in a controlled substances testing program that meets the requirements of the regulation within the previous 30 days; and,
(2) While participating in that program, either:
    (a) Was tested for controlled substances within the past 6 month (from the date of application with the employer); or,
    (b) Participated in the random controlled substances testing program for previous 12 months (from the date of application with the employer); and,

(3) The employer ensures that no prior employer of the driver of whom the employer has knowledge has record of a violation of the federal regulations.

An employer may, but is not required to, conduct pre-employment alcohol testing under the regulations. If an employer chooses to conduct pre-employment alcohol testing, it must comply with the following requirements:

(1) It must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).
(2) It must treat all safety-sensitive employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., it must not test some covered employees and not others).
(3) It must conduct the pre-employment test after making a conditional offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.
(4) It must conduct all pre-employment alcohol tests using the alcohol testing procedures of the federal regulations.
(5) It must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

Post-Accident Testing

As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road, an employer must test for alcohol and controlled substances each of its surviving drivers:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or,
(2) Who receives a citation within 8 hours of the occurrence under state or local law for a moving traffic violation arising from the accident, if the accident involved-
    (a) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or,
    (b) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

If a required post-accident alcohol test is not administered within two hours following the accident, the employer must prepare and maintain on file a record stating the reasons the test was not promptly administered. If the required post-accident alcohol test is not administered within eight hours following the accident, the employer must cease attempts to administer an alcohol test and must prepare and maintain the same record. If a required post-accident controlled substances test is not administered within 32 hours following the accident, the employer must cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered.

A driver who is subject to post-accident testing must remain readily available for such testing or may be deemed by the employer to have refused to submit to testing. However, such requirement should not be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a driver from leaving the scene of an accident for the necessary to obtain assistance in responding to the accident, or to obtain necessary emergency medical care. An employer must provide drivers with necessary post-accident information, procedures, and instructions, prior to the driver operating a commercial motor vehicle, to allow them to comply with these requirements.

Random Testing

The current minimum annual percentage rate for random alcohol testing is 10% of the average number of driver positions, and for controlled substances testing is 50% of the average number of driver positions. In the event of a change in the annual rate(s), the FMCSA Administrator will publish the new minimum annual percentage rate(s) in the *Federal Register*. The new minimum annual percentage rate(s) will be applicable starting January 1 of the calendar year following publication in the *Federal Register*.

The selection of drivers for random alcohol and controlled substances testing must be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with drivers' Social Security Numbers, payroll identification numbers, or other comparable identifying numbers. Covered employees, and only covered employees, are to be in an employer's random testing pool. Each driver selected for random alcohol and controlled substances testing under the selection process used must have an equal chance of being tested each time selections are made. The employer must ensure that random alcohol and controlled substances tests conducted under the regulations are unannounced and that the dates for administering random alcohol and controlled substances testing are spread reasonably throughout the calendar year.

Each employer must require that each driver who is notified of selection for random alcohol and/or controlled substances testing proceeds to the test site immediately; provided, however, that if the driver is performing a safety-sensitive function, other than driving a commercial motor vehicle, at the time of notification, the employer shall instead ensure that the driver ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible. A driver shall only be tested for alcohol while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

Reasonable Suspicion Testing

An employer must require a driver to submit to an alcohol test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of the federal regulations concerning alcohol. The employer's determination that reasonable suspicion exists to require the driver to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.

An employer must require a driver to submit to a controlled substances test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of the federal regulations concerning controlled substances. The employer's determination that reasonable suspicion exists to require the driver to undergo a controlled substances test must be based on specific contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the driver. The observations may include indications of the chronic and withdrawal effects of controlled substances.

The required observations for alcohol and/or controlled substances reasonable suspicion testing must be made by a supervisor who is trained in alcohol misuse and controlled substances use. The person who makes the determination that reasonable suspicion exists to conduct the alcohol test may not conduct the alcohol test of the driver. A written record must be made of the observations leading to an alcohol or controlled substances reasonable suspicion test, and signed by the supervisor who made the observations, within 24 hours of the observed behavior or before the results of the alcohol or controlled substances tests are released, whichever is earlier.

A driver may be directed by the employer to only undergo reasonable suspicion testing while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions. If a required reasonable suspicion alcohol test is not administered within two hours following the determination of reasonable suspicion, the employer must prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If a required reasonable suspicion alcohol test is not administered within eight hours following the determination of reasonable suspicion, the employer must cease attempts to administer an alcohol test and must state in the record the reasons for not administering the test.

Return-to-Duty Testing

If an employer decides that it wants to permit an employee who has tested positive for alcohol or controlled substances to return to the performance of safety-sensitive functions, it must ensure that the employee takes a return-to-duty test. Whether to return the employee to duty is a decision the employer has to make, subject to the terms of its collective bargaining agreement. The return-to-duty cannot occur until after a substance abuse professional (SAP) has determined that the employee has successfully complied with prescribed education and/or treatment. The employee must have a negative drug test result and/or an alcohol test with an alcohol concentration of less than 0.02, as determined by the SAP, before resuming performance of safety-sensitive duties.

Follow-up Testing

The SAP must establish a written follow-up testing plan for each employee who has committed a federal drug or alcohol regulation violation. The SAP may not establish this plan until after he/she determines that the employee has successfully with his/her recommendations for education and/or treatment. The SAP must present a copy of this plan to the employer.

The SAP is the sole determiner of the number and frequency of follow-up tests and whether these tests will be for drugs, alcohol, or both. However, the SAP must, at a minimum, direct that the employee be subject to six unannounced follow-up tests in the first 12 months of safety-sensitive duty following the employee's return to safety-sensitive functions. The SAP may require a greater number of follow-up tests during the first 12-month period of safety-sensitive duty. The SAP may also require follow-up tests during the 48 months of safety-sensitive duty following this first 12-month period. The SAP is not to establish the actual dates for the follow-up tests he/she prescribes. The decision on specific dates to test is up to the employer.

The employer may not impose additional testing requirements on the employee that go beyond the SAP's follow-up testing plan. The employer must carry out the SAP's follow-up testing requirements. The employer may not allow the employee to continue to perform safety-sensitive functions unless follow-up testing is conducted as directed by the SAP. While the employer should schedule follow-up tests on dates of its own choosing, it must ensure that the tests are unannounced with no discernible pattern as to their timing and that the employee is given no advance notice. The employer cannot substitute any other tests (e.g., those carried out under the random testing program) for this follow-up testing requirement.

EMPLOYMENT PRACTICES GUIDELINE

Drugs & Alcohol – Direct Observation Testing under the Federal Motor Carrier Safety Regulations (FMCSRs)

Under certain circumstances, direct observation of the specimen collection for drug and alcohol testing must occur under the FMCSRs. An employer must direct an immediate collection under direct observation with no advance notice to the employee if:

(1) The laboratory reported to the MRO that a specimen is invalid, and the MRO reported to the employer that there was not an adequate medical explanation for the result;
(2) The MRO reported to the employer that the original positive, adulterated, or substituted result had to be cancelled because the test of the split specimen could not be performed; or,
(3) The laboratory reported to the MRO that the specimen was negative-dilute with a creatinine concentration greater than or equal to 2 mg/dL but less than or equal to 5 mg/dL, and the MRO reported the specimen to the employer as negative-dilute and that a second collection must take place under direct observation.

An employer must also direct a collection under direct observation of an employee if the drug test is a return-to-duty test or a follow-up test. Under certain other enumerated circumstances, a collector must immediately conduct a collection under direct observation. The employer must explain to the employee the reason for a directly observed collection if it is undertaken for one of the above-mentioned reasons. Failure of the employee to permit any part of the direct observation procedure is a refusal to test.

EMPLOYMENT PRACTICES GUIDELINE

Drugs & Alcohol – Medical Review Officers (MROs) and the Verification Process

The Medical Review Officer (MRO) has a vital role to play in the drug testing process. The MRO acts as an independent and impartial "gatekeeper" and advocates for the accuracy and integrity of the drug testing process. He or she provides a quality assurance review of the drug testing process and determines whether there is a legitimate medical explanation for confirmed positive, adulterated, substituted, and invalid drug test results from the laboratory. He or she must act to investigate and correct problems where possible and notify appropriate parties where assistance is needed (e.g., cancelled or problematic tests, incorrect results). The MRO must ensure the timely flow of test results and other information to employers and must protect the confidentiality of the drug testing information.

When the MRO receives a confirmed positive, adulterated, substituted, or invalid test result from the laboratory, he or she must contact the employee directly, on a confidential basis, to determine whether the employee wants to discuss the test result. In making this contact, the MRO must explain to the employee that, if he or she declines to discuss the result, the MRO will verify the test as positive or as a refusal to test because of adulteration or substitution, as applicable.

The MRO must verify a confirmed positive test result for marijuana, cocaine, amphetamines, semi-synthetic opioids (i.e., hydrocodone, hydromorphone, oxycodone, and oxymorphone), and/or PCP unless the employee presents a legitimate medical explanation for the presence of the drug(s) in his or her system. In determining whether an employee's legally valid prescription constitutes a legitimate medical explanation, the MRO must not question whether the prescribing physician should have prescribed the substance. The employee has the burden of proof that a legitimate medical explanation exists. The employee must present information meeting this burden at the time of the verification interview. The MRO has discretion to extend the time available to the employee for this purpose up to five days before verifying the test result, if he or she determines that there is a reasonable basis to believe that the employee will be able to produce relevant evidence concerning a legitimate medical explanation within that time.

If the MRO determines that there is a legitimate medical explanation, he or she must verify the test result as negative. Otherwise, the MRO must verify the test result as positive.

In determining whether a legitimate medical explanation exists, the MRO must follow the following principles:

- There can be a legitimate explanation only with respect to a substance that is obtained legally.
- There can be a legitimate medical explanation only with respect to a substance that has a legitimate medical use. Use of a drug of abuse (e.g., heroin, PCP, marijuana) or any other substance that cannot be viewed as having a legitimate medical use

can never be the basis for a legitimate medical explanation, even if the substance is obtained legally.

- Use of the substance can form the basis of a legitimate medical explanation only if it is used consistently with its proper and intended medical purpose.
- Even if the MRO finds that there is a legitimate medical explanation and verifies a test negative, he or she may have a responsibility to raise fitness-for-duty considerations with the employer.

When the MRO verifies a drug test as a positive for a drug, or as a refusal to test because of adulteration or substitution, the MRO must notify the employee of his or her right to have the split specimen tested. The MRO must inform the employee that he or she has 72 hours from the time the MRO provides this notification to him or her to request a test of the split specimen. The MRO must tell the employee that if he or she makes this request within 72 hours, the employer must ensure that the test takes place, and that the employee is not required to pay for the test from his or her own funds before the test takes place. The MRO must also tell the employee that the employer may seek reimbursement for the cost of the test.

It is the MRO's responsibility to report all drug test results to the employer in a confidential manner. The MRO must transmit all verified positive test results, results requiring immediate collection under direct observation, adulterated or substituted specimen results, and other refusals to test on the same day the MRO verifies the result or the next business day.

If an employer receives a verified positive drug test result, it must immediately remove the employee involved from performing safety-sensitive functions. It must take this action upon receiving the initial report of the verified positive test result. The employer may not wait to receive the written report or the result of a split specimen test.

If an employer receives a verified adulterated or substituted drug test result, it must consider this a refusal to test and immediately remove the employee involved from performing safety-sensitive functions. It must take this action on receiving the initial report of the verified adulterated or substituted test result. The employer may not wait to receive the written report or the result of a split specimen test.

If an employer receives an alcohol test of 0.04 or higher, it must immediately remove the employee involved from performing safety-sensitive functions. The employer must not wait to receive the written report of the result of the test. If an employer receives an alcohol test result of 0.02-0.039, it must temporarily remove the employee involved from performing safety-sensitive functions until the start of the driver's next regularly scheduled duty period, but not less than 24 hours following administration of the test.

The employer must provide to each employee (including an applicant or new employee) who violates a DOT drug and alcohol regulation a listing of Substance Abuse Professionals (SAPs) readily available to the employee and acceptable to the employer, with names, addresses, and telephone numbers. The employer cannot charge the employee any fee for compiling or providing this list. A directory of individuals who have successfully obtained

the DOT's SAP Qualification can be found at: https://www.naadac.org/sap-directory and at https://www.saplist.com/ . This list must be provided even if the employer has no intention to return the employee to duty.

EMPLOYMENT PRACTICES GUIDELINE

Drugs & Alcohol – Substance Abuse Professionals (SAPs) and the Return-to-Duty Process

When an employee has a verified positive, adulterated, or substituted test result, or has otherwise violated a federal drug and alcohol regulation, the employer must not return the employee to the performance of safety-sensitive functions unless and until the employee successfully completes the return-to-duty process outlined in the regulations. The employer must provide to each employee (including an applicant or new employee) who violates a DOT drug and alcohol regulation a listing of Substance Abuse Professionals (SAPs) readily available to the employee and acceptable to the employer, with names, addresses, and telephone numbers. The employer cannot charge the employee any fee for compiling or providing this list. A directory of individuals who have successfully obtained the DOT's SAP Qualification can be found at: https://www.naadac.org/sap-directory and at https://www.saplist.com/ .

The employer is not required to provide an SAP evaluation or any subsequent recommended education or treatment for an employee who has violated a federal drug or alcohol regulation. However, if the employer offers that employee an opportunity to return to a safety-sensitive duty following a violation, it must, before, the employee again performs that duty, ensure that the employee receives an evaluation by a SAP and that the employee successfully complies with the SAP's evaluation recommendations and passes a return-to-duty test. The return-to-duty test cannot occur until after the SAP has determined that the employee has successfully complied with prescribed education and/or treatment. The employee must have a negative drug test result and/or an alcohol test with an alcohol concentration of less than 0.02 before resuming performance of safety-sensitive duties.

EMPLOYMENT PRACTICES GUIDELINE

Drugs & Alcohol – Confidentiality and Release of Information

An employer participating in the federal drug or alcohol testing process is prohibited from releasing individual test results or medical information about an employee to third parties without the employee's specific written consent. A third party is any person or organization to whom the regulations do not explicitly authorize or require the transmission of information in the course of the drug or alcohol testing process. Specific written consent means a statement signed by the employee that he or she agrees to the release of a particular piece of information to a particular, explicitly identified, person or organization at a particular time.

An employer may also release information pertaining to an employee's drug or alcohol test without the employee's consent in certain legal proceedings, including any lawsuit, grievance, or administrative proceeding brought by or on behalf of an employee and resulting from a positive drug or alcohol test or a refusal to test. These proceedings also include a criminal or civil action resulting from an employee's performance of safety-sensitive duties, in which a court of competent jurisdiction determines that the drug or alcohol test information sought is relevant to the case and issues an order directing the employer to produce the information.

In such legal proceedings, the employer may release the information to the decisionmaker in the proceeding, but only with a binding stipulation that the decisionmaker to whom it is released will make it available only to parties to the proceeding. The employer must immediately notify the employee in writing of any information it releases in connection with legal proceedings.

EMPLOYMENT PRACTICES GUIDELINE

Drugs & Alcohol – Driver Disqualification

The Federal Motor Carrier Safety Regulations (FMCSRs) require the disqualification of drivers of commercial motor vehicles (CMVs) for certain non-CMV and CMV driving offenses. Specifically, 49 CFR 383.51:

- Imposes a disqualification on CDL drivers who have been convicted of traffic offenses while operating a non-CMV which result in their license being cancelled, revoked, or suspended, or of committing drug or alcohol related offenses while driving a non-CMV;
- Imposes a disqualification on CDL drivers who have been convicted of driving a CMV after the driver's CDL was revoked, suspended or cancelled for violations while operating a CMV; and,
- Imposes a disqualification on CDL drivers who have been convicted of causing a fatality through the negligent or criminal operation of a CMV.

Additionally, the following serious traffic violations can result in disqualification of a driver if convicted two or more times within a three-year period:

- Driving a CMV when the driver has not obtained a CDL;
- Driving a CMV without a CDL in the driver's possession; and,
- Driving a CMV without having met the minimum testing standards for the specific class of CMV being operated or for the type of cargo being transported on the vehicle.

These requirements have been incorporated into the Michigan Motor Vehicle Code (MVC). The MVC calls for the Secretary of State to immediately suspend or revoke all vehicle group designations on the CDL of a person upon receiving a notice of a conviction, bond forfeiture, or civil infraction determination of the person for a violation of Michigan law identical to those offenses outlined in the FMCSRs as major offenses. A conviction, bond forfeiture, or civil infraction determination for a violation described in MCL 257.319b(7) (identical to those outlined in the FMCSRs as major offenses) while the person was operating a non-CMV will count against the person who holds a license to operate a CMV the same as if the person had been operating a CMV at the time of the violation.

Disqualification under the FMCSRs occurs not on the date of the conviction, but when the Secretary of State actually takes licensing action by suspending, revoking, or canceling the individual's CDL or otherwise withdraws the person's driving privileges. The court clerk must prepare and forward to the Secretary of State an abstract of the court record within five (5) days after a conviction, forfeiture of bail, or entry of a civil infraction determination or default judgment upon a charge of or citation for violating or attempting to violate the MVC. The Secretary of State, in turn, is supposed to notify the United States DOT of the suspension, revocation, or denial of a license within ten (10) days after the suspension, revocation, or denial.

Table 1 of Section 383.51 contains a list of the major offenses and period for which a driver must be disqualified, depending upon the type of vehicle the driver is operating at the time of the violation, as follows:

If a driver operates a motor vehicle and is convicted of:	For a first-time conviction or refusal to be tested while operating a CMV, a person required to have a CDL or a CDL holder must be disqualified from operating a commercial motor vehicle for:	For a first-time conviction or refusal to be tested while operating a non-CMV, a CDL holder must be disqualified from operating a commercial motor vehicle for:	For a first-time conviction or refusal to be tested while operating a CMV carrying hazardous material, a person required to have a CDL or a CDL holder must be disqualified from operating a motor vehicle for:	For a second conviction or refusal to be tested in a separate incident of any combination of offenses in this Table while operating a CMV, a person required to have a CDL and a CDL holder must be disqualified from operating a CMV for:	For a second conviction or refusal to be tested in a separate incident of any combination of offenses in this Table while operating a non-CMV, a CDL holder must be disqualified from operating a CMV for:
(1) Being under the influence of alcohol as prescribed by State law.	1 year	1 year	3 years	LIFE	LIFE
(2) Being under the influence of a controlled substance.	1 year	1 year	3 years	LIFE	LIFE
(3) Having an alcohol concentration of 0.04% or higher while operating a CMV.	1 year	Does not apply	3 years	LIFE	Not applicable
(4) Refusing to take an alcohol test as required by a State or jurisdiction's implied consent laws.	1 year	1 year	3 years	LIFE	LIFE
(5) Leaving the scene of an accident.	1 year	1 year	3 years	LIFE	LIFE
(6) Using a vehicle to commit a felony other than that described in (9) below.	1 year	1 year	3 years	LIFE	LIFE
(7) Driving a CMV with a revoked, suspended, or canceled CDL or when the driver is disqualified.	1 year	Not applicable	3 years	LIFE	Not applicable
(8) Causing a fatality through the negligent operation of a CMV.	1 year	Not applicable	3 years	LIFE	Not applicable
(9) Using a CMV in the commission of a felony involving manufacturing, distributing, or dispensing a controlled substance.	LIFE Not eligible for ten-year reinstatement	LIFE Not eligible for ten-year reinstatement	LIFE Not eligible for ten-year reinstatement	LIFE Not eligible for ten-year reinstatement	LIFE Not eligible for ten-year reinstatement

Table 3 to Section 383.51 contains a list of serious traffic offenses and the periods for which a driver must be disqualified, depending upon the type of vehicle the driver is operating at the time of the violation, as follows:

If a driver operates a motor vehicle and is convicted of:	For a second conviction of any combination of offenses in this table within a three-year period while operating a CMV, a person required to have a CDL or a CDL holder must be disqualified from operating a commercial motor vehicle for:	For a second conviction of any combination of offenses in this table within a three-year period while operating a non-CMV, a CDL holder must be disqualified from operating a commercial motor vehicle if the conviction results in the revocation, cancellation, or suspension of the CDL holder's license or non-CMV driving privileges, for:	For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CDL and a CDL holder must be disqualified from operating a CMV for:	For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CDL holder's license privileges, for:
(1) Excessive speed of 15 mph over the posted limit.	60 days	60 days	120 days	120 days
(2) Reckless driving as defined by State or local law including willful or wanton disregard for the safety of persons or property.	60 days	60 days	120 days	120 days
(3) Making improper or erratic lane changes.	60 days	60 days	120 days	120 days
(4) Following the vehicle ahead too closely.	60 days	60 days	120 days	120 days
(5) Violating State or local law relating to motor vehicle traffic control (other than parking) arising in connection with a fatal accident.	60 days	60 days	120 days	120 days
(6) Driving a CMV without a CDL.	60 days	Not applicable	120 days	Not applicable
(7) Driving a CMV without a CDL in the driver's possession.	60 days	Not applicable	120 days	Not applicable
(8) Driving a CMV without the proper class of CDL and/or endorsements for the specific vehicle being operated or for the passengers or type of cargo being transported.	60 days	Not applicable	120 days	Not applicable

The impact of these rules on road commissions and the drivers they employ is significant. Employees will lose their CDLs for a significant period of time if they are convicted of drunk driving and other violations while away from work. They will not be able to get restricted licenses to engage in any form of CDL driving. It is important for CDL drivers to understand the ramifications their off-duty conduct may have on their ability to perform their job duties.

EMPLOYMENT PRACTICES GUIDELINE

Drugs & Alcohol – Marijuana

The use of recreational marijuana was legalized in Michigan with the passage of the Michigan Regulation and Taxation of Marihuana Act (MRTMA). Notably, however, the MRTMA specifically provides that it does not require an employer to permit or accommodate the ingestion of marijuana in any workplace or an employee working while under the influence of marijuana. Additionally, the MRTMA does not prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while under the influence of marijuana. The MRTMA does not prevent an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's violation of a workplace drug policy or because that person was working while under the influence of marijuana.

The Michigan Medical Marihuana Act (MMMA) provides that a qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marijuana in accordance with the MMMA. However, the MMMA specifically prohibits the medical use of marijuana while undertaking any task under the influence of marijuana, when doing so would constitute negligence. The MMMA also prohibits an individual from operating or being in actual physical control of a motor vehicle while under the influence of marijuana. An employer is not required by the MMMA to accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana.

Marijuana use and possession are still illegal under Federal law. Therefore, marijuana is still considered a prohibited substance under both the Drug-Free Workplace Act and the Federal Motor Carrier Safety Regulations (FMCSRs). The FMCSRs address the issue of medical marijuana in two places. First in 49 CFR 40.151, an MRO is specifically prohibited from verifying a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act and lists, as an example, "under a state law that purports to authorize such recommendations, such as the 'medical marijuana' laws that some states have adopted." Thus, the regulations provide that, regardless of an employee's use of marijuana for medical purposes, a test should be verified as positive by the MRO. Additionally, 49 CFR 40.293 provides that, in conducting the initial evaluation of an employee following a DOT drug and alcohol regulation violation, the SAP is to assume that a verified positive test result has conclusively established that the employee committed a DOT drug and alcohol regulation violation. The SAP must not take into consideration in any way, as a factor in determining what his or her recommendation will be, statements by the employee that attempt to mitigate the seriousness of a violation of a DOT drug or alcohol regulation and lists as examples: "related to assertions of use of hemp oil, 'medical marijuana' use, 'contact positives',

poppy seed ingestion, or job stress." Thus, the regulations provide that the SAP evaluation is not to be affected in any way by the employee's reported use of marijuana for medical purposes.

Courts have considered whether the Americans with Disabilities Act (ADA) requires employers to accommodate employees' legal use of medical marijuana to treat serious medical conditions. In states like Michigan, where statutes are not silent on this issue, federal courts have generally determined that employers are not required to accommodate medical marijuana use under the ADA or under state statutes modeled on the ADA. However, Michigan courts have not yet weighed in on the issue nor addressed whether an employer has an obligation to accommodate use of medical marijuana to treat a disability off work premises during non-working hours by providing a waiver to a drug-free policy.

In one Michigan case, ***Eplee*** v ***City of Lansing and Lansing Board of Water and Light (BWL)***, 327 Mich App 635 (2019), the Michigan Court of Appeals held that it was not a violation of the MMMA for a public employer to withdraw a conditional offer of employment when a pre-employment drug screen administered as part of the hiring process came back positive for marijuana. The applicant was a qualifying patient under the MMMA with a valid registry identification card who had received a conditional offer of employment, which included as a condition that the applicant comply with the BWL's drug-testing policies. Once the applicant was informed that the results of her pre-employment drug test screen were positive for marijuana, she e-mailed documentation of her status as a registered qualifying patient under the MMMA to the BWL. Nonetheless, the BWL sent her a letter rescinding the offer of employment. The Court of Appeals affirmed dismissal of the applicant's lawsuit under the MMMA, noting that the MMMA does not create affirmative rights to employment which do not otherwise exist. Since the applicant failed to demonstrate that she had any right or property interest in employment with the BWL, there was no prohibition on the BWL's ability to withdraw, for any reason or no reason at all, its conditional offer of employment.

In ***Braska*** v ***Challenge Manufacturing Co.***, 307 Mich App 340 (2014), the Court of Appeals addressed the issue of whether an employee who possesses a registration identification card under the MMMA is disqualified from receiving unemployment benefits under the Michigan Employment Security Act (MESA) after the employee had been fired for failing to pass a drug test as a result of marijuana use. The ***Braska*** court held that although the claimants who tested positive for marijuana would have ordinarily been disqualified from receiving unemployment benefits under MESA because of their positive drug tests, the denial of unemployment benefits "constituted an improper penalty for the medical use of marijuana under the MMMA" when there was no evidence that the positive drug tests were the result of anything but the medical use of marijuana in compliance with the MMMA. MESA was amended thereafter to provide that an individual is disqualified from receiving unemployment benefits for, among other reasons, being discharged for illegally ingesting, injecting, inhaling, or possessing a controlled substance on the premises of the employer; refusing to submit to a drug test, if the test was administered in a nondiscriminatory manner; or testing positive on a drug test, if the test was administered in a nondiscriminatory manner. For purposes of the disqualification, a "drug test" is defined as being a test designed to detect the illegal use of a controlled substance. "Nondiscriminatory manner" means being administered impartially and objectively in accordance with a

collective bargaining agreement, rule, policy, a verbal or written notice, or a labor-management contract.

EMPLOYMENT PRACTICES GUIDELINE

Drugs & Alcohol – Fourth Amendment Concerns

Where drug testing is not mandated (i.e., non-CDL employees), a public employer faces certain constraints with regard to drug testing. State and federal courts have decided numerous cases that discuss the conditions under which drug testing is permissible in the public sector. In particular, the courts have focused on two constitutional issues: privacy and due process. According to federal courts, drug testing invokes the Fourth Amendment's protections against unreasonable searches and seizures. In judging the constitutionality of drug testing under the Fourth Amendment, the courts have typically sought to balance an individual's right to privacy (for instance, in protecting them against unreasonable or arbitrary searches) with the governments need and interest to protect the safety of the general public.

In addition to Fourth Amendment unreasonable search and privacy claims, the courts have also examined the legality of drug testing under the Fifth and Fourteenth Amendments' due process provisions. Under those provisions, individuals cannot be deprived of "life, liberty or property, without due process of law." In the context of drug testing, some courts have ruled that due process is violated if employees are not given prior notice of drug testing, if there are no procedural guidelines for drug testing (for example, in collecting urine or blood samples), or if employees are not granted a formal hearing in the event that a positive drug test leads to an adverse action such as layoff or termination.

Because of these constitutional issues, random drug testing of public sector employees is generally discouraged unless (1) it is authorized by federal law (e.g., CDL drivers); (2) the employee is in a high risk or safety-sensitive position; or (3) the test is part of an employee assistance program sponsored or authorized by the employer, and the employee is voluntarily participating in the program. Before instituting any random testing program, employers should inform current and/or prospective employees that the employer is implementing such a program. Further, before testing employees, employers should obtain the employee's or prospective employee's written informed consent. Finally, to prevent liability under the Americans with Disabilities Act (ADA), employers must keep drug-testing results strictly confidential and separate from the employee's personnel file.

_____ COUNTY ROAD COMMISSION

DRUG-FREE WORKPLACE POLICY

_____County Road Commission is committed to a drug-free workplace that encourages a safe, healthy and productive work environment. The goal of this policy is to create and maintain a workplace free from the use or abuse of drugs and ensure efficient and safe public services. As a condition of employment, all Road Commission employees shall comply with this policy and all applicable laws, including, the Drug-Free Workplace Act. In addition, DOT-regulated employees are required to comply with the Federal Omnibus Transportation Employee Testing Act of 1991 and applicable United States Department of Transportation regulations. The Road Commission will not hire anyone who is known to currently abuse a controlled substance.

I. DEFINITIONS

For purposes of this policy, the following terms shall have the meanings prescribed below:

Abuse – means the following:

1. The use of any controlled substance as included in Schedule I of 21 CFR Part 1308.

2. The use of any other controlled substance as included in Schedules II-V of 21 CFR Part 1308 in a manner inconsistent with its prescription or under circumstances where its use is not permitted.

3. The use of alcohol such that an employee has an alcohol concentration of 0.02 or above during working time. Additionally, the ingestion of alcohol up to four (4) hours before the performance of safety-sensitive functions regardless of the resulting alcohol concentration level.

Controlled Substance – A drug, compound, mixture, preparation, or substance included in Schedules I-V of 21 CFR Part 1308. Marijuana, although legal under State law, remains a Schedule I drug under federal regulations.

Conviction – A finding of guilty, no contest (including a plea of nolo contendere) or the imposition of a sentence by a judge or jury in any federal or state court.

DOT-Regulated Employees – A person who operates a commercial motor vehicle (CMV) with a gross vehicle weight rating of 26,001 or more pounds; or is designed to transport sixteen (16) or more occupants (including the driver); or is of any size and is used in the transport of hazardous materials that require the vehicle to be placarded or whose position requires the possession of a commercial driver's license.

Fitness for Duty – For purposes of this policy, to be fit for duty means the employee is able to perform the essential functions of his/her job and does not currently abuse alcohol or a controlled substance.

Prescription Medication – A written order for a controlled substance for the use of a particular person given by a licensed practitioner in the course of professional practice and in accordance with regulations promulgated by the director of the United States Drug Enforcement Administration. For purposes of this policy, marijuana, even if used for medicinal purposes, is not a prescription medication.

Reasonable Suspicion – Observations concerning the appearance, behavior, speech or body odors, or indications of the chronic and withdrawal effects of controlled substances, which lead the Road Commission to suspect that the employee has violated the prohibitions of this policy concerning alcohol and/or controlled substances. A written record will be made of the observations as soon after the observed behavior as possible, but in no case later than twenty-four (24) hours after the observed behavior.

Reports of drug use or aberrant behavior which are not confirmed by supervisory observations shall not constitute reasonable suspicion.

Safety Sensitive – For DOT-regulated employees, safety-sensitive functions are as defined in the Road Commission's DOT Substance Abuse Policy. For non-DOT employees, safety-sensitive shall include any job, position, work-related function, or job task designated as such by the Road Commission, which through the nature of the activity could be dangerous to the physical well-being of or jeopardize the security of the employee, co-workers, or the general public through a lapse in attention or judgment.

Workplace – All property and facilities owned, leased or rented by the Road Commission including grounds, buildings, vehicles and other equipment and any site where an employee is performing work for the Road Commission.

II. PROHIBITIONS

A. An employee shall not unlawfully possess, use, manufacture, distribute, dispense or be impaired by the use of a controlled substance or alcohol in the workplace, including marijuana, cannabis, cannabis extract or synthetic cannabis. An employee may not possess in the workplace any paraphernalia related in any way to alcohol or a controlled substance, including marijuana.

B. The use of prescription and/or non-prescription medications shall not impair an employee's ability to safely perform the duties of their position or compromise the health and safety of others in the workplace.

C. Employees Subject to Federal DOT Testing. This policy does not affect in any way the requirements of the Federal Omnibus Transportation Employee Testing Act of 1991 and applicable United States Department of Transportation regulations (collectively "DOT drug testing laws"). Any employee (or applicant) in a position that is DOT-regulated is prohibited from using drugs and/or alcohol (as defined in federal law) in a manner that violates DOT drug testing laws. Marijuana is one of the classes of drugs included in a Federal DOT test. As such, any DOT-regulated employee (or applicant) is prohibited from using marijuana at any time, even if a medical marijuana recommendation or other medical documentation is provided.

III. FITNESS FOR DUTY

All Road Commission employees are required to be fit for duty at the time they report to work and any time they are in the workplace. For purposes of this policy, fitness for duty means the employee is able to perform the essential functions of his/her job and he/she does not currently abuse a controlled substance or alcohol.

IV. TESTING FOR DOT-REGULATED EMPLOYEES

DOT-regulated employees are subject to drug and alcohol testing in accordance with the Federal Omnibus Transportation Employee Testing Act of 1991 and applicable United States Department of Transportation regulations. Such employees should refer to the Road Commission's DOT Substance Abuse Policy for their procedures and requirements.

V. TESTING FOR NON-DOT EMPLOYEES

A. Pre-Employment Testing. Final candidates for all positions must undergo drug testing prior to commencing work. The test shall be administered only after a conditional offer of employment has been made. The candidate must complete and successfully pass the drug test as a condition of employment. Additionally, employees are required to undergo drug testing prior to transfer into a DOT-regulated and/or safety-sensitive position and obtain a verified negative result.

B. Random Drug Testing. Employees are subject to random drug and alcohol testing according to the requirements of any applicable collective bargaining agreement. Additionally, employees in safety-sensitive positions that are exempt from collective bargaining are subject to random drug and alcohol testing as determined by the Managing Director. Employees may also volunteer to be in the random testing pool.

C. Reasonable Suspicion Testing. Employees may be required to undergo alcohol and/or drug testing based on a reasonable suspicion determination by management.

D. Post-Incident Testing. Any employee involved in a significant incident in which the health or safety of himself/herself or other individuals is involved, or in which extensive property damage has occurred, will be subject to post-incident testing in accordance with the requirements of any applicable collective bargaining agreement(s) or as determined by the Managing Director.

E. Return to Duty Testing. An employee shall be tested preceding the return to work following a positive test result or voluntary notification of a substance abuse problem. Testing may be for drugs and/or alcohol, as determined by a Substance Abuse Professional (SAP), even if the original infraction only involved drugs and/or alcohol. Return to duty testing will be at the employee's expense.

F. Follow-up Testing. Any employee referred to a counseling or rehabilitation program as a result of that employee's positive test will be subject to follow- up testing according to specifications and provisions of any applicable collective bargaining agreement(s) or, for employees exempt from collective bargaining, as determined by the SAP. Follow-up testing will be at the employee's expense.

G. Testing Procedures. All drug and alcohol tests conducted under this Policy shall be done following the drug and alcohol testing procedures outlined in 49 CFR Part 40. All employees subject to testing shall be tested for the following drugs or classes of drugs: cocaine, opioids (including codeine, morphine, heroin, hydrocodone, hydromorphone, oxycodone, and oxymorphone), amphetamines, and phencyclidine. In the case of reasonable suspicion and post-incident testing, non-DOT employees shall also be tested for marijuana. As stated elsewhere in this policy, DOT-regulated employees are always subject to testing for marijuana in accordance with DOT drug testing laws.

H. Confidentiality of Test Results. Confidentiality of alcohol and/or other drug test results will be maintained to the extent provided by law.

I. Opportunity to Provide Medical Documentation. Employees or applicants shall be given the opportunity as required by applicable collective bargaining agreements or, in the absence of such agreements, as stipulated by the Managing Director, to offer an explanation or submit medical documentation of legally prescribed medication or exposure to toxic substances which may explain a positive test result. Such information shall be reviewed only by the Medical Review Officer (MRO) in his/her determination of the validity of a positive result

and shall be released to the employer only to explain a test result. The employee is solely responsible for providing medical documentation as instructed by the MRO. This responsibility includes, but may not be limited to, coordinating any necessary records exchange between the employee's physician and the MRO and ensuring that the MRO receives the requested documentation within the timeframe provided by the MRO.

J. Refusal to Test. An employee will be subject to discipline, up to and including termination from employment, if the employee refuses to submit to a properly-ordered test or if the employee otherwise fails to cooperate with the testing process. An applicant will not be hired if the applicant refuses to submit to a pre-employment test or if the applicant fails to cooperate with the testing process. The types of actions listed below will be considered a refusal to test. This list is not intended to be all inclusive:

- Refusal to sign test forms;
- Refusal to provide a specimen to be tested or an adequate amount of the specimen;
- Alteration or substitution of the test specimen; or
- Any other failure to cooperate during the testing process that prevents proper completion of the test.

VI. DISCIPLINARY ACTION

An employee who violates any of the standards contained in this policy will be subject to the disciplinary provisions of any applicable collective bargaining agreement or, for employees exempt from collective bargaining, to action as determined by the Managing Director, which may include any of the following:

- Transfer or temporary reassignment;
- Granting of leave with or without pay;
- Discipline up to and including termination; and/or,
- Requiring satisfactory participation by the employee in an approved drug abuse assistance or rehabilitation program.

An employee whose blood alcohol level tests at or above .02% and below .04% shall be immediately removed from duty until the start of the employee's next scheduled shift or for twenty-four (24) hours, whichever is greater. Employees removed from duty may use any accrued leave available or be placed in a leave without pay status if accrued leave is not available.

VII. SELF-REFERRAL FOR TREATMENT

Employees are encouraged to seek treatment for drug or alcohol abuse and are offered cooperation and assistance under the Road Commission's Employee Assistance Program. Additionally, an employee who initiates his own treatment shall be exempt from the penalties of the Drug-Free Workplace Policy and/or any applicable collective bargaining agreement, subject to the terms and conditions set forth herein.

In order to be exempt, the employee's self-referral must occur prior to any employer-initiated random or reasonable cause testing and/or any other contract violations. The Self-Referral declaration by an employee at the time of random or reasonable cause testing or other contract violation occurrences shall not be allowed as an exemption from the implementation of discipline under the Drug- Free Workplace Policy and/or any applicable collective bargaining agreement.

An employee who has referred himself/herself for treatment shall be required to successfully complete a substance abuse rehabilitation program that includes a negative return to work drug and alcohol test prior to his/her return to work. In the event an employee tests negative, he/she will be allowed to return to work. The employee will be responsible for all costs associated with the program, including all return to work and follow-up testing required.

VIII. PRESCRIPTION AND NON-PRESCRIPTION MEDICATIONS.

Some prescription and non-prescription medications may affect the employee's judgment, coordination, and physical ability. Any employee using a medication which their physician has advised the employee the use of such medication may affect the employee's ability to perform the duties of their position must promptly notify the Road Commission that they are currently using such medication. Employees who need an accommodation should submit a request to the Road Commission.

IX. CRIMINAL DRUG CONVICTIONS.

As a condition of employment, each employee is required to notify the Road Commission within five (5) days after he/she receives a conviction for violating any federal or State criminal drug statute where such violation occurred at the workplace or any location where Road Commission business is conducted. Any employee who fails to report such a conviction will be subject to immediate termination. If required, any criminal drug conviction occurring in the workplace will be reported to federal granting or contracting authorities within ten (10) days after receiving notice from the employee or otherwise receiving actual notice of the conviction. Within thirty (30) days of such notification, the Road Commission will take appropriate disciplinary action against such employee, up to and including termination. The Road Commission may also refer the

employee to the Road Commission's Employee Assistance Program for referral and treatment.

X. TRAINING.

All Road Commission employees will be provided with periodic Drug-Free Workplace training. The training will include information regarding the:

- Dangers of alcohol and other drug abuse in the workplace;
- The Road Commission's Drug-Free Workplace Policy;
- The Road Commission's Employee Assistance Program and other available treatment programs; and,
- Penalties that may be imposed upon employees for alcohol and/or other drug abuse violations occurring at the workplace or any location where Road Commission business is conducted.

XI. FMCSA CLEARINGHOUSE.

The following information about DOT-regulated employees will be reported to the FMCSA Drug and Alcohol Clearinghouse:

i. A verified positive, adulterated, or substituted drug test result;
ii. An alcohol confirmation test concentration of 0.04 or higher;
iii. A refusal to submit to any required test;
iv. Any actual knowledge by the Road Commission of:

   A. On duty alcohol use;
   B. Pre-duty alcohol use in violation of DOT regulations;
   C. Alcohol use following an accident in violation of DOT regulations; or,
   D. Controlled substance abuse;

v. An SAP report of the successful completion of the return-to-duty process;
vi. A negative return-to-duty test; and,
vii. A Road Commission report of the completion of follow-up testing.

_____ County Road Commission

Reasonable Suspicion Determination Report

Employee Name: _____ Employee ID: _____

Date/Time of Observation: ____/____/____ _____AM/PM

Date/Time of Determination to Test: ____/____/____ _____AM/PM

Observed Indicators of Prohibited Drug Use/Alcohol Misuse

Reasonable Suspicion determinations must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odor of the safety-sensitive employee.

Check all indicators observed:

Physical Indicators
- ❑ Bloodshot or watery eyes
- ❑ Flushed or very pale complexion
- ❑ Extensive sweating/skin clamminess
- ❑ Dilated or constricted pupils
- ❑ Disheveled clothing/unkempt grooming
- ❑ Unfocused, blank stare
- ❑ Runny or bleeding nose
- ❑ Jerky eye movement
- ❑ Body odor

Behavioral Indicators
- ❑ Fidgety/agitated
- ❑ Irregular breathing
- ❑ Nausea/vomiting
- ❑ Slow reactions
- ❑ Unstable walking
- ❑ Poor coordination
- ❑ Hand tremors
- ❑ Suspicious, paranoid
- ❑ Depressed, withdrawn
- ❑ Lackadaisical attitude
- ❑ Irritable, moody
- ❑ Extreme fatigue

Speech Indicators
- ❑ Slurred or slowed speech
- ❑ Loud, boisterous
- ❑ Incoherent, nonsensical
- ❑ Repetitious, rambling
- ❑ Rapid, pressured
- ❑ Excessive talkativeness
- ❑ Exaggerated enunciation
- ❑ Cursing, inappropriate speech
- ❑ Inability to concentrate
- ❑ Impulsive, unusual risk-taking
- ❑ Delayed decision-making
- ❑ Reduced alertness

Written Summary

Summarize the facts and circumstances surrounding the incident. Attach additional sheets as needed.

_____

_____

_____

_____

_____

_____

_____

_____

_____

Testing Information:

Collection Site Location:_____ Time Arrived: _____AM/PM

1. Was the **alcohol** test performed within **2** hours of the reasonable suspicion determination?

   _____YES

   _____NO, **Explain:** _____

   _____

2. Was the **alcohol** test performed within **8** hours of the reasonable suspicion determination?

   _____YES

   _____NO, **Explain:** _____

   _____

   If the alcohol test is not conducted within <u>8 hours</u> cease all efforts to administer the test.

The above documentation of the observed physical, behavioral, and performance indicators of the named employee was provided by:

Supervisor Name:_____ Phone No: _____

Signature: _____ Date: _____

_____COUNTY ROAD COMMISSION
DRUG AND ALCOHOL TESTING
AUTHORIZATION FORM

I, _____, as an employee/applicant of the _____ Road Commission (the "Road Commission"), hereby acknowledge that I have received and read the Road Commission's Drug-Free Workplace Policy and that the Drug-Free Workplace Policy requires me to be subject to drug and/or alcohol testing. Drug testing will occur by urinalysis unless a disability recognized under federal and/or State law necessitates that I be tested by an alternative method. Alcohol testing may include breath, saliva, or blood testing.

I further understand that the purpose of this analysis is to determine or rule out the presence of drugs and/or alcohol.

I hereby freely and voluntarily consent to this request for a drug and/or alcohol test and agree to participate in the testing program.

I hereby release the Road Commission, its employees, agents, and contractors from any and all liability whatsoever arising from this request for testing, from the actual testing procedures, and from decisions made concerning my application for or continuation of employment based on the results of the analysis.

I agree to cooperate in all aspects of the testing program and understand that refusal to participate in required testing may result in denial of employment or disciplinary action up to and including termination of employment.

I hereby authorize the release of my drug and/or alcohol test results to the Road Commission's Medical Review Officer (MRO) as provided by the Road Commission's policy.

_____ _____
Employee Signature Date

_____
Employee Printed Name

_____ COUNTY ROAD COMMISSION
OVER-THE-COUNTER AND PRESCRIPTION DRUG POLICY

A. Policy

The following behaviors are prohibited:

1. Using a prescription (Rx) medication that is not legally prescribed for the employee;

2. Using an Rx or over-the-counter medication (OTC) in excess of the prescribed dosage;

3. Using any medication that contains alcohol within four (4) hours before performing safety-sensitive functions; and,

4. Using any medication that adversely impacts the employee's ability to safely perform his/her safety-sensitive job functions.

The _____ County Road Commission requires that all safety-sensitive employees obtain a completed form from their physician for each Rx medication prescribed for use while in working status indicating whether they should be medically disqualified from performing safety-sensitive functions during the duration of the treatment. Employees in possession of a form disqualifying them from performing safety-sensitive duties are to convey the form to their immediate supervisor. Employees released to work while taking a prescribed medication may report to work without further notice as long as they have the form from their physician so indicating on their person.

It is the responsibility of safety-sensitive employees when selecting an over-the-counter medication to read all warning labels before selecting it for use while working. Medications whose labels indicate they may affect mental functioning, motor skills or judgment should not be selected. If no alternate medication is available for the condition, employees should seek professional assistance from their physician.

Employees have the personal responsibility to assess their fitness for duty while using an Rx or OTC medication. They should not report for, or remain on, duty while being adversely affected by a medication even if they have a release to work from the prescribing physician or if the OTC medication being taken has no warning label.

B. Prescription Medications

The employee is responsible for providing the prescribing physician with the appropriate Road Commission form. The "Employee's Section" is to be completed before giving the form to the physician. Additionally, the employee shall directly advise the physician if he/she drives a vehicle, operates a vehicle, or performs other safety-sensitive duties. The employee is responsible for discussing the potential side effects of any prescription medication with the prescribing physician, including its potential to impair mental functioning, motor skills or judgment, as well as any adverse impact on the safe performance of his/her safety-sensitive job duties. The employee is encouraged to ask his/her physician for alternative treatments that do not have performance altering side effects.

An employee will be medically disqualified from the performance of safety-sensitive functions if the physician determines that the employee's medical history, current condition, side effects of the medication being prescribed and other indications pose a potential threat to the safety of coworkers, the public and/or the employee. The Road Commission will make a form available to employees for the guidance of their prescribing physician and his/her communication with the Road Commission. No other form is acceptable under this policy. Ultimately, the employee may be the best judge of how a substance is impacting him/her. As such, the employee has the responsibility to inform the prescribing physician of performance altering side effects and request medical disqualification from performance of safety-sensitive duties, as needed.

C. Over-the-Counter Medications.

It is the responsibility of safety-sensitive employees, when selecting an over-the-counter medication, to read all warning labels before selecting it for use while in working status. Medications whose labels indicate they may affect mental functioning, motor skills or judgment should not be selected. The advice of a pharmacist, if available at the purchase site, may be helpful in making a selection appropriate to the employee's job duties. If no alternate medication is available for the condition, employees should seek professional assistance from their pharmacist or physician. If the physician determines that an over-the-counter medication with potentially negative impact is the preferred choice for treatment, he/she can use the Employer's form to withhold the employee from work, as needed. As with a prescription medication, employees are to provide the Employer's form to their physician for this purpose and then convey it to their supervisor if they are disqualified from performing safety-sensitive functions.

Ultimately, the employee may be the best judge of how a substance is impacting him/her. As such, the employee has the responsibility to refrain from using any over-the-counter medication that causes performance altering side effects, whether or not the label warns of them. As needed, the at-work employee is to contact his/her supervisor for relief from safety-sensitive duties and seek the assistance of his/her physician in selecting an alternative treatment.

D. Discipline

A safety-sensitive employee who violates this policy is to be removed from duty immediately. Violation of this policy will subject an employee to disciplinary action up to and including termination of employment. Once removed from duty, an employee may not be returned to safety-sensitive duties until evaluated and released by a physician appointed by the Road Commission.

_____ COUNTY ROAD COMMISSION
SAFETY-SENSITIVE EMPLOYEE RELEASE TO WORK FORM
FOR PRESCRIPTION MEDICATIONS

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1. EMPLOYEE: Complete the "Employee's Section" on the reverse side of this form and provide the form to your prescribing physician for completion of the "Physician's Section."

2. PHYSICIAN: Please consider the following information and complete the "Physician's Section" on the reverse side of this form. Thank you for your assistance.

CONSIDERATIONS

A. The following list of medications of concern if used while performing safety-sensitive work is not definitive or all-inclusive but is provided as a starting point for your consideration.

Analgesics
Aspirin w/codeine, Codeine, Demerol, Dilaudid, Empirin Compound w/codeine, Levo-Dromoran, Methadone, Morphine, Percocet, Percodan, Soma Compound w/codeine, Talacen, Talwin, Tylenol w/codeine, and Vicodin.

Anti-Motion Sickness
Antivert, Dramamine, Marezine, Phenergan, Transderm-Scop.

Tranquilizers & Sedatives
Ativan, Centrax, Compazine, Dalmane, Diazepam, Equanil, Halcion, Haldol, Libritabs, Librium, Limbitrol, Paxipam, Phenergan, Prolixin, Serax, Stelazine, Thorazine, Tranxene, Valium, Valrelease, Xanax.

Antidepressants
Adapin, Amitriptyline, Asendin, Deproloft, Desyrel, Elavil, Endep, Etrafon, Limbitrol, Lithium, Ludiomil, Marplan, Nardil, Norpramin, Pamelor, Parnate, Pertofrane, Sinequan, Surmontil, Tofranil, Vivactil.

Barbiturates
Alurate, Butisol, Dilantin, Mebaral, Nembutal, Pentobarbital, Secobarbital, Seconal, Sedapap, Tuinal.

Skeletal Muscle Relaxants
Flexeril, Parafon, Soma.

Non-Prescription Cough & Cold Remedies, Antihistamines
Benadryl, Bromfed, Chlortrimeton, Comtrex, Contac, Deconamine, Dimetapp, Dristan, Drixoral, Extendryl, Fedahist, Kronofed, Naldecon, Nolamine, Novafed, Ornade, Phenergan, Rondec, Rynatan, Sinubid, Sinulin, Tavist-D.

B. The employee should <u>not</u> be released to work unless you are comfortable that, given the safety-sensitive nature of this patient's job duties, his/her medical history, current condition and possible side effects of the prescribed medication(s), it is your professional opinion that the medication(s) will have no adverse influence on the employee's performance of his/her safety-sensitive job duties.

RELEASE TO WORK FORM FOR PRESCRIPTION MEDICATIONS

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Employee's Section:

Printed Name: _____ SS# XXX-XX-_____

Employee's Safety-Sensitive Job Function – check those that apply.

___ Operate a vehicle requiring a commercial driver's license.
___ Control the dispatch or movement of vehicles requiring a commercial driver's license.
___ Maintain/repair vehicles requiring a commercial driver's license.
___ Supervisor whose duties require the performance of any of the above functions. (Check those that apply)

Medication(s) currently being taken _____

I attest that the foregoing information is complete and correct.

Employee Signature: _____ Date: _____

****

Physician's Section:

As the attending physician, I have prescribed the following medication(s) to be taken from _____ to _____.

_____ _____
Name of Medication Dosage

_____ _____
Name of Medication Dosage

(PLEASE CHECK ONE OF THE FOLLOWING)

____ Employee may not perform safety-sensitive duties while taking this medication. (Employee – give form to your supervisor.)
____ Employee released to perform safety-sensitive duties while taking medication. (Employee – keep form on your person while at work.)

_____ _____
Physician's Printed Name Telephone Number

_____ _____
Signature Date

_____ COUNTY ROAD COMMISSION
DOT SUBSTANCE ABUSE POLICY

The _____ County Road Commission (Road Commission) recognizes the critical and growing problem that alcohol and controlled substances abuse poses to the community. It is the policy of the Road Commission to provide and maintain a safe, healthy, and productive work environment for its drivers. This policy applies to all employees and applicants for employment with the Road Commission who must have a Commercial Drivers License (CDL) to operate Road Commission-owned vehicles.

All such employees have the responsibility to report for work and perform their jobs in a fit mental and physical condition. The nature of driving for the Road Commission is such that any unnecessary risk could affect its employees and the general public.

This policy complies with 49 CFR Part 382, as amended, and 49 CFR Part 40, as amended. All covered employees are required to submit to drug and alcohol tests as a condition of employment in accordance with these regulations. Copies of Parts 382 and 40 can be found at the Department of Transportation (DOT) Office of Drug and Alcohol Policy and Compliance website, http://www.transportation.gov/odapc .

Portions of this policy are not DOT-mandated but reflect the Road Commission's policy. These additional provisions are identified by **bold text**.

In addition, DOT has published 49 CFR Part 32, implementing the Drug-Free Workplace Act of 1988, which requires the establishment of drug-free workplace policies and the reporting of certain drug-related offenses to the DOT. All covered employees are subject to the provisions of the Drug-Free Workplace Act of 1988. In accordance with that Act, the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the workplace. An employee who is convicted of any criminal drug statute for a violation occurring in the workplace shall notify the Road Commission no later than five (5) days after such conviction.

1. COVERED EMPLOYEES

This policy applies to every person whose position requires the possession of a commercial driver's license, every employee performing a "safety-sensitive function" as defined below, and any person applying for such positions.

Covered employees perform any of the following safety-sensitive functions:

- Driving a commercial motor vehicle which requires the driver to have a CDL;
- Waiting to be dispatched to operate a commercial motor vehicle;
- Inspecting, servicing, or conditioning any commercial motor vehicle;

- Performing all other functions in or upon a commercial motor vehicle;
- Loading or unloading a commercial motor vehicle, supervising or assisting in the loading or unloading of the vehicle, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or giving or receiving receipts for shipments being loaded or unloaded on the vehicle; or,
- Repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle.

2. PROHIBITED BEHAVIOR

The use, possession, sale, purchase or transfer of unauthorized or illegal drugs or substances, or the abuse and misuse of legal drugs on Road Commission property, while on Road Commission business, or while operating Road Commission vehicles and equipment is prohibited.

For covered employees, the use of illegal drugs is prohibited at all times. Prohibited drugs include:

- Marijuana
- Cocaine
- Phencyclidine (PCP)
- Opioids
- Amphetamines

Marijuana, although legal under State law, remains a Schedule I drug under federal regulations.

All covered employees are prohibited from performing or continuing to perform safety-sensitive functions while having an alcohol concentration of 0.04 or greater.

All covered employees are prohibited from consuming alcohol while performing safety-sensitive job functions or while on-call to perform safety-sensitive job functions. If an on-call employee has consumed alcohol, they must acknowledge the use of alcohol at the time that they are called to report for duty.

All covered employees are prohibited from consuming alcohol within four (4) hours prior to the performance of safety-sensitive job functions.

All covered employees required to take a post-accident test are prohibited from consuming alcohol for eight (8) hours following involvement in an accident or until he or she submits to the post-accident drug and alcohol test, whichever occurs first.

3. CIRCUMSTANCES FOR TESTING

A. Pre-employment Testing

A negative pre-employment drug test result is required before an employee can first perform safety-sensitive functions. **Any individual who refuses to submit to such test or has a positive controlled substance test result will not be considered for employment with the Road Commission.**

If a covered employee has not performed a safety-sensitive function for 90 or more consecutive calendar days and has not been in the random testing pool during that time, the employee must take and a pass a pre-employment test before he or she can return to a safety-sensitive function.

A covered employee or applicant who has previously failed or refused a DOT pre-employment drug test must provide proof of having successfully completed a referral, evaluation, and treatment plan meeting DOT requirements.

A driver is not required to undergo a pre-employment test if:

(1) The driver has participated in a DOT testing program within the previous 30 days; and,
(2) While participating in that program, either:
    (a) Was drug tested within the past six (6) months (from the date of application with the Road Commission), or
    (b) Participated in the random drug testing program for the previous 12 months (from the date of application with the Road Commission); and,
(3) The Road Commission can ensure that no prior employer of the driver of whom the Road Commission has knowledge has records of a violation of 49 CFR Part 382, 49 CFR Part 40, or the controlled substances use rule of another DOT agency within the previous six (6) months.

B. Random Testing

Random drug and alcohol tests are unannounced and unpredictable, and the dates of administering random tests are spread reasonably throughout the calendar year. Random testing will be conducted at all times of the day when safety-sensitive functions are performed.

Testing rates will meet or exceed the minimum annual percentage rate set each year by the Federal Motor Carrier Safety Administration (FMCSA).

The selection of employees for random drug and alcohol testing will be made by a scientifically valid method, such as a random number table or a computer-based random number

generator. Under the selection process used, each covered employee will have an equal chance of being tested each time selections are made.

A covered employee may only be randomly tested for alcohol misuse while the employee is performing safety-sensitive functions, just before the employee is to perform safety-sensitive functions, or just after the employee has ceased performing such functions. A covered employee may be randomly tested prohibited drug use anytime while on duty.

Each covered employee who is notified of selection for random drug or random alcohol testing must immediately proceed to the designated testing site.

C. Post-Accident Testing

Covered employees shall be subject to post-accident drug and alcohol testing under the following circumstances:

Fatal Accidents

As soon as practicable following an accident involving a commercial motor vehicle operating on a public road which results in a fatality.

Non-fatal Accidents

As soon as practicable following an accident involving a commercial motor vehicle operating on a public road which results in any of the following:

i. Injuries requiring immediate medical treatment away from the scene.
ii. One or more vehicles incurring disabling damage and being towed away from the scene by a tow truck or other vehicle.

Post-accident testing of the covered employee will occur regardless of whether the covered employee receives a citation under State or local law for a moving traffic violation arising from the accident.

A covered employee subject to post-accident testing must remain readily available, or it is considered a refusal to test. Nothing in this section shall be construed to require the delay of necessary medical treatment or to prohibit a covered employee from leaving the scene of an accident for a period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

D. Reasonable Suspicion Testing

All covered employees shall be subject to a drug and/or alcohol test when the Road Commission has reasonable suspicion to believe that the covered employee has used a prohibited

drug and/or engaged in alcohol misuse. A reasonable suspicion referral for testing will be made by a trained supervisor or other trained Road Commission official on the basis of specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the covered employee.

Covered employees may be subject to reasonable suspicion drug testing any time while on duty. Covered employees may be subject to reasonable suspicion alcohol testing while the employee is performing safety-sensitive functions, just before the employee is to perform safety-sensitive functions, or just after the employee ceased performing such functions.

E. Return to Duty Testing

Any employee who is allowed to return to safety-sensitive duty after failing or refusing to submit to a DOT drug and/or alcohol test must first be evaluated by a substance abuse professional (SAP), complete a SAP-required program of education and/or treatment, **at the employee's expense**, and provide a negative return-to-duty drug test result and/or an alcohol test result of 0.02. Any return-to-duty testing will be directly observed. All tests will be conducted in accordance with 49 CFR Part 40, including the option to use oral fluid testing in place of urine testing for controlled substances, at the Road Commission's discretion, and the requirements of subpart O, as amended.

F. Follow-up Testing

Employees returning to safety-sensitive duty following a return-to-duty test will be required to undergo unannounced follow-up alcohol and/or drug testing, **at the employee's expense,** for a period of one (1) to five (5) years, as directed by the SAP. The duration of testing will be extended to account for any subsequent leaves of absence, as necessary. The type (drug and/or alcohol), number, and frequency of such follow-up testing shall be directed by the SAP.

A covered employee may only be subject to follow-up alcohol testing while the employee is performing safety-sensitive functions, just before the employee is to perform safety-sensitive functions, or just after the employee has ceased performing such functions. A covered employee may be subject to follow-up drug testing anytime while on duty. All follow-up drug tests will be directly observed. All testing will be conducted in accordance with 49 CFR Part 40, including the option to use oral fluid testing in place of urine testing for controlled substances, at the Road Commission's discretion, and the requirements of subpart O, as amended.

4. TESTING PROCEDURES

All testing will be conducted in accordance with 49 CFR Part 40, as amended, including the option to use oral fluid testing in place of urine testing for controlled substances, at the Road Commission's discretion. The Road Commission will strictly adhere to all standards of

confidentiality. Testing records and results will be released only to those authorized by FMCSA regulations to receive such information.

Dilute Urine Specimen

If there is a negative dilute test result, the Road Commission will conduct one additional retest. The result of the second test will be the test of record.

Dilute negative results with a creatinine level greater than or equal to 2 mg/dL but less than or equal to 5 mg/dL require an immediate recollection under direct observation.

Split Specimen Test

In the event of a verified positive test result, or a verified adulterated or substituted result, the employee can request that the split specimen be tested at a second laboratory **at the employee's expense**. The split specimen test will be conducted in a timely fashion.

5. TEST REFUSALS

A covered employee has refused to test if he or she:

- Fails to appear for any test (except a pre-employment test) within a reasonable time, as determined by the Road Commission.
- Fails to remain at the testing site until the testing process is complete. An employee who leaves the testing site before the testing process commences for a pre-employment test has not refused to test.
- Fails to attempt to provide a breath or urine specimen. An employee who does not provide a urine or breath specimen because he or she has left the testing site before the testing process commenced for a pre-employment test has not refused to test.
- In the case of a directly observed or monitored urine drug collection, fails to permit monitoring or observation of the provision of a specimen.
- Fails to provide a sufficient quantity of urine or breath without a valid medical explanation.
- Fails to undergo a medical evaluation as required by the Medical Review Officer (MRO) or the Road Commission's Designated Employer Representative (DER).
- Fails to cooperate with any part of the testing process.
- Fails to follow an observer's instructions to raise and lower clothing and turn around during a directly observed test.
- Possesses or wears a prosthetic or other device used to tamper with the collection process.
- Admit to the adulteration or substitution of a specimen to the collector or MRO.
- Refuses to sign the certification at Step 2 of the Alcohol Testing Form (ATF).
- Fails to remain readily available following an accident.

If the MRO reports that a covered employee has a verified adulterated or substituted test result, the covered employee has refused to take a drug test.

If a covered employee refuses to take a drug and/or alcohol test, he or she incurs the same consequences as testing positive and will be immediately removed from performing safety-sensitive functions and referred to a SAP.

6. CONSEQUENCES FOR VIOLATIONS

Compliance with the Road Commission's DOT Substance Abuse Policy is a condition of employment. An employee failing to submit to drug testing, or otherwise conform to the provisions of the Road Commission's substance abuse policy, may be terminated as an employee of the Road Commission immediately.

Following a positive drug or alcohol (BAC at or above 0.04) test result or test refusal, the employee will be immediately removed from safety-sensitive duty and referred to a SAP, **at the employee's expense**.

Following a BAC of 0.02 or greater, but less than 0.04, the employee will be immediately removed from safety-sensitive duty until the start of the employee's next regularly scheduled duty period, but for not less than 24 hours following administration of the test.

Discipline

In addition to the penalties mandated by the DOT, if an employee tests positive for drugs or alcohol (BAC at or above 0.04), the following are the disciplinary steps that shall be taken:

First Offense

Five (5) day suspension without pay. Upon satisfactory completion of the SAP referral, as determined by the SAP, and before the employee is allowed to return to work, he/she will submit to a return-to-duty test at the employee's expense. The employee must test negative before being allowed to return to work.

Second Offense

Discharge.

7. VOLUNTARY SELF-REFERRAL

Any covered employee who has a drug and/or alcohol abuse problem and has not been notified of the requirement to submit to reasonable suspicion, random or post-accident testing or

has not refused a drug or alcohol test may voluntarily refer him or herself to the Road Commission, who will refer the individual to a substance abuse counselor for evaluation and treatment, **at the employee's expense**.

The substance abuse counselor will evaluate the employee and make a specific recommendation regarding the appropriate treatment. Employees are encouraged to voluntarily seek professional substance abuse assistance before any substance abuse or dependence affects job performance.

Any safety-sensitive employee who admits to a drug and/or alcohol problem will immediately be removed from his/her safety-sensitive function until successful completion of a prescribed rehabilitation program. Prior to participating in a safety-sensitive function, the employee must also undergo a DOT return-to-duty test, **at the employee's expense**, with a verified negative result and/or a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

8. PRESCRIPTION DRUG USE

The appropriate use of legally prescribed drugs and non-prescription medications is not prohibited. However, the use of any substance which carries a warning label that indicates that mental functioning, motor skills, or judgment may be adversely affected must be reported to the Road Commission. Medical advice should be sought, as appropriate, while taking such medication and before performing safety-sensitive duties.

9. EMPLOYEE ASSISTANCE PROGRAM

The Road Commission recognizes that drug and alcohol dependency is a treatable health problem. Information will be provided by the Road Commission to employees concerning the effects of alcohol misuse and controlled substances use on an individual's health, work, and personal life, signs and symptoms of an alcohol problem, and available methods of intervening when an alcohol and/or controlled substance problem is suspected. Employees needing assistance in dealing with such a problem or dependency are encouraged to consult with management to obtain information on the availability of treatment clinics and programs before the condition affects their work performance.

10. CONTACT PERSON

For questions about this policy or the Road Commission's anti-drug and alcohol misuse program, contact [name, position, and telephone number of individual designated to answer questions].

X. DISCRIMINATION

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Discrimination – General Considerations

Title VII of the Civil Rights Act of 1964 is a federal law which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. In general, Title VII applies to employers with 15 or more employees. Title VII must be considered when reviewing applications or resumes, when interviewing candidates, when testing job applicants, and when considering employees for promotions, transfers, or any other employment-related benefit or condition.

The Pregnancy Discrimination Act of 1978 amended Title VII to provide that pregnant women are also protected by the Act and must be treated the same as other employees. The employer's policies for taking leave, health benefits during leaves, and reinstatement after leave applies equally to pregnant women and other employees.

The Age Discrimination in Employment Act of 1967 (ADEA) protects certain applicants and employees 40 years of age and older from discrimination on the basis of age in hiring, promotion, discharge, compensation, or terms, conditions or privileges of employment. Both Title VII and the ADEA are enforced by the Equal Employment Opportunity Commission (EEOC).

The Elliott-Larsen Civil Rights Act (ELCRA) is a Michigan statute that prohibits discrimination on the basis of "religion, race, color, national origin, age, sex, sexual orientation, gender identity or expression, height, weight, or marital status." For purposes of the ELCRA, an employer is anyone who has 1 or more employees, and includes an agent of that person. Under the ELCRA, an employer shall not do any of the following:

(1) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, sexual orientation, gender identity or expression, height, weight, or marital status.
(2) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, sexual orientation, gender identity or expression, height, weight, or marital status.
(3) Segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition, or privilege of employment, including, but not limited to, a benefit plan or system.

(4) Treat an individual affected by pregnancy, childbirth, or a related medical condition differently for any employment-related purpose from another individual who is not so affected but similar in ability or inability to work, without regard to the source of any condition affecting the other individual's ability or inability to work.

A person alleging a violation of the ELCRA may bring a civil action for appropriate injunctive relief or damages, or both. The action would be brought in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business. Damages includes all damages for injury or loss caused by a violation of the statute, as well as reasonable attorney's fees.

For intentional discrimination under Title VII, employees may seek a jury trial, with compensatory and punitive damages up to the maximum limitations established by the Civil Rights Act of 1991 according to the employer's number of employees: 15-100 employees, a maximum of $50,000; for 101-200 employees, a maximum of $100,000; for 201-500 employees, a maximum of $200,000; and for over 500 employees, a maximum of $300,000. Remedies of back pay, reinstatement, and retroactive seniority are available for all types of discrimination, whether intentional or disparate impact.

Disparate impact refers to practices in employment that adversely affect one group of people of a protected characteristic more than another, even though rules applied by employers are facially neutral. A facially neutral employment practice is one that does not appear to be discriminatory on its face; rather it is one that is discriminatory in its application or effect. Where a disparate impact is shown, the plaintiff can prevail without the necessity of showing intentional discrimination unless the employer demonstrates that the employment practice is required by business necessity. An employer using a selection standard with a legally significant disparate impact usually can successfully demonstrate the business necessity of the standard when it has a direct and obvious relationship to successful performance of the job in question. Business necessity is not a defense to an intentional discrimination claim.

For non-compliance under the ADEA, employees may be awarded back pay, reinstatement, retroactive seniority, and attorney's fees. Liquidated damages equal to the amount of back pay may be awarded if the violation is willful.

EMPLOYMENT PRACTICES GUIDELINE

Discrimination – Race/Color Discrimination

It is unlawful to discriminate against any employee or applicant for employment because of race or color in regard to hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment. Title VII and the ELCRA also prohibit employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups.

Title VII and the ELCRA prohibit both intentional discrimination and neutral job policies that disproportionately exclude minorities and that are not job related.

Equal employment opportunity cannot be denied because of marriage to or association with an individual of a different race; membership in or association with ethnic based organizations or groups; attendance or participation in schools or places of worship generally associated with certain minority groups; or other cultural practices or characteristics often linked to race or ethnicity, such as cultural dress or manner of speech, as long as the cultural practice or characteristic does not materially interfere with the ability to perform job duties.

Title VII and the ELCRA also prohibit discrimination on the basis of a condition which predominantly affects one race unless the practice is job-related and consistent with business necessity. For example, since sickle cell anemia predominantly occurs in African-Americans, a policy which excludes individuals with sickle cell anemia is discriminatory unless the policy is job-related and consistent with business necessity.

Even though race and color overlap, they are not synonymous. Thus, color discrimination can occur between persons of different races or ethnicities, or between persons of the same race or ethnicity. Although Title VII does not define color, the courts and the EEOC interpret color to have its commonly understood meaning, “pigmentation, complexion, or skin shade or tone.” Thus, color discrimination occurs when a person is discriminated against based on the lightness, darkness, or other color characteristic of the person. Title VII prohibits race/color discrimination against all persons, including Caucasians.

Although a plaintiff may prove a claim of discrimination through direct or circumstantial evidence, some courts take the position that if a white person relies on circumstantial evidence to establish a reverse discrimination claim, he or she must meet a heightened standard of proof. The EEOC, in contrast, applies the same standard of proof to all race discrimination claims, regardless of the victim’s race or the type of evidence used. In either case, the ultimate burden of persuasion remains always on the plaintiff.

With regard to specific types of employment actions:

- **Recruitment, Hiring, and Advancement**

  Job requirements must be uniformly and consistently applied to persons of all races and colors. Even if a job requirement is applied consistently, if it is not for job performance or business needs, the requirement may be found unlawful if it excludes persons of a certain racial group or color significantly more than others. Examples of potentially unlawful practices include: (1) soliciting applications only from sources in which all or most potential workers are of the same race or color; (2) requiring applicants to have a certain educational background that is not important for job performance or business needs; and (3) testing applicants for knowledge, skills or abilities that are not important for job performance or business needs.

- **Compensation and Other Employment Terms, Conditions, and Privileges**

  Title VII and the ELCRA prohibit discrimination in compensation and other terms, conditions, and privileges of employment. Thus, race or color discrimination may not be the basis for differences in pay or benefits, work assignments, performance evaluations, training, discipline or discharge, or any other area of employment.

- **Segregation and Classification of Employees**

  Title VII and the ELCRA are violated where minority employees are segregated by physically isolating or separating them from other employees. Title VII and the ELCRA also prohibit assigning primarily minorities to predominantly minority establishments or geographic areas. It is also illegal to exclude minorities from certain positions or to group or categorize employees or jobs so that certain jobs are generally held by minorities. Title VII and the ELCRA also do not permit racially motivated decisions driven by business concerns, for example, concerns about the effect on employee relations or the negative reaction of the public. Neither race nor color may ever be a bona fide occupational qualification under Title VII or the ELCRA.

EMPLOYMENT PRACTICES GUIDELINE

Discrimination – National Origin Discrimination

It is unlawful to discriminate against any employee or job applicant because of the individual's national origin. No one can be denied equal employment opportunity because of birthplace, ancestry, culture, or linguistic characteristics closely associated with an ethnic group. Equal employment opportunity cannot be denied because of marriage or association with persons of a national origin group; membership or association with specific ethnic promotion groups; attendance or participation in schools, churches, temples or mosques generally associated with a national origin group; or a surname associated with a national origin group.

Examples of national origin violations covered under Title VII and the ELCRA include:

Employment Decisions

Title VII and the ELCRA prohibit employment decisions, including those involving recruitment, hiring, promotion, segregation, and firing or layoffs, that have the purpose or effect of discriminating on the basis of national origin.

Language

- **Accent Discrimination**

  An employer may not base a decision on an employee's foreign accent unless effective spoken communication in English is required to perform job duties and the individual's accent materially interferes with his/her ability to communicate in English.

- **Fluency Requirements**

  An English (or foreign language) fluency requirement is only permissible if it is required for the effective performance of the position for which it is imposed.

- **English-only Rules**

  English-only rules must be adopted for nondiscriminatory reasons. An English-only rule may be used if it is needed to promote safe and efficient job performance or safe and efficient business operations. Employers must provide adequate notice of English-only rules.

Citizenship Issues

- **U.S. Citizenship Requirements**

  Title VII and the ELCRA do not prohibit citizenship discrimination. Title VII and the ELCRA are violated, however, whenever citizenship discrimination has the purpose or effect of discriminating on the basis of national origin. The anti-discrimination provision of the Immigration and Employee Rights Section of the U.S. Department of Justice, prohibits employers with four or more employees from discriminating because of citizenship status against U.S. citizens and certain classes of foreign nationals authorized to work in the United States with respect to hiring, firing, and recruitment or referral for a fee.

- **Coverage of Foreign Nationals**

  Title VII and other antidiscrimination laws prohibit discrimination against individuals employed in the United States, regardless of immigration status or authorization to work.

EMPLOYMENT PRACTICES GUIDELINE

Discrimination – Religious Discrimination

Title VII and the ELCRA prohibit employers from discriminating against individuals because of their religion (or lack of religious belief) in hiring, firing, or any other terms and conditions of employment. The law also prohibits job segregation based on religion, such as assigning an employee to a geographic area because of actual or feared co-worker or public preference.

In addition, these statutes require employers to reasonably accommodate the sincerely held religious beliefs and practices of applicants and employees, unless doing so would cause more than a minimal burden on the operation of the employer's business. The United States Supreme Court has held, in the case of *Groff* v *DeJoy*, 600 US 447 (2023), that Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. A reasonable religious accommodation is any adjustment to the work environment that will allow the employee to practice his or her religion. Flexible scheduling, voluntary shift substitutions or swaps, job reassignments, lateral transfers, and exceptions to dress or grooming rules are examples of accommodating an employee's religious beliefs.

Whether a particular accommodation would pose an undue hardship on the employer's business depends on the individual circumstances. For example, an accommodation may cause undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work. Undue hardship also may be shown if the request for an accommodation violates others' job rights established through a collective bargaining agreement or seniority system.

Religious accommodation must be reviewed on a case-by-case basis. The EEOC has stated that employers should not feel the need to determine whether an employee holds a religious belief for the "proper" reasons. The EEOC has determined that religious practices may be sincerely held by an individual even if:

- It is a newly adopted faith or belief.
- It is not consistently observed.
- It is different from the commonly followed tenets of the individual's religion.
- The employee follows some common practices in the faith tradition but not others.

Title VII explicitly forbids employers from coercing employees to participate in religious activities.

EMPLOYMENT PRACTICES GUIDELINE

Discrimination – Sex Discrimination

Sex discrimination involves treating someone (an applicant or employee) unfavorably because of that person's sex, including the person's sexual orientation, gender identity, or pregnancy. The law forbids sex discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment. An employment policy or practice that applies to everyone, regardless of sex, can be illegal if it has a negative impact on the employment of people of a certain sex and is not job-related or necessary to the operation of the business.

Discrimination against an individual because of gender identity, including transgender status, or because of sexual orientation is discrimination because of sex in violation of Title VII and the ELCRA. In *Bostock* v *Clayton County, Georgia*, 140 S Ct 1731 (2020), the United States Supreme Court held that firing individuals because of their sexual orientation or transgender status violates Title VII's prohibition on discrimination because of sex. Similarly, in *Rouch World, LLC* v *Michigan Dep't of Civil Rights*, ____ Mich ____ (2022), the Michigan Supreme Court held that, under the ELCRA, sexual orientation discrimination is discrimination "because of sex" and is therefore prohibited. Recent amendments to the ELCRA specifically prohibit discrimination on the basis of gender identity or expression, defined as "having or being perceived as having a gender-related self-identity or expression whether or not associated with an individual's assigned sex at birth," and sexual orientation, defined as "having an orientation for heterosexuality, homosexuality, or bisexuality or having a history of such an orientation or being identified with such an orientation."

Although accidental misuse of a transgender employee's preferred name and pronouns do not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment. Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute gender discrimination.

Courts have long recognized that employers may have separate bathrooms, locker rooms, and showers for men and women, or may choose to have unisex or single-use bathrooms, locker rooms, and showers. The EEOC has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity. In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.

EMPLOYMENT PRACTICES GUIDELINE

Discrimination – Pregnancy Discrimination

The Pregnancy Discrimination Act is an amendment to Title VII of the Civil Rights Act of 1964. Discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII. Women affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees who are similar in their ability or inability to work.

An employer cannot refuse to hire a woman because of her pregnancy-related condition as long as she is able to perform the essential functions of her job. An employer cannot refuse to hire her because of the prejudices of co-workers. The Pregnancy Discrimination Act also forbids discrimination based on pregnancy when it comes to any other aspect of employment, including pay, job assignments, promotions, layoffs, training, fringe benefits, firing, and any other term or condition of employment.

An employer may not single out pregnancy-related conditions for medical clearance procedures that are not required of employees who are similar in their ability or inability to work. However, if an employer requires its employees to submit a doctor's statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to do the same.

Pregnant employees must be permitted to work as long as they are able to perform their jobs. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, her employer may not require her to remain on leave until after giving birth. Nor may an employer have a rule that prohibits an employee from returning to work for a predetermined length of time after childbirth.

If an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee, for example, by providing light duty, modified tasks, alternative assignments, disability leave, or leave without pay. Under the Pregnancy Discrimination Act, an employer that allows temporarily disabled employees to take disability leave or leave without pay must allow an employee who is temporarily disabled due to pregnancy to do the same. Employers must hold open a job for a pregnancy-related absence the same length of time that jobs are held open for employees on sick or temporary disability leave.

Any health insurance provided by an employer must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions. Pregnancy-related expenses should be reimbursed in the same manner as those incurred for other medical conditions. The amounts payable by the insurance provider can be limited only to the same extent as costs for other conditions. No additional or larger deductible can be imposed. Employers must provide the same level of health benefits for spouses of male employees as they do for spouses of female employees.

If an employer provides any benefits to workers on medical leave, the employer must provide the same benefits for those on medical leave for pregnancy-related conditions. Employees with pregnancy-related disabilities must be treated the same as other temporarily disabled employees for accrual and crediting of seniority, vacation calculation, pay increases, and temporary disability benefits.

EMPLOYMENT PRACTICES GUIDELINE

Discrimination – Equal Pay Act

The Equal Pay Act requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal. It is job content, not job titles, that determines whether jobs are substantially equal. Specifically, the Equal Pay Act provides that employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort, and responsibility, and that are performed under similar working conditions within the same establishment. Each of these factors is summarized below:

- **Skill**

  Measured by factors such as the experience, ability, education, and training required to perform the job. The issue is what skills are required for the job, not what skills the individual employees may have. For example, two bookkeeping jobs could be considered equal under the Equal Pay Act even if one of the job holders has a master's degree in physics, since that degree would not be required for the job.

- **Effort**

  The amount of physical or mental exertion needed to perform the job. For example, on an assembly line, if a person at the end of the line has to lift the assembled product off the line as he or she completes the work and the extra effort of lifting the assembled product off the line is substantial and is a regular part of the job, that job requires more effort than the other assembly line jobs. In that case, it would not be a violation to pay that person more, regardless of whether the job is held by a man or a woman.

- **Responsibility**

  The degree of accountability required in performing the job. For example, a salesperson who is delegated the duty of determining whether to accept customers' personal checks has more responsibility than other salespeople. On the other hand, a minor difference in responsibility, such as turning out the lights at the end of the day, would not justify a pay differential.

- **Working Conditions**

  This encompasses two factors: (1) physical surroundings like temperature, fumes, and ventilation; and (2) hazards.

Pay differentials are permitted when they are based on seniority, merit, quantity or qualify of production, or a factor other than sex. It is the employer's burden to prove that such factors apply.

EMPLOYMENT PRACTICES GUIDELINE

Discrimination – Age Discrimination

The Age Discrimination in Employment Act of 1967 (ADEA) protects applicants and employees who are 40 years of age or older from employment discrimination based on age. The ELCRA also prohibits discrimination on the basis of age. However, unlike the ADEA, the ELCRA does not specify an age limit for discrimination. Accordingly, employers may be subject to claims of age discrimination under the ELCRA in instances where they would not be guilty under federal law.

Under the ADEA and the ELCRA, it is unlawful to discriminate against a person because of his or her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training. ADEA protections also include:

- **Advertisements and Job Notices**

  The ADEA generally makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements. A job notice or advertisement may specify an age limit only in the rare circumstances where age is shown to be a "bona fide occupational qualification" (BFOQ) reasonably necessary to the normal operation of the business.

- **Apprenticeship Programs**

  It is generally unlawful for apprenticeship programs, including joint labor-management apprenticeship programs, to discriminate on the basis of an individual's age. Age limitations in apprenticeship programs are valid only if they fall within certain specific exceptions under the ADEA or if the EEOC grants a specific exemption.

- **Pre-Employment Inquiries**

  The ADEA does not explicitly prohibit an employer from asking an applicant's age or date of birth. However, such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, contrary to the purposes of the ADEA. If the information is needed for a lawful purpose, it can be obtained after the employee is hired.

- **Benefits**

  The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the ADEA to specifically prohibit employers from denying benefits to older employees.

Employers are permitted to coordinate retiree health benefit plans with eligibility for Medicare.

- **Waivers of ADEA Claims or Rights**

  The ADEA sets specific requirements that permit waivers of claims or rights in certain circumstances. Waivers are common in settling discrimination claims or in connection with exit incentive or other employment termination programs. To be valid, the waiver must meet minimum standards to be considered knowing and voluntary. Among other requirements, a valid ADEA waiver must:

  - Be in writing and be understandable;
  - Specifically refer to ADEA rights or claims;
  - Not waive rights or claims that may arise in the future;
  - Be in exchange for valuable consideration in addition to anything of value to which the individual already is entitled;
  - Advise the individual in writing to consult an attorney before signing the waiver; and
  - Provide the individual with at least 21 days to consider the agreement before signing.

EMPLOYMENT PRACTICES GUIDELINE

Discrimination – Genetic Information Nondiscrimination Act (GINA)

Title II of the Genetic Information Nondiscrimination Act (GINA) protects individuals against employment discrimination on the basis of genetic information. GINA covers employers with 15 or more employees, including state and local governments.

Genetic information means:

- Information about an individual's genetic tests;
- Information about the genetic test of a family member;
- Family medical history;
- Requests for and receipt of genetic services by an individual or a family member; and,
- Genetic information about a fetus carried by an individual or family member or of an embryo legally held by an individual or family member using assisted reproductive technology.

GINA prohibits the use of genetic information in making employment decisions, such as hiring, firing, advancement, compensation, and other terms, conditions, and privileges of employment. For example, it would be illegal for an employer to reassign an employee from a job it believes is too stressful after learning of his family medical history of heart disease. There are no exceptions to the prohibition on using genetic information to make employment decisions.

GINA also prohibits employers from requesting, requiring, or purchasing genetic information about applicants or employees. For example, it is illegal for an employer to require an applicant or employee to answer questions about family medical history during an employment-related medical exam, such as a pre-employment exam or a fitness for duty exam during employment.

It is not unlawful for an employer to have genetic information where the information is acquired inadvertently or in the form of family medical history to comply with the certification requirements of the Family and Medical Leave Act (FMLA), state or local leave laws, or certain employer leave policies. However, any such information obtained by an employer must be kept confidential and, if the information is in writing, apart from other personnel information in separate medical files. There are six limited circumstances under which an employer may disclose genetic information:

- To the employee or family member about whom the information pertains upon receipt of the employee's or family member's written request;
- To an occupational or other health researcher conducting research in compliance with certain federal regulations;

- In response to a court order, except that the employer may disclose only the genetic information expressly authorized by the order;
- To government officials investigating compliance with Title II of GINA, if the information is relevant to the investigation;
- In accordance with the certification process for FMLA leave or state family and medical leave laws; or
- To a public health agency only with regard to information about the manifestation of a disease or disorder that concerns a contagious disease that presents an imminent hazard of death or life-threatening illness.

EMPLOYMENT PRACTICES GUIDELINE

Discrimination – Required Workplace Posters

The following is a list of posters that are required to be displayed in the workplace. These posters can be obtained through the State of Michigan or from the U.S. Department of Labor (DOL) as follows:

Annual Summary of Injuries and Illnesses Form 300A

https://www.michigan.gov/-/media/Project/Websites/leo/Documents/MIOSHA3/CIS_WSH_form300A.pdf?rev=7606b6dce639440484bf0d4d4baeff08

Each February through April, Michigan employers must post a summary of job-related injuries and illnesses that occurred the previous year. If requested, copies of the records must be provided to current and former employees, or their representatives.

Michigan Employment Security Act Notice to Employees

https://www.michigan.gov/-/media/Project/Websites/leo/Documents/UIA/Employer-Forms/UIA-1710-Notice-to-All-Employees-Poster.pdf?rev=64350b409902441fad42d6f043deb684

This poster informs employees that unemployment benefits are payable to eligible workers through UIA.

Michigan Law Prohibits Discrimination

https://www.michigan.gov/-/media/Project/Websites/mdcr/posters/discrimination/english.pdf?rev=43ff001cede743dc93aad18d5e6ddc78

Michigan Safety and Health Protection on the Job

https://www.michigan.gov/leo/-/media/Project/Websites/leo/Documents/MIOSHA/Publications/Workplace-Posters/CET-2010-English-8-x-11--09-20.pdf?rev=fed3cdb0364242a6a1f6e67ca7491ba3&hash=6C39E71C9DD0E8148C221853B93E12E0

Employers must make this poster available for employees in a central and conspicuous location.

Michigan Right to Know Law

https://www.michigan.gov/leo/-/media/Project/Websites/leo/Documents/MIOSHA/Publications/Workplace-Posters/CET-2105_RTK-Poster.pdf?rev=3ff284c2bb2048c687f80f40ce89c6b8&hash=AD347DABBDC43259BF4682400B1A936

https://www.michigan.gov/leo/-/media/Project/Websites/leo/Documents/MIOSHA/Publications/Workplace-Posters/CET-2106_SDS-Poster.pdf?rev=d0b6f956c88043b2856c6f09c592ba7a&hash=E96838C8781E5B5C69A31F383839F1

These posters are required for any employer that has hazardous chemicals in its workplace. The first poster (CET-2105) is designed to serve as a reminder to workers of their rights under the Michigan Right to Know Law and to provide information on how to locate SDSes and the Right to Know program for the worksite. The second poster (CET-2106) informs workers of any changes recently made to one or more SDSes. Whenever and employer receives or creates an updated SDS, it must provide the necessary information on the poster within five days of receipt and display it in a prominent manner for a minimum of ten days.

Michigan Whistleblowers Protection Act 469 of 1980

https://www.michigan.gov/leo/-/media/Project/Websites/leo/Documents/MIOSHA31/wsh_whistleblowers.pdf?rev=e193981ba58a476f97e34f20019acdf2&hash=88B04C57AA898F2254A14DB2D1ED819A

MCL 15.368 states that posting notice of protections and obligations are required as follows: “An employer shall post notices and use other appropriate means to keep his or her employees informed of their protections and obligations under the Act.”

Michigan Paid Medical Leave Act

https://www.michigan.gov/leo/-/media/Project/Websites/leo/Documents/WAGE-HOUR/WHD-99xx-Information-Sheets/WHD-9911-PMLA-Poster/Paid_Medical_Leave_Act_Poster_9911_English.pdf?rev=764ee47c1ed442bd9ac1d904eb042ea7&hash=31AC205C4341736BEF941A0FCF09DF51

Covered employers (i.e., those with 50 or more employees) are required to display a poster created by the Department of Labor and Economic Opportunity in a conspicuous place that is accessible to eligible employees.

Youth Employment

https://www.michigan.gov/leo/-/media/Project/Websites/leo/Documents/WAGE-HOUR/WHD-99xx-Information-Sheets/WHD-9919-YESA-posting/whd_9919_yesa_Posting_Requirements.pdf?rev=b3839e54d09642afa30161243120c6d5&hash=E13A6319D90133633087A2469A00D341

Michigan employers are required to post this notice if employing minors (under 18 years of age).

Michigan Minimum Wage

https://www.michigan.gov/leo/-/media/Project/Websites/leo/Documents/WAGE-HOUR/WHD-99xx-Information-Sheets/WHD-9904-MW-optional-posting/WHD-9904-Minimum_Wage_Poster.pdf?rev=1e820b8507ec46f3bb53fb751822a437&hash=91CFA286EA0400C5A873B2F0DCB83CEF

This poster is required by law to be posted in the workplace if federal minimum wage provisions would result in a lower minimum wage than provided in the Michigan Improved Workforce Opportunity Wage Act.

Federal Minimum Wage

https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh1385State.pdf

Every employer of employees subject to the Fair Labor Standards Act's minimum wage provisions must post, and keep posted, a notice explaining the Act in a conspicuous place in all of their establishments so as to permit employees to readily read it.

Family and Medical Leave Act

https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fmlaen.pdf

All covered employers are required to display and keep displayed a poster prepared by the U.S. Department of Labor summarizing the major provisions of the Family and Medical Leave Act (FMLA) and telling employees how to file a complaint. The poster must be displayed in a conspicuous place where employees and applicants for employment can see it.

Equal Employment Opportunity

https://www.dol.gov/sites/dolgov/files/OFCCP/regs/compliance/posters/pdf/22-088_EEOC_KnowYourRights.pdf

Every employer covered by the nondiscrimination and EEO laws is required to post on its premises the posted, "Know Your Rights." The notice must be posted prominently, where it can be readily seen by employees and applicants for employment.

Your Rights Under USERRA

https://www.dol.gov/sites/dolgov/files/VETS/files/USERRA-Poster.pdf

Employers are required to provide to persons entitled to the rights and benefits under the Uniformed Services Employment and Reemployment Rights Act (USERRA), a notice of the rights, benefits and obligations of such persons and such employers under USERRA. Employers may provide the notice by posting it where employee notices are customarily placed.

EMPLOYMENT PRACTICES GUIDELINE

Discrimination – Administrative Charges and Recordkeeping Requirements

A charge of discrimination is a signed statement asserting that an employer engaged in employment discrimination. It requests the Equal Employment Opportunity Commission (EEOC) or the Michigan Department of Civil Rights (MDCR) to take remedial action. The laws enforced by EEOC, except for the Equal Pay Act, require an employee to file a charge before he or she can file a federal lawsuit for unlawful discrimination. No administrative agency charge is required before bringing a state lawsuit for unlawful discrimination, although one may be filed with the MDCR.

When an EEOC or MDCR charge has been filed against an employer, the employer must retain personnel or employment records relating to the issues under investigation as a result of the charge, including those related to the charging party or other persons alleged to be aggrieved and to all other employees holding or seeking positions similar to that held or sought by the affected individual(s). These records must be kept until the final disposition of the charge, or any lawsuit based on the charge. When a charge is not resolved after investigation, and the charging party has received a notice of right to sue, "final disposition" means the date of expiration of the 90-day statutory period within which the aggrieved person may bring suit or, where suit is brought by the charging party, the EEOC, or the MDCR, the date on which the litigation is terminated, including any appeals.

EQUAL EMPLOYMENT OPPORTUNITY POLICY

In order to provide equal employment and advancement opportunities to all individuals, employment decisions at the _____ County Road Commission will be based on merit, qualifications, and abilities. This policy governs all aspects of employment, including selection, job assignment, compensation, discipline, termination, and access to benefits and training. Except where required or permitted by law, employment practices will not be influenced or affected by an applicant's or employee's religion, race, color, national origin, age, sex (including gender identity, sexual orientation, and pregnancy), height, weight, marital status, genetic information, or disability.

The Road Commission will make reasonable accommodations for qualified individuals with known disabilities unless doing so would result in an undue hardship. **Any employee who believes he/she needs a reasonable accommodation must submit a written request for that accommodation to the Road Commission within 182 days after the date the employee knew or reasonably should have known that an accommodation was needed.** Failure to do so will prevent the employee from alleging that the Road Commission failed to accommodate him/her in violation of the Michigan Persons with Disabilities Civil Rights Act.

Any employees with questions or concerns about any type of discrimination in the workplace are encouraged to bring these issues to the attention of the Managing Director. Employees can raise concerns and make reports without fear of reprisal. Anyone found to be engaging in any type of unlawful discrimination will be subject to disciplinary action, up to and including termination of employment.

XI. HARASSMENT

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Harassment – General Considerations

Both Michigan's Elliott-Larsen Civil Rights Act (ELCRA) and federal Title VII of the Civil Rights Act of 1964 (Title VII) recognize workplace harassment as a form of employment discrimination. Other statutory sources for harassment claims include the Age Discrimination in Employment Act of 1967 (ADEA), the Michigan Persons with Disabilities Civil Rights Act (PWDCRA), and its federal counterpart, the Americans with Disabilities Act of 1990 (ADA).

Harassment is unwelcome conduct that is based on race, color, religion, sex (including sexual orientation, gender identity, or pregnancy), national origin, age, height, weight, marital status, disability, or genetic information. Harassment becomes unlawful where (1) enduring the offensive conduct becomes a condition of continued employment, or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.

Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Harassment can occur in a variety of circumstances, including, but not limited to, the following:

- The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.
- The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.
- Unlawful harassment may occur without economic injury to, or discharge of, the victim.

Prevention is the best tool to eliminate harassment in the workplace. Employers are encouraged to take appropriate steps to prevent and correct unlawful harassment. They should clearly communicate to employees that unwelcome harassing conduct will not be tolerated. They 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. Employers should strive to create an environment in which employees feel free to raise concerns and are confident that those concerns will be addressed.

Employees should be encouraged to inform the alleged harasser directly that the conduct is unwelcome and must stop. Employees should also report harassment to management at an early stage to prevent its escalation.

EMPLOYMENT PRACTICES GUIDELINE

Harassment – Sex-Based Harassment

It is unlawful to harass a person because of that person's sex, including the person's sexual orientation, gender identity, or pregnancy. Harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when the conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment. Harassment does not have to be of a sexual nature, however. It can include offensive remarks about a person's sex, including the person's sexual orientation, gender identity, or pregnancy. For example, it can be unlawful to harass a woman by making offensive comments about women in general.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

Although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

While the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is unlawful when it is so frequent or severe that it creates a hostile work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

EMPLOYMENT PRACTICES GUIDELINE

Harassment – Employer Liability for Harassment

In *Burlington Industries, Inc.* v *Ellerth*, 118 S Ct 2257 (1998), and *Faragher* v *City of Boca Raton*, 118 S Ct 2275 (1998), the United States Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles: (1) an employer is responsible for the acts of its supervisors, and (2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment. In order to accommodate these principles, the Supreme Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action, such as termination, failure to promote or hire, and loss of wages. If it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

- The employer exercised reasonable care to prevent and correct promptly any harassing behavior, and

- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

While the *Ellerth* and *Faragher* decisions addressed sexual harassment, courts have taken the position that the same basic standards apply to cases involving harassment on other protected bases.

The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action. According to Michigan law, in order to impute knowledge to an employer regarding conditions in the workplace, the employee must notify someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining employees. Alternatively, the employee must demonstrate that the employer knew of harassment in the workplace by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge.

In order to avoid liability for harassment, employers must have in place a harassment policy which prohibits unlawful harassment, sexual and otherwise. They must distribute the policy to all employees and have them provide a written acknowledgment of receiving same. Employers may also wish to consider posting the policy on employer bulletin boards, but only in addition to making sure each employee individually receives a copy of the policy.

All supervisors and management personnel must be trained concerning the policy. Any supervisor who observes or has reported to them instances of unlawful harassment must report such activity to the Managing Director as soon as possible so that corrective measures may be taken.

Higher management must then take immediate action to prevent similar occurrences. The Managing Director and/or his/her designee should:

- Obtain a signed and dated statement from the victim.
- Conduct a thorough investigation of the incident.
- Counsel the harasser regarding possible discipline.
- Counsel the victim in a supportive manner.

EMPLOYMENT PRACTICES GUIDELINE

Harassment – Harassment Investigations

An effective investigation is essential to minimize an employer's potential liability and assist in preparing a defense to a potential lawsuit. The following outline is a checklist of key points to consider and remember during the course of investigating complaints.

I. FACTS TO BE SOUGHT

A. Identity of alleged harasser(s).
B. When and where incident(s) occurred.
C. Context of each incident; what had the individuals been doing and talking about
D. For each incident, precisely what was said and done by each participant…as if describing a scene in a movie.
E. Whether the incident was isolated or part of a pattern of conduct.
F. The actions, at the time and afterwards, of the complainant to the harasser(s).
G. Effect the incident had on the complainant then and afterwards.
H. Witnesses to each incident.
I. Whether the complainant has talked to anyone about the incident at any time; who, when, what was said.
J. Whether any documentation of the incident occurred—calendar, diary, or other notes.
K. Whether the complainant is aware of other recipients of unwanted harassment.

II. INTERVIEWING WITNESSES

A. Objective is to determine the critical facts and to be able to make credibility determinations.
B. Tell witnesses:
    1. Truthful cooperation and completeness are required of witnesses.
    2. Confidentiality: limited to persons with legitimate need to know. Do not promise absolute confidentiality. Advise the alleged harasser that sometimes witnesses must know his/her identity in order to respond.
    3. Conclusions and debriefing occur at the end of the investigation (to both the complainant and the accused).
    4. Assure against retaliatory actions.
    5. Describe the purpose and process of the investigation.

III. INTERVIEWING THE COMPLAINANT

A. Preferable for complainant's statement to be committed to writing and confirmed by complainant.
B. Establish reporting relationship between the alleged harasser and the complainant.
C. Be detail-oriented in obtaining facts. Do not accept conclusionary words like "it was harassment"; rather, learn what occurred.
D. Get nuances of conversations, nature and frequency of conduct, context in which events occurred.
E. Ask about harasser's conduct towards males and females.
F. Ask consequences (work or other) of alleged conduct to complainant.
G. Ask what his/her conduct has been towards the alleged harasser. (Did the complainant provide gifts, cards, make personal phone calls, or other personal overtures?).
H. Cover whether and how the complainant communicated that the conduct was unwelcome and what was the alleged harasser's response.
I. Be prepared for questions about what the next steps of the investigation are.
J. Be prepared for inquiries about immediate judgments concerning the validity of his/her claim. Explain that conclusions are premature until the investigation is complete.
K. If the complainant becomes uncooperative and withholds names, details, or refuses to cooperate, make a record; consider a memo to complainant verifying the assurances given to him/her, the refusal to cooperate, emphasis on the employer's desire for and need of cooperation and encouragement to come forward.

IV. INTERVIEWING THE ALLEGED HARASSER

A. Usually interview promptly. Sometimes may be strategic reason to obtain background information first from third-party witnesses.
B. Cover same introductory items and same factual inquiries as with complainant.
C. If alleged harasser contends complainant had reason to lie, misrepresent, or conceal, or has questionable motives, ask for factual basis.
D. If alleged harasser claims conduct was welcome, ask for detailed supporting facts (e.g., conduct engaged in by complainant, dates, witnesses, content, etc.).
E. Permit alleged harasser to respond to each of the specific allegations made.
F. Anticipate "concealment" by alleged harasser due to embarrassment and privacy concerns.
G. If the harasser is a union employee, inform alleged harasser of Weingarten rights as appropriate.

V. ADDITIONAL INTERVIEWS

A. Interview third-party witnesses identified by either harasser or complainant unless information becomes so clear that additional interviews are redundant.
B. The basis of the third party's knowledge needs to be identified. What specifically did this witness see or hear, or is this witness useful for identifying other first-hand witnesses?
C. Provide same introductory instructions concerning confidentiality, complete and truthful responses, and no retaliation.
D. May need to be told reason he or she has been selected for an interview and assured that there will be no repercussions because of participation.
E. Re-interview any witness, including alleged harasser or complainant, where new information prompts need for clarification or a chance to respond.

VI. RECORDKEEPING

A. Records are very useful in reviewing progress, making ongoing assessments of information, and identifying open issues.
B. Record of a well-conducted investigation helps establish prompt and remedial action. Incomplete, inaccurate, biased, or naïve notes can establish inadequacy of investigation and judgment.
C. Absence of a record significantly compromises ability to recall important details far in the future when testimony must be given.
D. A written record that establishes why the employer drew its factual conclusions and the reasons for the remedy to complainant and discipline to harasser can be useful in defense of subsequent lawsuit.
E. Determination should be made about whether to attempt to cloak the "record" in attorney-client and/or work product privileges.
F. Attorney guidance throughout may be helpful.
G. Records should be kept out of the personnel files and preferably in the office of legal counsel. Records of discipline and memos to the specific parties involved in the outcome are retained in the personnel file.

VII. CONCLUDING THE INVESTIGATION

A. Drawing conclusions:

    1. Evaluate credibility: what each witness said; reputation and reasons; motives for truth; objective information that influences credibility.
    2. Where no conclusion can be drawn; advise parties in a neutral manner.
        a. In all cases, stress protection from retaliation to both complainant and harasser. Protect against retaliation by others in work group.
        b. Stress importance of reporting all future claims of harassment.

c. Advise alleged harasser that compliance with the employer's policy against harassment and retaliation is essential although in this case no violation has been substantiated. Go over the harassment policy with the individual.

B. Determine who to tell of the outcome:

1. Complainant.
2. Alleged harasser.
3. Depending on the circumstances-to be very carefully evaluated-some witnesses or work group.
4. Balance avoidance of defamation with the importance of deterring inappropriate future conduct and creating confidence in employer investigation and corrective action.

VIII. WHERE HARASSMENT HAS OCCURRED

A. Appropriate remedial action on behalf of the complainant must be considered: correcting erroneous personnel documents (like performance reviews); reinstating lost wages or benefits arising out of stress-related absences due to the harassment; reinstating a lost job opportunity; psychiatric therapy.
B. Where harassment is found, immediate sanction to the harasser is necessary.
C. Complainant should be advised that action was taken which the employer believes should prevent future incidents. Complainant also should be advised to inform the employer immediately of any reoccurrence of harassment by anyone.
D. Factors to consider in determining level of discipline:
   1. Severity of conduct.
   2. Frequency of conduct.
   3. Harasser's prior notice of employer's harassment policy.
   4. Harasser's employment record.
   5. Collective bargaining agreement considerations, if any.
   6. Employer's past practice about level of discipline for similar violations.
   7. Effectiveness of prior remedial steps with this harasser.
   8. Level of contrition and openness in changing behavior.
   9. Compliance with employer's policies concerning progressive discipline or employer's written agreement.
E. Discipline must be calculated to deter future harassment.
   1. Comments such as "times have changed," "avoid the individual," or "we don't want any future problems" are too unspecific to educate the harasser about what was unacceptable.
   2. If prior discipline was not successful, employer must impose harsher sanctions to insure effectiveness.
   3. One goal should be bona fide effective education. Do not expect change in conduct if the harasser does not "get it."

F. The danger of an oral warning without some memorialization is proving that it occurred and the recipient not taking it seriously. Management should balance these concerns against being too heavy-handed for a minor incident. Even a record of an oral warning should include where it occurred, when, and who was present.
G. In all cases, harasser should be reminded of and provided a copy of employer's harassment policy, its content individually reviewed, and the individual advised of the potential consequences of further violations. Make a record.
H. Written warnings, suspension, demotion, or denial of a prospective promotion or pay increase are all additional forms of discipline. However, a demotion which continues the working relationship between harasser and complainant must be closely monitored.
I. Beware of transfers, reassignments, shift changes and restructuring of the workplace which adversely affect the complainant. All may be retaliatory. Ask complainant what would be helpful in making the work environment more comfortable.
J. Consider one-to-one training by an outside consultant of the harasser and/or group training on harassment.
K. Evaluate whether the intended discipline of the harasser is consistent with written contract, collective bargaining agreement and treatment of other people for similarly serious infractions.
L. Always follow-up with both parties and make a record of doing so.

ANTI-HARASSMENT POLICY

The _____ County Road Commission is committed to providing a work environment that maintains employee equality, dignity and respect. In keeping with this policy, the _____ County Road Commission strictly prohibits discriminatory practices, including harassment, sexual or otherwise. Any unlawful harassment, whether verbal, physical, or environmental, is unacceptable and will not be tolerated. It is the responsibility of all employees of the Road Commission to nurture and maintain work environments in which employees, citizens, labor representatives, and vendors are valued, welcomed, and treated with respect.

Harassment of or discrimination against Road Commission employees based on race, color, religion, national origin, age, sex (including gender identity, sexual orientation, and pregnancy), height, weight, marital status, genetic information, or disability is prohibited. The _____ County Road Commission resolves to provide:

- A workplace free from discrimination based on an individual's race, color, religion, national origin, age, sex (including gender identity, sexual orientation, and pregnancy), height, weight, marital status, genetic information, or disability, and the provision of public services on the same basis.

- A workplace free from harassment and hostility due to race, color, religion, national origin, age, sex (including gender identity, sexual orientation, and pregnancy), height, weight, marital status, genetic information, or disability.

- Equal employment opportunities in all phases of employment through recruitment, retention, and advancement of diverse qualified people, and utilization of job-related criteria in making employment decisions.

Sexual harassment is illegal under federal and state laws. It is defined by the Equal Employment Opportunity Commission as any unwelcome sexual advance, request for sexual favors, or other verbal or physical conduct of a sexual nature when:

a. Submission to the conduct is made either explicitly or implicitly a term or condition of an individual's employment;

b. Submission or rejection of such conduct by an individual is used as the basis for employment decisions affecting the individual; or,

c. The conduct has the purpose or effect of substantially interfering with the individual's performance or of creating an intimidating, hostile or offensive working environment.

Harassment on the basis of religion, race, color, national origin, age, sex (including gender identity, sexual orientation, and pregnancy), height, weight, marital status, genetic information, or disability is illegal under federal and/or state laws. Such harassment is defined as unwelcome conduct or communication on the basis of a protected category when the conduct or communication has the purpose or effect of substantially interfering with an employee's work performance or of creating an intimidating, hostile or offensive working environment.

Violations of this policy shall subject the offending employee to disciplinary measures, up to and including discharge.

_____ County Road Commission management is responsible for addressing all reports of discrimination, including racial and gender harassment. Any employee who has a complaint must bring the problem to the attention of responsible Road Commission officials. Employees may bring their complaint to the Managing Director. If the complaint is about the Managing Director, the employee shall register his/her complaint with the Road Commission Board Chair. The Road Commission shall designate appropriate personnel to investigate the complaint.

The success of this policy will be dependent upon communications between an employee, his or her co-employees and those charged with enforcing the policy. The Road Commission cannot respond or react to harassment conditions that are unknown to it and/or cannot be documented. Therefore, a significant responsibility will be incumbent upon the employee who believes he or she has been harassed by another employee(s) to advise the offending employee and put him/her on notice of the offending behavior and that such activity must stop. Further, any employee who believes he or she has been harassed in violation of this policy should promptly report such harassment to Road Commission management for investigation.

Management is responsible to objectively investigate reports of any harassment by or between employees of the Road Commission. All harassment complaints should be reduced to writing and include all appropriate information in order to facilitate investigation of the complaint. Specifically, the complaint should contain:

- ✓ The name and address of the person filing;
- ✓ The full name and address (if known) of the person against whom the complaint is being made; and,
- ✓ A short summary of the allegedly harassing action or conduct.

The recipient of the complaint and/or appropriate designee shall conduct an independent investigation and evaluation of the validity of the complaint. Investigations and evaluations shall be completed in a timely fashion. Anonymous complaints will not be pursued. Complaints will be resolved in the best interests of both the complainant and the Road Commission.

The Road Commission will take appropriate corrective action, including disciplinary measures, to remedy all violations of this policy. There will be no discrimination or retaliation against any employee because the employee has filed a complaint, testified, assisted, or participated in an investigation under this policy. If both a harassment complaint and a union grievance are filed by an employee concerning the same alleged discriminatory conduct, the grievance procedure contained in the Collective Bargaining Agreement will be utilized to resolve that complaint. This policy does not preclude any employee from filing a complaint with an appropriate outside agency.

XII. DISABILITY DISCRIMINATION

EMPLOYMENT PRACTICES GUIDELINE

Disability Discrimination – General Considerations

The Americans with Disabilities Act of 1990 (ADA) protects a "qualified individual with a disability" in all aspects of employment. Similarly, the Michigan Persons with Disabilities Civil Rights Act (PWDCRA) provides that an employer may not discharge or otherwise discriminate against an individual because of a disability that is unrelated to the individual's ability to perform the duties of a particular job or position. Although some differences exist between the two statutes, both acts are conceptually very similar.

The ADA makes it illegal for an employer to discriminate against a qualified individual with a disability. The term qualified individual with a disability means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Under the ADA, disability is defined in one of three ways: "(A) a physical or mental impairment that substantially limits one or more of the major life activities; (B) a record of such an impairment; or (C) being regarded as having such an impairment." Under the first definition, major life activities are defined as those basic activities that the "average person" can perform with little or no difficulty. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) made important changes to the definition of a disability under the ADA. First, it clarified that the term "substantially limits" is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. Further, mitigating measures other than "ordinary eyeglasses or contact lenses" are not to be considered in assessing whether an individual has a disability. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.

An individual with a disability must also be qualified to perform the essential functions of the job with or without a reasonable accommodation in order to be protected by the ADA. This means that an applicant or employee must:

- Satisfy the employer's job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job related; and,
- Be able to perform those tasks that are essential to the job, with or without reasonable accommodation.

The essential functions of the job are defined as the fundamental job duties of the employment position. The ADA does not limit an employer's ability to establish or change the content, nature, or functions of a job. The employer has the right to define the job and what functions are required to perform it. Factors to consider in determining if a function is essential include:

- Whether the reason the position exists is to perform that function;
- The number of other employees available to perform the function or among whom the performance of the function can be distributed; and,
- The degree of expertise or skill required to perform the function.

An employer's judgment as to which functions are essential and a written job description prepared before advertising or interviewing for a job will be considered by the Equal Employment Opportunity Commission (EEOC) as evidence of essential functions. Other kinds of evidence that the EEOC will consider include:

- The actual work experience of present or past employees in the job;
- The time spent performing a function;
- The consequences of not requiring that an employee perform a function; and,
- The terms of a collective bargaining agreement.

The PWDCRA protects an "individual who has 1 or more disabilities." Similar to the ADA, the PWDCRA defines disability as a:

> Determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic…substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.

The definition of disability also includes an individual who has a history of or is regarded as having a determinable physical or mental characteristic as described above.

Notably, under both the ADA and the PWDCRA, disability does not include the current illegal use of a controlled substance by that individual nor does it include alcoholism if the use of alcohol by that individual prevents the individual from performing the duties of his or her job. An alcoholic may be a person with a disability and protected by the ADA if he or she is qualified to perform the essential functions of the job. However, an employer can discipline, discharge, or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct. An employer may also prohibit the use of alcohol in the workplace and can require that employees not be under the influence of alcohol. On the other hand, the ADA permits an employer to discipline or terminate an employee or refuse to hire an applicant who is currently engaging in the illegal use of drugs. It is not necessary

for an employer to prove that the drug use occurred during working hours or at the employer's workplace.

EMPLOYMENT PRACTICES GUIDELINE

Disability Discrimination – Reasonable Accommodation

Both the Americans with Disabilities Act of 1990 (ADA) and the Michigan Persons with Disabilities Civil Rights Act (PWDCRA) require that covered employers provide reasonable accommodation to applicants and employees with disabilities if they require such accommodations due to their disabilities. Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities that the employer can adopt without undue hardship. For example, reasonable accommodation may include:

- Making existing facilities used by employees readily accessible to and useable by individuals with disabilities;
- Job restructuring;
- Part-time or modified work schedules;
- Reassigning a disabled individual to a vacant position;
- Acquiring or modifying equipment or devices;
- Appropriately adjusting or modifying examinations, training materials, or policies;
- Providing qualified readers or interpreters; and,
- Other similar accommodations for individuals with disabilities.

Leave must also be considered as a reasonable accommodation when it will allow an employee to return to work following the period of leave. Requests for leave related to disability can often fall under existing employer policies. In those cases, the employer's obligation is to provide persons with disabilities access to those policies on equal terms as similarly situated individuals. However, an employer must also consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it and so long as it does not create an undue hardship for the employer. Indefinite leave, meaning that an employee cannot say whether or when he or she will be able to return to work at all, would constitute an undue hardship and does not have to be provided as a reasonable accommodation.

As a general rule, the individual with a disability must inform the employer that an accommodation is needed. Once an accommodation is requested, the employer should promptly engage in an "interactive process" with an employee, designed to identify potential accommodations that would enable the individual to perform the essential functions of the job. Every accommodation must be evaluated on a case-by-case basis, taking into consideration the employer's resources and the employee's abilities, the functional requirements of the job, and the employee's functional limitations. The reasonable accommodation obligation is an ongoing duty and may arise any time that a person's disability or job changes. An individual with a disability has the right to refuse an

accommodation. But, if the individual cannot perform the essential job functions without an accommodation, the individual may not be qualified for the job.

An employer may obtain information from the employee's health care provider (with the employee's permission) to confirm or to elaborate on the information that the employee has provided. Employers may also ask the health care provider to respond to questions designed to enable the employer to understand the need for accommodation, the type of accommodation required, and whether reasonable accommodations other than (or in addition to) that requested by the employee may be effective. Information from the health care provider may also assist the employer in determining whether the accommodation would pose an undue hardship. An employee requesting an accommodation should respond to questions from an employer as part of the interactive process and work with his or her health care provider to obtain requested medical documentation as expeditiously as possible.

The ADA only requires an employer to reasonably accommodate an individual with a disability; an employer is not required to undergo undue hardship to make such accommodations. The ADA defines undue hardship as an action that would require significant difficulty or expense to the employer when considered in light of the following factors:

- The nature and cost of the accommodation needed;
- The overall financial resources of the facility or facilities involved;
- The number of persons employed at the facility;
- The effect on expenses and resources, and the impact upon the operation of the facilities;
- The overall financial resources of the covered entity;
- The overall size of the business and the number of its employees;
- The number, type, and location of its facilities;
- The type of operation or operations of the covered entity;
- The composition, structure, and functions of the workforce;
- The geographic separateness; and,
- The administrative or fiscal relationship of the facility or facilities to the covered entity.

Whether a particular accommodation will impose an undue hardship is always determined on a case-by-case basis.

Similarly, when making determinations whether to return an employee to work with medical restrictions, each situation needs to be analyzed on a case-by-case basis. An employer may not require an employee with a disability to have no medical restrictions—that is, be "100%" healed or recovered—before returning to work from a leave of absence. Instead, the employer must determine whether, given the medical restrictions, the employee can perform the essential functions of the job with or without reasonable accommodation. If the employee can perform his or her job with or without reasonable

accommodation, the employer must return the employee to work, unless the employer can show providing the needed accommodations would cause an undue hardship.

An employer may require, as a standard for employment, that an individual not pose a "direct threat to the health or safety of other individuals in the workplace." An employer will violate the ADA if it claims an employee with medical restrictions poses a safety risk, but it cannot show that the individual is a "direct threat." Direct threat is the ADA standard for determining whether an employee's disability poses a "significant risk of substantial harm" to self or to others. If an employee's disability poses a direct threat, an employer must consider whether reasonable accommodation will eliminate or diminish the direct threat.

The ADA does not require an employer to make any modification, adjustment, or change in a job, if the employer can demonstrate that the change would fundamentally alter the essential functions of the job in question. Further, there is no obligation to create a position or to bump existing employees from their jobs to create an opening. An employer is not required to violate or ignore language in a collective bargaining agreement in order to accommodate an employee, provided that the contract language is not discriminatory. However, contrary to some court decisions, the Equal Employment Opportunity Commission (EEOC) has taken the position that the ADA requires an employer to attempt to provide reasonable accommodation without violating the collective bargaining agreement and, if no other reasonable accommodation is possible, to attempt to negotiate with the union regarding a variance to the collective bargaining agreement.

Under the PWDCRA, a person with a disability may allege a failure-to-accommodate claim only if the person with a disability notifies the employer in writing of the need for accommodation within 182 days after the person with a disability knew or should have known that an accommodation was needed. The ADA does not contain such a requirement. However, the employer waives the right to notice if it fails to use appropriate means to notify all employees and job applicants of the 182-day rule.

Under the PWDCRA, if a person with a disability can prove that a reasonable accommodation is possible, the burden shifts to the employer to produce evidence that an accommodation would impose an undue hardship on the employer. If the employer meets this burden of production, the person with the disability bears the ultimate responsibility of demonstrating that the accommodation would not pose an undue hardship. This is different from the ADA, where the burden of proving undue hardship falls squarely on the employer.

EMPLOYMENT PRACTICES GUIDELINE

Disability Discrimination – Medical Examinations and Inquiries

Under the Americans with Disabilities Act of 1990 (ADA), it is unlawful to:

- Ask an applicant whether he or she is disabled or about the nature or severity of a disability; or,
- To require the applicant to take a medical examination before making a job offer.

Generally, medical pre-employment inquiries are prohibited. For example, an employer may ask an applicant, "How many days were you absent from work last year?," but may not follow up this inquiry by asking, "How many of those days were you sick?" Nor may an employer ask an applicant how much time off the applicant needs on account of a disability or medical treatment for a disability. An employer may ask, "How well can you handle stress?" but the employer cannot follow up that inquiry by asking, "Have you sought treatment for your inability to handle stress?" These prohibited "follow-up" questions may elicit information about disabilities.

An employer may ask an applicant questions about ability to perform job-related functions, as long as the questions are not phrased in terms of a disability. An employer can also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will perform job-related functions. At the initial interview stage, employers may ask limited questions concerning reasonable accommodation under these circumstances:

- If the employer reasonably believes the applicant will need a reasonable accommodation because of an obvious disability;
- If the employer reasonably believes the applicant will need reasonable accommodation because of a hidden disability that the applicant has voluntarily disclosed to the employer; or,
- If the applicant has voluntarily disclosed to the employer that he or she needs reasonable accommodation to perform the job.

In general, however, an employer may not ask on a job application whether the applicant will require reasonable accommodation to perform a job.

After a job offer is made and prior to the commencement of employment duties, the employer may require that an applicant take a medical examination if everyone who will be working in the same job category must also take the examination. The employer may condition the job offer on the results of the medical examination. However, if an individual is not hired because a medical examination reveals the existence of a disability, the employer must be able to show that the reasons for exclusion are job-related and necessary

for the conduct of the employer's business. The employer would also have to show that there was no reasonable accommodation that would have made it possible for the individual to perform the essential job functions.

The ADA permits employers to require that existing employees submit to medical examinations or medical inquiries. However, the examination or inquiries must not be for the purpose of determining whether an employee has a disability or its nature or severity. The requirements for employee medical examinations are more stringent than those for job applicants; the medical examinations or inquiries must be job-related and necessary for the conduct of the business. An employer may ask an employee to undergo a medical examination:

- When an employee is having difficulty performing the job effectively;
- When an employee becomes disabled, either on or off the job;
- When an examination is necessary to determine reasonable accommodation; or,
- When examinations or medical monitoring are required by other laws.

An employer must keep any medical information on applicants or employees confidential and may not keep such information in regular personnel files. There are several exceptions to this confidentiality rule. An employer may reveal medical information to:

- Managers and supervisors when it is necessary for them to fashion modifications or restrictions on the work or duties of the employee as reasonable accommodation;
- First-aid and safety personnel when they might need to perform emergency treatment on the individual;
- State or federal government officials when investigating compliance with the ADA or other disability-related laws; and,
- Insurance companies for insurance purposes.

Further, the guidelines provide that medical information may be given to decisionmakers involved in the hiring process so that they can make employment decisions consistent with the ADA and to medical professionals when crafting a reasonable accommodation.

XIII. UNLAWFUL RETALIATION

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Unlawful Retaliation – General Considerations

The law of retaliation prohibits employers from taking materially adverse employment action against their employees for participating in protected activity or opposing unlawful employment practices. Several federal statutes prohibit retaliatory conduct, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act, the Fair Labor Standards Act, the Americans with Disabilities Act of 1990 (ADA), and the Genetic Information Nondiscrimination Act. Additionally, Michigan's Elliott-Larsen Civil Rights Act (ELCRA) and Person with Disabilities Civil Rights Act (PWDCRA) prohibit retaliation. The essence of these statutory prohibitions against retaliation is that an employer may not take adverse employment action against an employee who engages in statutorily protected activity, e.g., an employee who complains about unlawful discrimination.

The anti-retaliation clause found in Title VII provides that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment…because he has opposed any practice, made an unlawful employment practice by this [title], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [title].

The ELCRA's anti-retaliation provision states:

> Two or more persons shall not conspire to, or a person shall not, retaliate or discriminate
> against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing, under this act.

In order to demonstrate a violation of these statutory prohibitions, a plaintiff must establish:

(1) Statutorily protected activity (i.e., that the employee opposed an unlawful employment practice or has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the statute);
(2) Materially adverse action taken by the employer; and
(3) Requisite level of causal connection between the protected activity and the materially adverse action.

A retaliation claim based on participation or opposition is not defeated merely because the underlying challenged practice ultimately is found to be lawful. For statements or actions to be protected opposition, however, they must be based on a reasonable good faith belief

that the conduct opposed violates the law, or could do so if repeated. Anti-retaliation protections extend to many individuals, including those who make formal or informal allegations of violations of law (whether or not successful), those who serve as witnesses or participate in investigations, those who exercise rights such as requesting religious or disability accommodation, and even those are retaliated against after their employment relationship ends.

Retaliation applies to any action that is "materially adverse," meaning any action that might well deter a reasonable person from engaging in protected activity. The most obvious types of adverse actions are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge. Other types of adverse actions may include work-related threats, warnings, reprimands, transfers, negative or lowered evaluations, transfers to less prestigious or desirable work or work locations, and any other type of adverse treatment that in the circumstances might well dissuade a reasonable person from engaging in protected activity. Other examples of materially adverse actions may include:

- Disparaging the person to others;
- Making false reports to government authorities;
- Filing a civil action;
- Threatening reassignment;
- Scrutinizing work or attendance more closely than that of other employees, without justification;
- Removal of supervisory responsibilities;
- Abusive verbal or physical behavior that is reasonably likely to deter protected activity, even if it is not sufficiently "severe or pervasive" to create a hostile work environment; and,
- Any other action that might well deter reasonable individuals from engaging in protected activity.

A fact-driven analysis applies to determine if the challenged action(s) in question would be likely to deter participation or opposition.

Unlawful retaliation is established when a causal connection is established between a materially adverse action and the individual's protected activity. The retaliatory animus need not necessarily be held by the employer's official who took the materially adverse action; an employer may still be vicariously liable if one of its agents, motivated by discriminatory or retaliatory animus, intentionally and proximately caused the official to take the action. The causation standard requires the evidence to show that "but for" a retaliatory motive, the employer would not have taken the adverse action. A retaliation claim will not succeed absent enough evidence to prove retaliation under this causation standard.

Engaging in protected conduct does not shield an employee from all discipline or discharge. Employers are free to discipline or terminate workers if motivated by non-retaliatory and non-discriminatory reasons that would otherwise result in such consequences. However, an employer is not allowed to do anything in response to protected

activity that would discourage someone from resisting or complaining about future discrimination.

The ADA prohibits not just retaliation, but also "interference" with the exercise or enjoyment of ADA rights. Examples of conduct by an employer prohibited under the ADA as interference would include:

- Coercing an individual to relinquish or forgo an accommodation to which he or she is otherwise entitled;
- Intimidating an applicant from requesting accommodation for the application process by indicating that such a request will result in the applicant not being hired;
- Threatening an employee with loss of employment or other adverse treatment if he does not "voluntarily" submit to a medical examination or inquiry that is otherwise prohibited under the statute;
- Issuing a policy or requirement that purports to limit an employee's rights to invoke ADA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason");
- Interfering with a former employee's right to file an ADA lawsuit by stating that a negative job reference will be given to prospective employers if the suit is filed; and,
- Subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because he or she assisted a coworker in requesting reasonable accommodation.

The interference provision does not apply to any and all conduct or statements that an individual finds intimidating. It only prohibits conduct that is reasonably likely to interfere with the exercise or enjoyment of ADA rights.

EMPLOYMENT PRACTICES GUIDELINE

Unlawful Retaliation – Michigan Whistleblowers' Protection Act

The Michigan Whistleblowers' Protection Act (WPA), MCL 15.362, provides that "[a]n employer shall not discharge, threaten, or otherwise discriminate against an employee…because the employee…reports or is about to report…a violation or a suspected violation of a law…to a public body." Employees are also protected if a public body requests that the employee participate in a court action, or an investigation or hearing held by the public body. When an individual is employed by a public body, the individual's complaints to his or her supervisor and others within that public body can serve as the basis for a claim under the WPA.

The WPA does not shield an employee who was discharged under the erroneous perception that he or she reported a violation of law. The Michigan Supreme Court has stated:

> The Michigan legislature has seen fit to require either actual reporting or proof by clear and convincing evidence that an employee was "about to report." It has refused to bring within the protection of the act an employee who discusses reporting and who approaches the employer and threatens to report but takes no further action. *Shallal* v *Catholic Social Services*, 455 Mich 626-627, 55 NW2d 517 (1997) (Kelly, J., concurring in part and dissenting in part).

Additionally, an employee is not protected under the WPA if the employee knows that the report is false.

Protection under the WPA is not limited to employees who report violations of law by employers. An employee who reports a violation of law by a fellow employee is also protected under the WPA. For instance, in one case, the Michigan Supreme Court held that an employee stated a claim under the WPA where he was fired after filing a criminal complaint against a fellow employee for an assault that arose out of a dispute over the handling of the employer's business, during business hours, and the site of employment, and there was evidence of a causal connection between the employee's protected activity and his termination. *Dudewicz* v *Norris-Schmid, Inc.*, 443 Mich 68; 503 NW2d 645 (2007).

To establish a prima facie case under the WPA, a plaintiff must show that he or she (1) was engaged in a protected activity as defined by the Act, (2) was subjected to adverse employment action, and (3) a causal connection existed between the protected activity and the adverse employment action. In "about to report" actions under the WPA, an affected employee must show by clear and convincing evidence that he or she, or a person acting on the employee's behalf, was about to report, verbally or in writing, a violation or suspected violation of a state or federal law to a public body. MCL 15.263(4). The clear and convincing evidence standard applies to the "about to report" element only and not to the other elements of the plaintiff's claim.

A shifting burden of proof analysis is generally used to analyze cases that arise under the WPA. Under that analysis, first, the plaintiff has the burden of proving a prima facie case by showing that he or she was engaged in protected conduct and that his or her participation in that conduct was a motivating factor in some adverse employment action against him or her. Then the burden shifts to the employer to present evidence that demonstrates that the adverse employment action was for a legitimate reason. If the employer states a legitimate reason, the employee may still prevail if he or she demonstrates that the stated reason was a mere pretext for the adverse employment action. The evidence used in showing a prima facie case will be considered and may suffice to determine the existence of issues of fact on the question of pretext. The proper standard for proving pretext in a WPA case is made either (1) directly, by persuading the court that a discriminatory reason more than likely motivated the employer, or (2) indirectly, by showing that the employer's explanation was not believable. This standard protects an employer's right to base employment decisions on legitimate business reasons and also fosters the WPA's goal of protecting the public.

An action must be brought within 90 days after the occurrence of the alleged violation of the WPA. MCL 15.363(1). This provision is a statute of limitations and bars an action under the WPA if the 90-day limitations period is not complied with, regardless of the remedy sought. The WPA provides successful employees with the following remedies:

> A court, in rendering a judgment in an action brought pursuant to this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate. MCL 14.364.

The WPA provides the exclusive remedy for an employee who has been wrongfully discharged for reporting an employer's violation of law.

EMPLOYMENT PRACTICES GUIDELINE

Unlawful Retaliation – Retaliatory Discharge in Violation of Public Policy

Although an at-will employee generally cannot sustain an action for wrongful termination, Michigan law recognizes that "some grounds for discharging an employee are so contrary to public policy as to be actionable." *Suchodolski* v *Michigan Consolidated Gas Co*, 412 Mich 692, 695 (1982). In *Suchodolski*, the Michigan Supreme Court announced three public policy exceptions to the at-will employment doctrine: (1) when the employee is discharged in violation of an explicit legislative statement prohibiting discharge of employees who act in accordance with a statutory right or duty, (2) when the employee is discharged for failing or refusing to violate the law in the course of employment; and (3) when the employee is discharged for exercising a right conferred by a well-established legislative enactment. While Michigan Whistleblowers' Protection Act (WPA) claims may arguably be brought for adverse employment actions other than discharge, these public policy exceptions are narrow common-law exceptions to the at-will employment doctrine and are not applicable to situations other than terminations of employment.

Claims of retaliatory discharge in violation of public policy are frequently joined with WPA claims. However, if the individual's conduct would fall within the protections of the WPA or another statute prohibiting retaliatory discharge, a public policy claim will not survive. Besides the WPA, several other Michigan statutes contain anti-retaliation provisions. Employees who engage in protected activities (usually filing a complaint or testifying) under laws in the following subject areas are protected from retaliation: discrimination (Elliott-Larsen Civil Rights Act), minimum wage (Workforce Opportunity Wage Act), occupational safety and health (Michigan Occupational Safety and Health Act), payment of wages and fringe benefits (Payment of Wages and Fringe Benefits Act), and persons with disabilities (Persons with Disabilities Civil Rights Act). Employees who report discrimination, occupational safety and health violations, and certain wage violations are protected by these statutes.

To determine what constitutes public policy, Michigan courts will look to statutes and constitutional provisions to determine if a given practice has been endorsed (e.g., the right to collect workers' compensation benefits) or prohibited (e.g., criminal laws prohibiting perjury). So, for example, because a Michigan statute endorses an employee's right to collect workers' compensation benefits, an employer who retaliates against an employee for invoking that right would be acting in violation of public policy. Similarly, because criminal statutes prohibit perjury, an employer who threatens an employee with discharge if the employee refuses to commit perjury is also acting in violation of public policy. In both situations, employees are protected from retaliatory discharge.

EMPLOYMENT PRACTICES GUIDELINE

Unlawful Retaliation – Preventing Retaliation Claims

Two of the most critical questions for employers are how to prevent retaliation claims and how to defuse a potentially explosive retaliation situation. Following are some practical solutions:

- ✓ **Take all complaints of harassment and discrimination seriously and document them when they occur.**

  All managers and supervisors need to be sensitive to complaints of harassment or discrimination in the workplace, even when made verbally. When such complaint is made, it must be immediately reported to the appropriate person within the Road Commission so that prompt, appropriate action can be taken. All complaints should be thoroughly investigated.

  Unlawful retaliation can only occur if some form of legally protected activity has taken place. The legally protected activity could be as obvious as the filing of a charge with the Equal Employment Opportunity Commission (EEOC) or the Michigan Department of Civil Rights or as vague as a verbal complaint to the supervisor regarding alleged illegal treatment. It is important to identify and document when the original complaint of harassment or discrimination occurs. By doing so, one is better situated to prevent application of the retaliation doctrine to claims prior to the initial complaint.

- ✓ **Implement a stand-alone anti-retaliation policy.**

  Employers should consider the implementation of a separate anti-retaliation policy that announces that unlawful retaliation will not be tolerated. This policy should contain internal reporting mechanisms similar to those in an unlawful harassment policy. If the alleged retaliation is originating from an employee's supervisor, then clearly an alternative channel for complaint should be provided. The policy should promise an investigation and appropriate action.

  The employer clearly benefits from having a separate anti-retaliation policy. Such a policy is tangible evidence that the employer takes retaliation very seriously and is committed to preventing its occurrence. Moreover, the failure of an employee to timely use such a visible and available complaint procedure raises serious questions about the merits of a later retaliation allegation.

- ✓ **Train employees on your anti-retaliation policy and document that the training has occurred.**

  All supervisors need to understand the importance of preventing retaliation. Supervisors need to be reassured that it is natural to feel anger toward an employee who might accuse them of unlawful conduct. Nonetheless, to show anger or to act on it is unprofessional and may legally worsen the situation. Training on how a manager should respond can be invaluable in avoiding actual retaliation as well as the appearance of retaliation. Such training should be reviewed at least annually. Evidence that managers have undergone such training is evidence of the seriousness given the topic by the employer and makes it more credible that the supervisor did not engage in retaliation. It is also recommended that all employees receive training on the content and procedures of the anti-retaliation policy. This increases the likelihood of early reporting, emphasizes the importance placed on this topic by the employer, and makes the failure to complain harder for the employee to explain.

- ✓ **Preempt retaliation claims as soon as statutorily protected activity occurs.**

  Begin building a record of non-retaliation from the moment a harassment or discrimination complaint is received. Make it a practice to immediately reassure the complaining employee that the employer takes its anti-retaliation policy seriously. Provide the employee with an additional copy of the policy, review its content and procedures with the employee, and document that this action was taken. Following this meeting, identify those supervisors affected by the complaint and/or supervising the complaining employee. Consider the value of providing them with the same anti-retaliation policy and information as was supplied to the employee. The purpose is, in fact, to discourage actual retaliation while establishing a record of non-retaliation.

- ✓ **Engage in pro-active follow-up.**

  Employers may wish to check in with employees, supervisors, and witnesses during the pendency of an employment investigation to inquire if there are any concerns regarding potential or perceived retaliation and to provide guidance. One or two days after the initial protected activity, consider having an employer representative follow-up with the involved employee. Practical questions such as the following may be helpful: “How are you doing?” “Is there anything more we can do for you while the investigation is taking place?” “Since our meeting, is there anything more you think I (we) should know?” These questions are designed to solicit potential retaliation problems while not planting suggestions in the mind of the employee. Moreover, negative answers should be documented as evidence that the anti-retaliation policy is working.

- ✓ **Take retaliation complaints seriously and conduct a separate investigation.**

  Retaliation complaints expose an organization to significant potential liability even if the original underlying complaint appears frivolous. Several juries have cleared the employer of discrimination only to conclude that later discipline was the result of having made the original complaint. Retaliation complaints are serious business and, as such, must receive priority treatment.

  A retaliation complaint procedure is an opportunity to take swift action and avoid litigation and/or minimize possible damages. When the complaint is not justified, early documentation is invaluable. If the complaint is justified, then immediate corrective action may be taken.

  A complaint of retaliation should be handled independently from the underlying investigation of the original complaint. This gives an opportunity for a different analysis of the evidence, with a focus on the allegations of retaliation separate and apart from the allegations of harassment or discrimination. Each investigation should have a separate conclusion.

- ✓ **Consider using an outside investigator for major retaliation complaints.**

  Clearly, certain harassment or discrimination complaints from an employee, especially a current employee, can upset management (even at the highest levels). Claims of illegal conduct by management are normally not taken lightly. In such cases, if management does its own investigation, it will be difficult to show that a neutral investigation took place. The employee is likely to be disliked and disbelieved. This justifies using an independent, neutral evaluator, who will do a thorough investigation, and who will make a strong employer witness in the event of litigation. If the outside investigator concludes that retaliation exists, the organization should take quick, corrective action. This may occur at an interim stage in the investigation before the evaluator is forced to reach his or her ultimate conclusions. On the other hand, if the evaluator concludes that there has been no retaliation, a report should be prepared to that effect.

- ✓ **Do not become a victim of litigation fear.**

  Retaliation complaints should be taken seriously, and they demand a careful investigation and follow-up action to correct abuses which could include disciplinary action (up to and including termination) against retaliators. Nonetheless, a complaint of retaliation does not cast a lifetime protective shield around the complaining employee. Such employees can often be marginal performers who may be evaluated negatively by the employer. It is essential that the employer continue to document deficiencies and discipline complaining employees for workplace offenses. Consistency of treatment is critical. An employer should treat the complaining employee no better and no worse than other employees. Nonetheless, the employer needs to be even more careful than

usual to ensure that its actions are based on solid foundations and, in fact, are consistent. It should be assumed that the matter will lead to litigation, and the employer will need to be prepared.

- ✓ **Consider "outside the box" practical solutions for avoiding retaliation claims.**

  Occasionally, the personal chemistry of a situation will not support maintaining the status quo. If an immediate supervisor is accused of unlawful harassment, it may be impractical to have this supervisor act as though it is business as usual. A creatively restructured working environment may be the best temporary (or long-term) solution. The complaining employee might be offered a voluntary transfer to an equivalent position. Alternatively, the employer should consider transferring the supervisor. Obtaining the employee's consent to make a change will help defend against subsequent retaliation claims. Nonetheless, consultation with legal counsel is essential to ensure that no adverse employment action occurs. The overriding objective is to find a practical solution which will reduce the interaction between the accused and the accuser, while respecting the need for consistency and business as usual.

- ✓ **Consider ultimate litigation solutions.**

  A current employee bringing a lawsuit against his or her employer is fully protected from retaliation by appropriate statutes. However, the reality of the situation is one in which the employer and the employee are sentenced to a tense working relationship. Long after the litigation has ended, the employee may still view any negative act as one likely motivated by the past litigation. In some situations, it may become possible to have the employee resign his/her employment as part of a settlement. This is not something the employer can insist upon, but often it is what both parties privately desire. Therefore, the employer should be prepared to pay some monetary amount to settle the underlying claim if the employee is willing to agree to voluntarily resign.

Retaliation claims have the potential of becoming a nightmare for even the most respectable and law-abiding employer. No employer is immune from such claims. However, through the exercise of the above-enumerated steps, an employer can significantly reduce exposure by potentially avoiding or successfully defending against such claims. Retaliation claims must be taken seriously and not minimized. All supervisors within an organization must play an active role in preventing these claims.

POLICY FOR THE PROHIBITION OF UNLAWFUL RETALIATION IN THE WORKPLACE

The _____ County Road Commission takes unlawful retaliation very seriously and is committed to a policy prohibiting its occurrence. Unlawful retaliation will not be tolerated. Any complaint of unlawful retaliation will result in an investigation and appropriate corrective action. Any employee found in violation of this policy will be subject to disciplinary action which may include termination.

It shall be a violation of this policy for any Road Commission employee to ridicule, threaten, discipline or otherwise discriminate or retaliate against another Road Commission employee because that employee has:

1. Opposed a discriminatory practice by the Road Commission; or,
2. Made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing with respect to a discriminatory practice by the Road Commission.

A discriminatory practice is one in which the employee alleges that the Road Commission has treated an employee differently from other similarly situated employees, and/or harassed an employee, on the basis of race, age, color, sex (including gender identity, sexual orientation, and pregnancy), religion, national origin, marital status, height, weight, genetic information, or disability.

The Road Commission prohibits unlawful retaliation by the Road Commission, its supervisors, managers, and employees. Retaliatory conduct includes any conduct or communication which has the purpose or effect of substantially interfering with an individual's job performance or creates an intimidating, hostile, or offensive working environment. The purpose of this policy is not, however, to insulate employees from warranted discipline. Any employee whose conduct legitimately warrants discipline will still be subject to such discipline, even if the employee tries to prevent same by making a complaint of discrimination.

All employees should know, and are herewith placed on notice, that the Road Commission will not tolerate or permit unlawful retaliation to occur in the workplace. **Employees who are found to be in violation of this policy will be considered to have violated a serious Road Commission policy and will be subject to a variety of disciplinary measures up to and including discharge.** Under this policy, it is the Road Commission's position that responsible personnel will take affirmative action or actions, as may be necessary and appropriate, to prevent unlawful retaliation from occurring in the workplace and to investigate all reported incidents in a fair, objective, impartial manner and within a reasonable time frame. In those instances where a violation of the policy is verified through investigation, action or actions will be taken to discipline those involved where appropriate and to prevent reoccurrence of the unlawful retaliation.

Under the policy, the Road Commission's management is responsible to objectively investigate reports of unlawful retaliation by or between employees of the Road Commission. Incidents of retaliation shall be reported to the Managing Director. If the complaint is against the

Managing Director, the employee shall register his/her complaint with the Road Commission Board Chair. The Road Commission shall designate appropriate personnel to investigate the complaint. All retaliation complaints should be reduced to writing and include all appropriate information in order to facilitate investigation of the complaint. Specifically, the complaint should contain:

- ✓ The name and address of the person filing;
- ✓ The full name and address (if known) of the person against whom the complaint is being made; and,
- ✓ A short summary of the alleged retaliatory action or conduct.

The recipient of the complaint and/or appropriate designee shall conduct an independent investigation and evaluation of the validity of the complaint. Investigations and evaluations shall be completed in a timely fashion. Anonymous complaints will not be pursued. Complaints will be resolved in the best interests of both the complainant and the Road Commission.

This policy is intended to facilitate the elimination of unlawful retaliation against employees in the workplace. Employees who believe they have been subjected to unlawful retaliation are encouraged to report same in order that all employees may have a fair and objective environment in which to work. If both a retaliation complaint and a union grievance are filed by an employee concerning the same alleged retaliatory conduct, the grievance procedure contained in the Collective Bargaining Agreement will be utilized to resolve that complaint. This policy, however, does not supersede existing statutes and should not be construed to preclude any employee's alternative course of action for redress of unlawful retaliation.

XIV. FAMILY & MEDICAL LEAVE

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Family & Medical Leave – Family and Medical Leave Act

The Family and Medical Leave Act of 1993 (FMLA) entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. A covered employer is a:

- Private-sector employer with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer; and,
- Public agency, including a local, state, or Federal government agency, regardless of the number of employees it employs.

Being a covered employer subjects these entities to the administrative requirements of the FMLA, including the requirement to keep and maintain records pertaining to compliance with the FMLA and the requirement to post a notice in the workplace summarizing the provisions of the law.

Regardless of whether the employer is covered, only eligible employees are entitled to take FMLA leave. An eligible employee is one who:

- Works for a covered employer;
- 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.

The 12 months of employment do not have to be consecutive. That means any time previously worked for the same employer (including seasonal work) could, in most cases, be used to meet the 12-month requirement. If the employee has a break in service that lasted seven years or more, the time worked prior to the break will not count unless the break is due to service covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA), or there is a written agreement, including a collective bargaining agreement, outlining the employer's intention to rehire the employee after the break in service.

Eligible employees may take up to 12 workweeks of leave in a 12-month period for one or more of the following reasons:

- The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care;
- To care for a spouse, son, daughter, or parent who has a serious health condition;

- For a serious health condition that makes the employee unable to perform the essential functions of his or her job; or
- For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status.

An eligible employee may also take up to 26 workweeks of leave during a "single 12-month period" to care for a covered servicemember with a serious injury or illness, when the employee is the spouse, son, daughter, parent, or next of kin of the servicemember. The "single 12-month period" for military caregiver leave begins on the first day the employee takes leave for this reason and ends 12 months later, regardless of the 12-month period established by the employer for other FMLA reasons. "Next of kin" is defined by as the "nearest blood relative" of the servicemember.

For "qualifying exigency leave," covered active duty means:

- For members of the Regular Armed Forces, duty during deployment of the member with the Armed Forces to a foreign country (including deployment to international waters); or,
- For members of the Reserve components of the Armed Forces (members of the National Guard and Reserves), duty during deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in support of a contingency operation.

Qualifying exigencies for which an employee may take FMLA leave include making alternative child care arrangements for a child of the deployed military member, attending certain military ceremonies and briefings, or making financial or legal arrangements to address the military member's absence.

The FMLA defines a serious health condition as an illness, injury, impairment, or physical or mental condition that involves either inpatient care or continuing treatment by a health care provider. Inpatient care under the FMLA means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity or any subsequent treatment in connection with an overnight stay. Health conditions also meet the FMLA's criteria as serious if they require continuing treatment by a health care provider. Conditions that may require continuing treatment include incapacity plus treatment, pregnancy, chronic conditions, permanent or long-term conditions, and conditions requiring multiple treatments. Incapacity plus treatment involves a period of incapacity of more than three consecutive, full calendar days with follow-up treatment. To qualify as a serious health condition under the FMLA, the employee or the employee's family member experiencing the period of incapacity must also:

- Be treated by a health care provider within seven days of the first day of incapacity, and:
- Be prescribed a course of treatment by a health care provider (e.g., a course of prescription medication), or,

- Have at least one other visit with a health care provider within 30 days of the first day of incapacity.

Under some circumstances employees may take FMLA leave on an intermittent or reduced schedule basis. That means an employee may take leave in separate blocks of time or by reducing the time he or she works each day or week for a single qualifying reason. When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operations. If FMLA is for the birth, adoption, or foster placement of a child, use of intermittent or reduced schedule leave requires the employer's approval.

Under certain conditions, employees may choose, or employers may require employees, to "substitute" (run concurrently) accrued paid leave, such as sick or vacation leave, to cover some or all of the FMLA leave period. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy.

Employees must comply with their employer's usual and customary requirements for requesting leave and provide enough information for their employer to reasonably determine whether the FMLA may apply to the leave request. Employees generally must request leave 30 days in advance when the need for leave is foreseeable. When the need for leave is foreseeable less than 30 days in advance or is unforeseeable, employees must provide notice as soon as possible and practicable under the circumstances.

When an employee seeks leave for a FMLA-qualifying reason for the first time, the employee need not expressly assert FMLA rights or even mention the FMLA. If an employee later requests additional leave for the same qualifying condition, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave.

When an employee requests FMLA leave due to his or her own serious health condition or a covered family member's serious health condition, the employer may require certification in support of the leave from a health care provider. An employer may also require second or third medical opinions (at the employer's expense) and periodic recertification of a serious health condition.

For intermittent leave or leave on a reduced leave schedule, the certification can also require the following:

(1) For planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;
(2) For leave due to an employee's own serious health condition, a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule and the expected duration of the intermittent leave or reduced leave schedule; and,
(3) For leave due to a family member's serious health condition, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the child, parent, or spouse who has a serious health condition, or will

assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

The employer's request for medical certification should be made within five (5) business days after the request for leave is made in the case of foreseeable leaves and within five (5) business days after the leave commences in the case of unforeseeable leaves. If the employer does not request medical certification when it first receives notice of a leave, the employer is not precluded from later requesting certification if the employer later has reason to question the appropriateness of the leave or its duration. Any employee can choose to provide, but cannot be required to provide, an authorization, release, or waiver allowing the employer to communicate with the health care provider. However, if the employee refuses, he/she does so at his/her peril because it is the employee's responsibility to provide the employer with complete and sufficient certification, and FMLA leave can be denied if the employee fails to do so.

An employer must advise an employee whenever the employer finds that a certification is incomplete or insufficient, state in writing what additional information is necessary to make the certification complete and sufficient and give the employee at least seven calendar days to cure the deficiency unless this time period is not practicable under the particular circumstances despite the employee's diligent good faith efforts. If the employee fails to cure the deficiencies, the employer can deny the requested FMLA leave. A certification is considered insufficient when the information provided is vague, ambiguous, or non-responsive.

The FMLA provides that an employer may require an employee to submit a medical certification that the employee is able to return to work as a condition of reinstating an employee whose leave was occasioned by the employee's own serious health condition. The regulations provide that a fitness-for-duty certification may be sought only with regard to the particular health condition that caused the employee's need for FMLA leave and may be required only if the employer has a uniformly applied policy or practice requiring all employees who take leave for such conditions to obtain a certification from a health care provider that an employee is able to resume work. Moreover, any requirement that an employee obtain a fitness-for-duty certification must be clearly explained to the employee at the time the employee requests FMLA leave and should be set forth in the employer's written policy. A second or third fitness-for-duty certification may not be required.

Except as otherwise noted above, eligible employees are entitled to up to a total of twelve (12) workweeks of FMLA leave per twelve-month period. Leave due to the birth of a child or placement of a child with the employee for adoption or foster care must be concluded prior to the end of the twelve (12) month period after the birth or placement. Additionally, where a husband and wife are employed by the same employer, the aggregate leave to which both are entitled may be limited to twelve (12) workweeks in any twelve (12) month period, if the leave is taken due to the birth or placement of a child with the employee or to care for a parent with a serious health condition. If the leave is taken for any other reason, each spouse is entitled to the full twelve (12) workweeks (if applicable) of leave.

The regulations provide employers a choice of methods for determining the twelve (12) month period in which employees may take up to twelve (12) workweeks (or twenty-six (26) workweeks, if applicable) of leave. Employers may utilize:

(1) The calendar year;
(2) Any fixed twelve-month leave year, such as a fiscal year of a year starting on an employee's anniversary date;
(3) The twelve-month period measured forward from the date an employee first takes FMLA leave; or
(4) A rolling twelve-month period measured backward from the date an employee uses any FMLA leave.

Employers may implement any of the above methods, provided that the method chosen is applied consistently and the employees are provided with written notice. An employer wishing to change to another method is required to give at least sixty (60) days' notice to all employees, and the transition must occur in a manner that allows the employees to retain the full benefit of twelve (12) workweeks of leave (or twenty-six (26) workweeks, if applicable).

It is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying. The employer must give notice of the designation to the employee within five business days from the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, notice must be given within five business days from the time the employer determines that the leave qualifies as FMLA leave. Although oral notice is sufficient to comply with the five-business-day requirement, employers often choose to give this notice in writing. The notice must state whether the employee is eligible for FMLA leave and, if not, provide at least one reason why the employee is not eligible. If an employee has not met the 12-month service requirement, an employer must inform the employee how many months the employee has worked toward this requirement.

In addition to the eligibility notice, employers must also provide employees with a rights and responsibilities notice, notifying employees of their obligations concerning the use of FMLA leave and the consequences of failing to meet those obligations. The rights and responsibilities notice must be in writing and include the following types of information:

- That the leave may be designated and counted against the employee's annual FMLA entitlement, if qualifying, and the applicable 12-month period for FMLA entitlement;
- Any medical or qualifying exigency certification requirement and the consequences for failing to provide such certification;
- The employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, including the conditions related to any substitution and the employee's entitlement to unpaid leave if he or she does not meet the requirements for paid leave;

- Any requirement for the employee to make premium payments to maintain health benefits, the arrangements for making such payments and the consequences for failing to make such payments;
- The employee's status as a key employee and the fact that restoration of employment may be denied following FMLA leave;
- The employee's right to continued benefits during FMLA leave and restoration to the same or equivalent job upon return from FMLA leave; and,
- The employee's potential liability for health insurance premiums if the employee fails to return to work after taking FMLA leave.

The notice may also include other information, such as whether the employer will require periodic reports of the employee's status and intent to return to work. If an employer fails to designate leave with appropriate notice within the above-stated five business days, the employer may retroactively designate leave, provided that the employer's failure to designate leave does not cause harm or injury to the employee. The employer and employee can always mutually agree to designate leave as FMLA-qualifying retroactively.

Failure to follow the notice requirements may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.

EMPLOYMENT PRACTICES GUIDELINE

Family & Medical Leave – Continuation of Benefits and Reinstatement

The Family and Medical Leave Act of 1993 (FMLA) entitles eligible employees to take unpaid leave. Under certain conditions, employees may substitute (or run at the same time as their FMLA leave) accrued paid leave (such as sick or vacation leave) to cover some or all of the period of FMLA leave. An employer may also require employees to substitute accrued paid leave for unpaid FMLA leave even when the employee has not elected to do so. In order to substitute accrued paid leave, the employee must follow the employer's normal rules for use of that type of leave, such as submitting a leave form or providing advance notice. If an employee does not meet the requirements to take paid leave under the employer's normal leave policies, the employee may still take unpaid FMLA leave. Paid leave taken for reasons that do not qualify for FMLA leave does not count against the employee's FMLA entitlement.

If an employee is provided group health insurance, the employee is entitled to the continuation of the group health insurance coverage during FMLA leave on the same terms as if he or she had continued to work. If family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. The employee must continue to make any normal contributions to the cost of the health insurance premiums.

If paid leave is substituted for FMLA leave, the employee's share of group health plan premiums must be paid by the method normally used during paid leave (usually payroll deduction). An employee on unpaid FMLA leave must make arrangements to pay the normal employee portion of the insurance premiums in order to maintain insurance coverage. If the employee's premium payment is more than 30 days late, the employee's coverage may be dropped unless the employer has a policy of allowing a longer grace period. The employer must provide written notice to the employee that the payment has not been received and allow at least 15 days after the date of the letter before coverage stops.

In some instances, an employer may choose to pay the employee's portion of the premium, for example, in order to ensure that it can provide the employee with equivalent benefits upon return from FMLA leave. In that case, the employer may require the employee to repay these amounts. In addition, the employer may require the employee to repay the employer's share of the premium payment if the employee fails to return to work following the FMLA leave unless the employee does not return because of circumstances that are beyond the employee's control, including a FMLA-qualifying medical condition.

An employee's right to benefits other than group health insurance while on FMLA leave depend upon the employer's established policies. Any benefits that would be maintained while the employee is on other forms of leave, including paid leave if the employee

substitutes accrued paid leave during FMLA leave, must be maintained while the employee is on FMLA leave.

When an employee returns from FMLA leave, he or she must be restored to the same job or to an "equivalent job." The employee is not guaranteed the actual job held prior to the leave. An equivalent job means a job that is virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions (including shift and location).

Equivalent pay includes the same or equivalent pay premiums, such as a shift differential, and the same opportunity for overtime as the job held prior to FMLA leave. An employee is entitled to any unconditional pay increases that occurred while he or she was on FMLA leave, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted only if employees taking the same type of leave for non-FMLA reasons receive the increases. Equivalent pay includes any unconditional bonuses or payments. If an employee does not meet a specific goal for achieving a bonus because of taking FMLA leave, however, the employer must only pay the bonus if employees taking the same type of leave for non-FMLA reasons receive it. For example, if an employee is substituting accrued paid sick leave for unpaid FMLA leave and other employees on paid sick leave are entitled to the bonus, then the employee taking FMLA-protected leave concurrently with sick leave must also receive the bonus.

All benefits an employee had accrued prior to a period of FMLA leave must be restored to the employee when he or she returns from leave. An employee returning from FMLA leave cannot be required to requalify for any benefits the employee enjoyed before the leave began.

An employee on FMLA leave is not protected from actions that would have affected him or her if the employee was not on FMLA leave. For example, if a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours. If an employee is laid off during the period of FMLA leave, the employer must be able to show that the employee would not have been employed at the time of reinstatement.

An employer may also deny restoration to a "key" employee under certain circumstances. A key employee is a salaried, FMLA-eligible employee who is among the highest-paid 10 percent of all the employer's employees within 75 miles. To deny restoration to a key employee, an employer must have determined that substantial and grievous economic injury to its operations would result from the restoration, must have provided notice to the employee that he or she is a key employee, and that restoration will be denied, and must provide the employee a reasonable opportunity to return to work.

It is unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided by the FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to the FMLA.

EMPLOYMENT PRACTICES GUIDELINE

Family & Medical Leave – Michigan Paid Medical Leave Act

The Michigan Paid Medical Leave Act (PMLA) requires employers with 50 or more employees to provide eligible employees with paid medical leave to use for their own or their family members' medical needs and for purposes related to domestic violence, sexual assault, and public health emergencies. Under the Act, an eligible employee does not include an individual who is exempt from the overtime requirements of the Fair Labor Standards Act (FLSA), an individual employed by an employer for 25 weeks or fewer in a calendar year for a job scheduled for 25 weeks or fewer, or an individual who worked, on average, fewer than 25 hours per week during the immediately preceding calendar year.

Paid medical leave accrual begins upon commencement of the employee's employment. Paid medical leave is accrued at a rate of 1 hour for every 35 actual hours worked; however, an employer is not required to allow accrual of over 1 hour in a calendar week or more than 40 hours in a benefit year. A benefit year is any consecutive 12-month period used by an employer to calculate an eligible employee's benefits. If an employer already has a paid time off benefit for its employees which provides at least 40 hours of paid leave year (including, but not limited to, paid vacation days, paid personal days, paid sick time, and paid time off), this paid time off covers the paid medical leave required under the PMLA.

Employees can carry over up to 40 hours of unused accrued paid medical leave from one benefit year to the next; however, employers are not required to allow employees to use more than 40 hours in a single benefit year. An employer may provide the total amount of paid medical leave all at once by providing at least 40 hours at the beginning of the benefit year or on the date that the individual becomes eligible during the benefit year on a prorated basis. If an employer adopts this practice is does not have to permit employees to carry over unused leave to the next benefit year.

An employee may use paid medical leave as it is accrued except an employer may require an employee to wait until the 90th calendar day after commencing employment before using accrued paid medical leave. Paid medical leave must be used in 1-hour increments unless the employer has a different increment policy set forth in writing in an employee handbook or other employee benefit document. Employees must follow the employer's usual and customary notice, procedural, and documentation requirements for requesting leave.

Employees may take paid medical leave for the following:

- Physical or mental illness, injury, or health condition of the employee or his or her family member.

- Medical diagnosis, care, or treatment of the employee or employee's family member.
- Preventative care of the employee or his or her family member.
- Closure of the employee's primary workplace by order of a public official due to a public health emergency.
- The care of his or her child whose school or place of care has been closed by order of a public official due to a public health emergency.
- The employee's or his or her family member's exposure to a communicable disease that would jeopardize the health of others as determined by health authorities or a health care provider.

For domestic violence and sexual assault situations, employees may use paid medical leave for the following:

- Medical care or psychological or other counseling.
- Receiving services from a victim services organization.
- Relocation.
- Obtaining legal services.
- Participation in any civil or criminal proceedings related to or resulting from domestic violence or sexual assault.

If an eligible employee separates from employment and is rehired by the same employer, the employer is not required to allow the eligible employee to retain any unused paid medical leave that the eligible employee previously accumulated while working for the employer. An employer is not required to provide financial or other reimbursement to an eligible employee for accrued paid medical leave that was not used before the end of a benefit year or before the eligible employee's termination, resignation, retirement, or other separation from employment.

An employer must display a poster at the employer's place of business, in a conspicuous place that is accessible to eligible employees, that contains all the following information:

(a) The amount of paid medical leave required to be provided to an eligible employee under the Act;
(b) The terms under which paid medical leave may be used; and,
(c) The eligible employee's right to file a complaint with the Department of Labor and Economic Opportunity (LEO) for any violation of the Act.

Aggrieved employees may file a complaint with the LEO within 6 months of the alleged violation. LEO will investigate complaints and attempt mediation, where appropriate.

The PMLA is not designed to prohibit an employer from providing more paid medical leave than is required under the Act, nor does it diminish any other rights provided to any eligible employee under a collective bargaining agreement. The PMLA does not prevent an employer from establishing a policy that permits an eligible employee to donate unused accrued paid medical leave to another eligible employee.

FAMILY AND MEDICAL LEAVE ACT POLICY

The _____ County Road Commission (Road Commission) complies with the Family and Medical Leave Act (FMLA) and will grant up to 12 weeks of leave during a 12-month period to eligible employees (or up to 26 weeks of military caregiver leave). The purpose of this policy is to provide employees with a general description of their FMLA rights. In the event of any conflict between this policy and the applicable law, employees will be afforded all rights required by law.

Employee Eligibility

To be eligible for leave under this policy, an employee must meet **all** of the following requirements:

- Have worked for the Road Commission for at least twelve (12) months.
- Have worked at least 1,250 hours for the Road Commission over the twelve (12) months preceding the date the leave would commence.
- Currently work at a location where there are at least fifty (50) employees within seventy-five (75) miles.

The 12 months of employment do not have to be consecutive. All periods of absence from work due to or necessitated by service in the uniformed services are counted as hours worked in determining eligibility.

Leave Entitlement

To qualify as FMLA leave under this policy, the leave must be for one of the following reasons:

- The birth of a child or placement of a child with the employee for adoption or foster care.
- To care for a spouse, child or parent who has a serious health condition.
- For a serious health condition that makes the employee unable to perform the essential functions of his or her job.
- For any qualifying exigency arising out of the fact that a spouse, child or parent is a military member on covered active duty or on call to covered active duty status.
- To care for a covered service member with a serious injury or illness, when the employee is the spouse, son, daughter, or next of kin of the servicemember (military caregiver leave).

For all but military caregiver leave, an eligible employee can take up to 12 weeks of FMLA during any 12-month period. The Road Commission will measure the 12-month period as a rolling 12-month period measured backward from the date an employee uses any leave under this policy.

Each time an employee takes leave, the Road Commission will compute the amount of leave the employee has taken under this policy in the last 12 months and subtract it from the 12 weeks of available leave, and the balance remaining is the amount the employee may be entitled to take at that time.

An eligible employee can take up to 26 weeks for the FMLA military caregiver leave during a single 12-month period. FMLA leave already taken for other FMLA circumstances during the preceding 12 months will be deducted from the total of 26 weeks available.

Spouses employed by the Road Commission are jointly entitled to a combined total of 12 workweeks of family leave for the birth or placement of a child for adoption or foster care, and to care for a parent (but not a parent-in-law) who has a serious health condition. Both may only take a combined total of 26 weeks of leave to care for a covered injured or ill service member (if each spouse is a parent, spouse, child or next of kin of the service member).

Leave for birth or placement for adoption or foster care must conclude within 12 months of the birth or placement.

A qualifying exigency arising out of covered active duty includes short-notice deployment, military events and activities, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and additional activities that arise out of active duty, provided that the Road Commission and employee agree, including agreement on timing and duration of the leave.

Intermittent Leave or a Reduced Work Schedule

Under some circumstances, employees may take FMLA leave intermittently - which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule.

- If FMLA leave is for birth or placement for adoption or foster care, use of intermittent leave is subject to the Road Commission's approval.

- FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

The Road Commission may temporarily transfer an employee to an available alternative positions with equivalent pay and benefits if the alternative position would better accommodate the intermittent or reduced schedule, in instances when leave for the employee or employee's family member is foreseeable and for planned medical treatment, including recovery from a serious health condition or to care for a child after birth or placement for adoption or foster care.

When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the company's operations.

Use of Paid and Unpaid Leave

An employee who is taking FMLA leave because of the employee's own serious health condition or the serious health condition of a family member, as well as for FMLA military caregiver leave, must use all paid vacation, personal or sick leave prior to being eligible for unpaid leave. Sick leave must run concurrently with FMLA leave if the reason for FMLA leave is covered by the established sick leave policy.

An employee who is taking leave for the adoption or foster care, as well as military FMLA leave for a qualifying exigency, must use all paid vacation and personal leave prior to being eligible for unpaid leave.

Employee Notice Requirement

All employees requesting FMLA leave must provide written notice of the need for leave to the Road Commission. When the need for leave is foreseeable, the employee must provide the Road Commission with at least 30 days' notice. When an employee becomes aware of a need for FMLA leave fewer than 30 days in advance, the employee must provide notice of the need for the leave either the same day the need for leave is discovered or the next business day. When the need for FMLA leave is not foreseeable, the employee must comply with the Road Commission's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

Employees seeking to use FMLA leave due to a serious health condition affecting the employee or an immediate family member will be required to provide a medical certification supporting the need for leave.

Continuation of Health Benefits During Leave

The Road Commission will continue an employee's health benefits during the leave period at the same level and under the same conditions as if the employee was continuously at work.

While on paid leave, the Road Commission will continue to make payroll deductions to collect the employee's share of insurance premiums. While on unpaid leave, the employee must continue to make this payment, either in person or by mail. The payment must be received by the Road Commission by the ____ day of each month. If the payment is more than 30 days late, the employee's health care coverage may be dropped for the duration of the leave. The Road Commission will provide 15 days' notification prior to the employee's loss of coverage.

If the employee chooses not to return to work for reasons other than a continued serious health condition of the employee or the employee's family member or a circumstance beyond the employee's control, the Road Commission will require the employee to reimburse the Road Commission the amount it paid for the employee's health insurance premiums during the leave period.

Return to Work After Leave

The Road Commission may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. If an employee is on FMLA leave due to his or her own serious health condition, the employee will be required to submit a fitness-for-duty certification prior to his or her return to work.

Upon return from FMLA leave, an employee will be restored to his or her original job, or to an equivalent job with equivalent pay, benefits, and other employment terms and conditions. In addition, an employee's use of FMLA leave will not result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave.

The Road Commission may choose to exempt certain key employees from this requirement and not return them to the same or similar position when doing so will cause substantial and grievous economic injury to business operations. Key employees will be given written notice at the time the FMLA leave is requested of his or her status as a key employee.

Family and Medical Leave Act (FMLA) Request Form

To request leave on the basis of the Family and Medical Leave Act (FMLA), please complete the following request form and submit to the Road Commission at least 30 days prior to leave (unless leave is unforeseen, in which case submit the form as soon as practical).

Employee Name (print clearly): _____

Requested Leave Start Date: _____ Estimated End Date: _____

The reason for this FMLA leave request is (select the most appropriate box):

❑ Birth of a son or daughter and to care for the newborn child, or placement with the employee of a child for adoption or foster care. Date of birth/placement: _____

❑ To care for the employee's spouse, son, daughter or parent with a serious health condition.

❑ A serious health condition that makes the employee unable to perform the functions of the employee's job.

❑ A qualifying exigency arising out of the fact that the employee's spouse, son, daughter or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status).

❑ To care for a covered service member with a serious injury or illness if the employee is the spouse, son, daughter, parent or next of kin of the covered service member.

Time off work is expected to be (select the most appropriate box):

❑ For a continuous block of time (several continuous days, weeks or months off work).

❑ For a reduced work schedule (change in work schedule needed—fewer hours per day or fewer hours per week).

❑ On an intermittent basis (periodic time off that is not usually expected to be the same days or time off from week to week; examples may be time off for flare-ups of a medical condition and/or for ongoing medical treatment/appointments).

If for a reduced work schedule or on an intermittent basis, please provide further detail:

_____

_____

_____

_____

Determination of eligibility for leave under the FMLA, and/or additional documentation or clarification of documentation, may be required prior to making a final FMLA determination to approve or deny an FMLA leave request. Please contact the Road Commission with any questions.

I understand that I am required to complete a FMLA Leave Certification of Health Care Provider form if my requested leave is due to a serious health condition and submit the form to the Road Commission before my leave commences. I request the following forms for my FMLA leave of absence:

1. Certification of Health Care Provider: This form is to be completed by either my health care provider (if this leave is for my own serious health condition) or by my family member's health care provider (if this leave is for the serious health condition of a spouse, parent, or child). The health care provider must complete the entire form. **Failure to complete this form may delay or prevent my leave approval.**
2. Request to Return from FMLA Leave: I should fill out the top portion of the form, notifying the Road Commission of my date of return. For my own serious health condition, the bottom portion of the form (fitness-for-duty certification) should be filled out by my health care provider and returned to the Road Commission on or before the day I return to work from FMLA leave.

I understand that the Certification of Health Care Provider form should be returned to the Road Commission within 15 days. If I am not able to return the form within the allowed timeframe, I will contact the Road Commission for assistance.

Employee Signature: _____ Date: _____

Return to Road Commission

For Road Commission use ONLY:

Date received: _____

FMLA Eligibility Notice sent: _____

Notice of Eligibility & Rights and Responsibilities under the Family and Medical Leave Act

U.S. Department of Labor
Wage and Hour Division

WAGE AND HOUR DIVISION

DO NOT SEND TO THE DEPARTMENT OF LABOR.
PROVIDE TO EMPLOYEE.

OMB Control Number: 1235-0003
Expires: 6/30/2023

In general, to be eligible to take leave under the Family and Medical Leave Act (FMLA), an employee must have worked for an employer for at least 12 months, meet the hours of service requirement in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. §§ 825.300(b), (c) which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Information about the FMLA may be found on the WHD website at www.dol.gov/agencies/whd/fmla.

Date: _____ *(mm/dd/yyyy)*

From: _____ *(Employer)* To: _____ *(Employee)*

On _____ *(mm/dd/yyyy)*, we learned that you need leave *(beginning on)* _____ *(mm/dd/yyyy)* for one of the following reasons: *(Select as appropriate)*

☐ The birth of a child, or placement of a child with you for adoption or foster care, and to bond with the newborn or newly-placed child

☐ Your own serious health condition

☐ You are needed to care for your family member due to a serious health condition. Your family member is your:

☐ Spouse ☐ Parent ☐ Child under age 18 ☐ Child 18 years or older and incapable of self-care because of a mental or physical disability

☐ A qualifying exigency arising out of the fact that your family member is on covered active duty or has been notified of an impending call or order to covered active duty status. Your family member on covered active duty is your:

☐ Spouse ☐ Parent ☐ Child of any age

☐ You are needed to care for your family member who is a covered servicemember with a serious injury or illness. You are the servicemember's:

☐ Spouse ☐ Parent ☐ Child ☐ Next of kin

Spouse means a husband or wife as defined or recognized in the state where the individual was married, including in a common law marriage or same-sex marriage. The terms "child" and "parent" include *in loco parentis* relationships in which a person assumes the obligations of a parent to a child. An employee may take FMLA leave to care for an individual who assumed the obligations of a parent to the employee when the employee was a child. An employee may also take FMLA leave to care for a child for whom the employee has assumed the obligations of a parent. No legal or biological relationship is necessary.

SECTION I – NOTICE OF ELIGIBILITY

This Notice is to inform you that you are:

☐ **Eligible** for FMLA leave. *(See Section II for any Additional Information Needed and Section III for information on your Rights and Responsibilities.)*

☐ **Not eligible** for FMLA leave because: *(Only one reason need be checked)*

☐ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately: _____ towards this requirement.
(months)

☐ You have not met the FMLA's 1,250 hours of service requirement. As of the first date of requested leave, you will have worked approximately: _____towards this requirement.
(hours of service)

Employee Name: _____

☐ You are an airline flight crew employee and you have not met the special hours of service eligibility requirements for airline flight crew employees as of the first date of requested leave (i.e., worked or been paid for at least 60% of your applicable monthly guarantee, and worked or been paid for at least 504 duty hours.)

☐ You do not work at and/or report to a site with 50 or more employees within 75-miles as of the date of your request.

If you have any questions, please contact: _____ *(Name of employer representative)*

at _____ *(Contact information).*

SECTION II – ADDITIONAL INFORMATION NEEDED

As explained in Section I, you meet the eligibility requirements for taking FMLA leave. Please review the information below to determine if additional information is needed in order for us to determine whether your absence qualifies as FMLA leave. Once we obtain any additional information specified below we will inform you, **within 5 business days**, whether your leave will be designated as FMLA leave and count towards the FMLA leave you have available. **If complete and sufficient information is not provided in a timely manner, your leave may be denied.**

(Select as appropriate)

☐ No additional information requested. If no additional information requested, go to Section III.

☐ We request that the leave be supported by a certification, as identified below.

☐ Health Care Provider for the Employee
☐ Health Care Provider for the Employee's Family Member
☐ Qualifying Exigency
☐ Serious Illness or Injury *(Military Caregiver Leave)*

Selected certification form is ☐ attached / ☐ not attached.

If requested, medical certification must be returned by _____ *(mm/dd/yyyy) (Must allow at least 15 calendar days from the date the employer requested the employee to provide certification, unless it is not feasible despite the employee's diligent, good faith efforts.)*

☐ We request that you provide reasonable documentation or a statement to establish the relationship between you and your family member, including *in loco parentis* relationships (as explained on page one). The information requested must be returned to us by _____ *(mm/dd/yyyy).* You may choose to provide a simple statement of the relationship or provide documentation such as a child's birth certificate, a court document, or documents regarding foster care or adoption-related activities. Official documents submitted for this purpose will be returned to you after examination.

☐ Other information needed *(e.g. documentation for military family leave*): _____.

The information requested must be returned to us by _____ *(mm/dd/yyyy).*

If you have any questions, please contact: _____ *(Name of employer representative)*

at _____ *(Contact information).*

SECTION III – NOTICE OF RIGHTS AND RESPONSIBILITIES

Part A: FMLA Leave Entitlement

You have a right under the FMLA to take unpaid, job-protected FMLA leave in a 12-month period for certain family and medical reasons, including up to **12 weeks** of unpaid leave in a 12-month period for the birth of a child or placement of a child for adoption or foster care, for leave related to your own or a family member's serious health condition, or for certain qualifying exigencies related to the deployment of a military member to covered active duty. You also have a right

under the FMLA to take up to **26 weeks** of unpaid, job-protected FMLA leave in a single 12-month period to care for a covered servicemember with a serious injury or illness (*Military Caregiver Leave*).

The 12-month period for FMLA leave is calculated as: *(Select as appropriate)*

- ☐ The calendar year (January 1st - December 31st)
- ☐ A fixed leave year based on _____
  (e.g., a fiscal year beginning on July 1 and ending on June 30)
- ☐ The 12-month period measured forward from the date of your first FMLA leave usage.
- ☐ A "rolling" 12-month period measured backward from the date of any FMLA leave usage. *(Each time an employee takes FMLA leave, the remaining leave is the balance of the 12 weeks not used during the 12 months immediately before the FMLA leave is to start.)*

If applicable, the single 12-month period for *Military Caregiver Leave* started on _____ *(mm/dd/yyyy)*.

You (☐ are / ☐ are not) considered a key employee as defined under the FMLA. Your FMLA leave cannot be denied for this reason; however, we may not restore you to employment following FMLA leave if such restoration will cause substantial and grievous economic injury to us.

We (☐ have / ☐ have not) determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us. Additional information will be provided separately concerning your status as key employee and restoration.

Part B: Substitution of Paid Leave – When Paid Leave is Used at the Same Time as FMLA Leave

You have a right under the FMLA to request that your accrued paid leave be substituted for your FMLA leave. This means that you can request that your accrued paid leave run concurrently with some or all of your unpaid FMLA leave, provided you meet any applicable requirements of our leave policy. Concurrent leave use means the absence will count against both the designated paid leave and unpaid FMLA leave at the same time. If you do not meet the requirements for taking paid leave, you remain entitled to take available unpaid FMLA leave in the applicable 12-month period. Even if you do not request it, the FMLA allows us to require you to use your available sick, vacation, or other paid leave during your FMLA absence.

(Check all that apply)

- ☐ **Some or all of your FMLA leave will not be paid.** Any unpaid FMLA leave taken will be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.
- ☐ **You have requested to use some or all of your available paid leave** *(e.g., sick, vacation, PTO)* during your FMLA leave. Any paid leave taken for this reason will also be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.
- ☐ **We are requiring you to use some or all of your available paid leave** *(e.g., sick, vacation, PTO)* during your FMLA leave. Any paid leave taken for this reason will also be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.
- ☐ **Other:** *(e.g., short- or long-term disability, workers' compensation, state medical leave law, etc.)*_____
  Any time taken for this reason will also be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.

The applicable conditions for use of paid leave include: _____.

For more information about conditions applicable to sick/vacation/other paid leave usage please refer to _____

_____ available at: _____.

Employee Name: _____

Part C: Maintain Health Benefits

Your health benefits must be maintained during any period of FMLA leave under the same conditions as if you continued to work. During any paid portion of FMLA leave, your share of any premiums will be paid by the method normally used during any paid leave. During any unpaid portion of FMLA leave, you must continue to make any normal contributions to the cost of the health insurance premiums. To make arrangements to continue to make your share of the premium payments on your health insurance while you are on any unpaid FMLA leave, contact _____ at _____.

You have a minimum grace period of (☐ 30-days or ☐ _____ *indicate longer period, if applicable)* in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.

You may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave if you do not return to work following **unpaid** FMLA leave for a reason other than: the continuation, recurrence, or onset of your or your family member's serious health condition which would entitle you to FMLA leave; or the continuation, recurrence, or onset of a covered servicemember' s serious injury or illness which would entitle you to FMLA leave; or other circumstances beyond your control.

Part D: Other Employee Benefits

Upon your return from FMLA leave, your other employee benefits, such as pensions or life insurance, must be resumed in the same manner and at the same levels as provided when your FMLA leave began. To make arrangements to continue your employee benefits while you are on FMLA leave, contact _____ at _____.

Part E: Return-to-Work Requirements

You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. An equivalent position is one that is virtually identical to your former position in terms of pay, benefits, and working conditions. At the end of your FMLA leave, all benefits must also be resumed in the same manner and at the same level provided when the leave began. You do not have return-to-work rights under the FMLA if you need leave beyond the amount of FMLA leave you have available to use.

Part F: Other Requirements While on FMLA Leave

While on leave you (☐ will be / ☐ will not be) required to furnish us with periodic reports of your status and intent to return to work every _____.

(Indicate interval of periodic reports, as appropriate for the FMLA leave situation).

If the circumstances of your leave change and you are able to return to work earlier than expected, you will be required to notify us at least two workdays prior to the date you intend to report for work.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(b), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

DO NOT SEND THE COMPLETED FORM TO THE DEPARTMENT OF LABOR. EMPLOYEE INFORMATION.

Designation Notice
under the Family and Medical Leave Act

U.S. Department of Labor
Wage and Hour Division

WAGE AND HOUR DIVISION

DO NOT SEND TO THE DEPARTMENT OF LABOR.
PROVIDE TO EMPLOYEE.

OMB Control Number: 1235-0003
Expires: 6/30/2023

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form is optional, a fully completed Form WH-382 provides employees with the information required by 29 C.F.R. §§ 825.300(d), 825.301, and 825.305(c), which must be provided within five business days of the employer having enough information to determine whether the leave is for an FMLA-qualifying reason. Information about the FMLA may be found on the WHD website at www.dol.gov/agencies/whd/fmla.

SECTION I - EMPLOYER

The employer is responsible in **all** circumstances for designating leave as FMLA-qualifying and giving notice to the employee. Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, an employer may not delay designating such leave as FMLA leave, and neither the employee nor the employer may decline FMLA protection for that leave.

Date: _____ *(mm/dd/yyyy)*

From: _____ *(Employer)* To: _____ *(Employee)*

On _____ *(mm/dd/yyyy)* we received your most recent information to support your need for leave due to: *(Select as appropriate)*

- ☐ The birth of a child, or placement of a child with you for adoption or foster care, and to bond with the newborn or newly-placed child
- ☐ Your own serious health condition
- ☐ The serious health condition of your spouse, child, or parent
- ☐ A qualifying exigency arising out of the fact that your spouse, child, or parent is on covered active duty or has been notified of an impending call or order to covered active duty with the Armed Forces
- ☐ A serious injury or illness of a covered servicemember where you are the servicemember's spouse, child, parent, or next of kin *(Military Caregiver Leave)*

We have reviewed information related to your need for leave under the FMLA along with any supporting documentation provided and decided that your FMLA leave request is: *(Select as appropriate)*

☐ **Approved.** All leave taken for this reason will be designated as FMLA leave. Go to Section III for more information.

☐ **Not Approved**: *(Select as appropriate)*
- ☐ The FMLA does not apply to your leave request.
- ☐ As of the date the leave is to start, you do not have any FMLA leave available to use.
- ☐ Other _____

☐ **Additional information** is needed to determine if your leave request qualifies as FMLA leave. *(Go to Section II for the specific information needed. If your FMLA leave request is approved and no additional information is needed, go to Section III.)*

SECTION II – ADDITIONAL INFORMATION NEEDED

We need additional information to determine whether your leave request qualifies under the FMLA. Once we obtain the additional information requested, we will inform you **within 5 business days** if your leave will or will not be designated as FMLA leave and count towards the amount of FMLA leave you have available. **Failure to provide the additional information as requested may result in a denial of your FMLA leave request**.

If you have any questions, please contact: _____ at _____
(Name of employer FMLA representative) *(Contact information)*

Incomplete or Insufficient Certification

The certification you have provided is incomplete and/or insufficient to determine whether the FMLA applies to your leave request. *(Select as applicable)*

☐ The certification provided is incomplete and we are unable to determine whether the FMLA applies to your leave request. *"Incomplete" means one or more of the applicable entries on the certification have not been completed.*

Employee Name: _____

☐ The certification provided is insufficient to determine whether the FMLA applies to your leave request. *"Insufficient" means the information provided is vague, unclear, ambiguous or non-responsive.*

Specify the information needed to make the certification complete and/or sufficient: _____

_____

You must provide the requested information no later than *(provide at least 7 calendar days)* _____ *(mm/dd/yyyy),* unless it is not practicable under the particular circumstances despite your diligent good faith efforts, or your leave may be denied.

Second and Third Opinions

☐ We request that you obtain a (☐ second / ☐ third opinion) medical certification at our expense, and we will provide further details at a later time. *Note: The employee or the employee's family member may be requested to authorize the health care provider to release information pertaining only to the serious health condition at issue.*

SECTION III – FMLA LEAVE APPROVED

As explained in Section I, your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave and will count against the amount of FMLA leave you have available to use in the applicable 12-month period. The FMLA requires that you notify us as soon as practicable if the dates of scheduled leave change, are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against the total **amount of FMLA leave** you have available to use in the applicable 12-month period: *(Select as appropriate)*

☐ Provided there is no change from your **anticipated FMLA leave schedule**, the following number of hours, days, or weeks will be counted against your leave entitlement: _____.

☐ Because the leave you will need will be **unscheduled**, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

Please be advised: *(check all that apply)*

☐ **Some or all of your FMLA leave will not be paid.** Any unpaid FMLA leave taken will be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.

☐ **Based on your request, some or all of your available paid leave** *(e.g., sick, vacation, PTO)* **will be used during your FMLA leave.** Any paid leave taken for this reason will also be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.

☐ **We are requiring you to use some or all of your available paid leave** *(e.g., sick, vacation, PTO)* **during your FMLA leave.** Any paid leave taken for this reason will also be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.

☐ **Other:** _____
(e.g., Short- or long-term disability, workers' compensation, state medical leave law, etc.) Any time taken for this reason will also be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.

Return-to-work requirements. To be restored to work after taking FMLA leave, you (☐ will be / ☐ will not be) required to provide a certification from your health care provider (fitness-for-duty certification) that you are able to resume work. This request for a fitness-for-duty certification is *only* with regard to the particular serious health condition that caused your need for FMLA leave. **If such certification is not timely received, your return to work may be delayed until the certification is provided.**

A list of the essential functions of your position (☐ is / ☐ is not) attached. If attached, the fitness-for-duty certification must address your ability to perform the essential job functions.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to inform employees in writing whether leave requested under the FMLA has been determined to be covered under the FMLA. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(d), (e). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

DO NOT SEND THE COMPLETED FORM TO THE DEPARTMENT OF LABOR. EMPLOYEE INFORMATION.

Certification of Health Care Provider for Employee's Serious Health Condition under the Family and Medical Leave Act

U.S. Department of Labor
Wage and Hour Division

WAGE AND HOUR DIVISION

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR.
RETURN TO THE PATIENT.

OMB Control Number: 1235-0003
Expires: 6/30/2023

The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. 29 U.S.C. §§ 2613, 2614(c)(3); 29 C.F.R. § 825.305. The employer must give the employee **at least 15 calendar days** to provide the certification. If the employee fails to provide complete and sufficient medical certification, his or her FMLA leave request may be denied. 29 C.F.R. § 825.313. Information about the FMLA may be found on the WHD website at www.dol.gov/agencies/whd/fmla.

SECTION I – EMPLOYER

Either the employee or the employer may complete Section I. While use of this form is optional, this form asks the health care provider for the information necessary for a complete and sufficient medical certification, which is set out at 29 C.F.R. § 825.306. **You may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308.** Additionally, you **may not** request a certification for FMLA leave to bond with a healthy newborn child or a child placed for adoption or foster care.

Employers must generally maintain records and documents relating to medical information, medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

(1) Employee name: _____
First *Middle* *Last*

(2) Employer name: _____ Date: _____ *(mm/dd/yyyy)*
(List date certification requested)

(3) The medical certification must be returned by _____ *(mm/dd/yyyy)*
(Must allow at least 15 calendar days from the date requested, unless it is not feasible despite the employee's diligent, good faith efforts.)

(4) Employee's job title: _____ Job description (☐ is / ☐ is not) attached.
Employee's regular work schedule: _____
Statement of the employee's essential job functions: _____
_____
(*The essential functions of the employee's position are determined with reference to the position the employee held at the time the employee notified the employer of the need for leave or the leave started, whichever is earlier.)*

SECTION II - HEALTH CARE PROVIDER

Please provide your contact information, complete all relevant parts of this Section, and sign the form. Your patient has requested leave under the FMLA. The FMLA allows an employer to require that the employee submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to the serious health condition of the employee. For FMLA purposes, a "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves *inpatient care* or *continuing treatment by a health care provider*. For more information about the definitions of a serious health condition under the FMLA, see the chart on page 4.

You may, but are **not required** to, provide other appropriate medical facts including symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment. Please note that some state or local laws may not allow disclosure of private medical information about the patient's serious health condition, such as providing the diagnosis and/or course of treatment.

Employee Name: _____

Health Care Provider's name: *(Print)* _____

Health Care Provider's business address: _____

Type of practice / Medical specialty: _____

Telephone: (___) _____ Fax: (___) _____ E-mail: _____

PART A: Medical Information

Limit your response to the medical condition(s) for which the employee is seeking FMLA leave. Your answers should be your **best estimate** based upon your medical knowledge, experience, and examination of the patient. **After completing Part A, complete Part B to provide information about the amount of leave needed.** Note: For FMLA purposes, "incapacity" means the inability to work, attend school, or perform regular daily activities due to the condition, treatment of the condition, or recovery from the condition. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), genetic services, as defined in 29 C.F.R. § 1635.3(e), or the manifestation of disease or disorder in the employee's family members, 29 C.F.R. § 1635.3(b).

(1) State the approximate date the condition started or will start: _____ *(mm/dd/yyyy)*

(2) Provide your **best estimate** of how long the condition lasted or will last: _____

(3) Check the box(es) for the questions below, as applicable. For all box(es) checked, the amount of leave needed must be provided in Part B.

☐ **Inpatient Care**: The patient (☐ has been / ☐ is expected to be) admitted for an overnight stay in a hospital, hospice, or residential medical care facility on the following date(s): _____

☐ **Incapacity plus Treatment**: *(e.g. outpatient surgery, strep throat)*
Due to the condition, the patient (☐ has been / ☐ is expected to be) incapacitated for *more than* three consecutive, full calendar days from _____ *(mm/dd/yyyy)* to _____ *(mm/dd/yyyy)*.

The patient (☐ was / ☐ will be) seen on the following date(s): _____
_____

The condition (☐ has / ☐ has not) also resulted in a course of continuing treatment under the supervision of a health care provider *(e.g. prescription medication (other than over-the-counter) or therapy requiring special equipment)*

☐ **Pregnancy**: The condition is pregnancy. List the expected delivery date: _____ *(mm/dd/yyyy)*.

☐ **Chronic Conditions**: *(e.g. asthma, migraine headaches)* Due to the condition, it is medically necessary for the patient to have treatment visits at least twice per year.

☐ **Permanent or Long Term Conditions**: *(e.g. Alzheimer's, terminal stages of cancer)* Due to the condition, incapacity is permanent or long term and requires the continuing supervision of a health care provider (even if active treatment is not being provided).

☐ **Conditions requiring Multiple Treatments**: (*e.g. chemotherapy treatments, restorative surgery)* Due to the condition, it is medically necessary for the patient to receive multiple treatments.

☐ **None of the above**: If none of the above condition(s) were checked, (i.e., inpatient care, pregnancy) no additional information is needed. Go to page 4 to sign and date the form.

Employee Name: _____

(4) If needed, briefly describe other appropriate medical facts related to the condition(s) for which the employee seeks FMLA leave. *(e.g., use of nebulizer, dialysis*) _____

_____

PART B: Amount of Leave Needed

For the medical condition(s) checked in Part A, complete all that apply. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your **best estimate** based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage.

(5) Due to the condition, the patient (☐ had / ☐ will have) **planned medical treatment(s)** (scheduled medical visits) *(e.g. psychotherapy, prenatal appointments)* on the following date(s): _____

_____

(6) Due to the condition, the patient (☐ was / ☐ will be) **referred to other health care provider(s)** for evaluation or treatment(s).

State the nature of such treatments: *(e.g. cardiologist, physical therapy)* _____

Provide your **best estimate** of the beginning date _____ *(mm/dd/yyyy)* and end date _____ *(mm/dd/yyyy)* for the treatment(s).

Provide your **best estimate** of the duration of the treatment(s), including any period(s) of recovery *(e.g. 3 days/week)*

_____

(7) Due to the condition, it is medically necessary for the employee to work a **reduced schedule**.

Provide your **best estimate** of the reduced schedule the employee is able to work. From _____ *(mm/dd/yyyy)* to _____ *(mm/dd/yyyy)* the employee is able to work: *(e.g., 5 hours/day, up to 25 hours a week)*

_____

(8) Due to the condition, the patient (☐ was / ☐ will be) **incapacitated for a continuous period of time**, including any time for treatment(s) and/or recovery.

Provide your **best estimate** of the beginning date _____ *(mm/dd/yyyy)* and end date _____ *(mm/dd/yyyy)* for the period of incapacity.

(9) Due to the condition, it (☐ was / ☐ is / ☐ will be) medically necessary for the employee to be absent from work on an **intermittent basis** (periodically), including for any episodes of incapacity i.e., episodic flare-ups. Provide your **best estimate** of how often (frequency) and how long (duration) the episodes of incapacity will likely last.

Over the next 6 months, episodes of incapacity are estimated to occur _____ times per (☐ day / ☐ week / ☐ month) and are likely to last approximately _____ (☐ hours / ☐ days) per episode.

Employee Name: _____

PART C: Essential Job Functions

If provided, the information in Section I question #4 may be used to answer this question. If the employer fails to provide a statement of the employee's essential functions or a job description, answer these questions based upon the employee's own description of the essential job functions. An employee who must be absent from work to receive medical treatment(s), such as scheduled medical visits, for a serious health condition is considered to be *not able* to perform the essential job functions of the position during the absence for treatment(s).

(10) Due to the condition, the employee (☐ was not able / ☐ is not able / ☐ will not be able) to perform *one or more* of the essential job function(s). Identify at least one essential job function the employee is not able to perform:

_____

_____

Signature of Health Care Provider _____ **Date** _____ *(mm/dd/yyyy)*

Definitions of a Serious Health Condition *(See 29 C.F.R. §§ 825.113-.115)*
Inpatient Care
• An overnight stay in a hospital, hospice, or residential medical care facility. • Inpatient care includes any period of incapacity or any subsequent treatment in connection with the overnight stay.
Continuing Treatment by a Health Care Provider (any one or more of the following)
Incapacity Plus Treatment: A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves either: o Two or more in-person visits to a health care provider for treatment within 30 days of the first day of incapacity unless extenuating circumstances exist. The first visit must be within seven days of the first day of incapacity; or, o At least one in-person visit to a health care provider for treatment within seven days of the first day of incapacity, which results in a regimen of continuing treatment under the supervision of the health care provider. For example, the health provider might prescribe a course of prescription medication or therapy requiring special equipment.
Pregnancy: Any period of incapacity due to pregnancy or for prenatal care.
Chronic Conditions: Any period of incapacity due to or treatment for a chronic serious health condition, such as diabetes, asthma, migraine headaches. A chronic serious health condition is one which requires visits to a health care provider (or nurse supervised by the provider) at least twice a year and recurs over an extended period of time. A chronic condition may cause episodic rather than a continuing period of incapacity.
Permanent or Long-term Conditions: A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, but which requires the continuing supervision of a health care provider, such as Alzheimer's disease or the terminal stages of cancer.
Conditions Requiring Multiple Treatments: Restorative surgery after an accident or other injury; or, a condition that would likely result in a period of incapacity of more than three consecutive, full calendar days if the patient did not receive the treatment.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 15 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR. RETURN TO THE PATIENT.

Certification of Health Care Provider for Family Member's Serious Health Condition under the Family and Medical Leave Act

U.S. Department of Labor
Wage Hour Division

WAGE AND HOUR DIVISION

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR.
RETURN TO THE PATIENT.

OMB Control Number: 1235-0003
Expires: 6/30/2023

The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave to care for a family member with a serious health condition to submit a medical certification issued by the family member's health care provider. 29 U.S.C. §§ 2613, 2614(c)(3); 29 C.F.R. § 825.305. The employer must give the employee **at least 15 calendar days** to provide the certification. If the employee fails to provide complete and sufficient medical certification, his or her FMLA leave request may be denied. 29 C.F.R. § 825.313. Information about the FMLA may be found on the WHD website at www.dol.gov/agencies/whd/fmla.

SECTION I - EMPLOYER

Either the employee or the employer may complete Section I. While use of this form is optional, this form asks the health care provider for the information necessary for a complete and sufficient medical certification, which is set out at 29 C.F.R. § 825.306. **You may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308**. Additionally, you **may not** request a certification for FMLA leave to bond with a healthy newborn child or a child placed for adoption or foster care.

Employers must generally maintain records and documents relating to medical information, medical certifications, recertifications, or medical histories of employees or employees' family members created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

(1) Employee name: _____
First *Middle* *Last*

(2) Employer name: _____ Date: _____ *(mm/dd/yyyy)*
(List date certification requested)

(3) The medical certification must be returned by _____ *(mm/dd/yyyy)*
(Must allow at least 15 calendar days from the date requested, unless it is not feasible despite the employee's diligent, good faith efforts.)

SECTION II - EMPLOYEE

Please complete and sign Section II before providing this form to your family member or your family member's health care provider. The FMLA allows an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to the serious health condition of your family member. If requested by your employer, your response is required to obtain or retain the benefit of the FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). **You are responsible for making sure the medical certification is provided to your employer within the time frame requested, which must be at least 15 calendar days.** 29 C.F.R. §§ 825.305-825.306. Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA leave request. 29 C.F.R. § 825.313.

(1) Name of the family member for whom you will provide care: _____

(2) Select the relationship of the family member to you. The family member is your:

☐ Spouse ☐ Parent ☐ Child, under age 18
☐ Child, age 18 or older and incapable of self-care because of a mental or physical disability

Spouse means a husband or wife as defined or recognized in the state where the individual was married, including in a common law marriage or same-sex marriage. The terms "child" and "parent" include *in loco parentis* relationships in which a person assumes the obligations of a parent to a child. An employee may take FMLA leave to care for an individual who assumed the obligations of a parent to the employee when the employee was a child. An employee may also take FMLA leave to care for a child for whom the employee has assumed the obligations of a parent. No legal or biological relationship is necessary.

Employee Name: _____

(3) Briefly describe the care you will provide to your family member: (*Check all that apply)*

☐ Assistance with basic medical, hygienic, nutritional, or safety needs ☐ Transportation

☐ Physical Care ☐ Psychological Comfort ☐ Other: _____

(4) Give your **best estimate** of the amount of leave needed to provide the care described: _____

_____

(5) If a **reduced work schedule** is necessary to provide the care described, give your **best estimate** of the reduced schedule you are able to work. From _____ *(mm/dd/yyyy)* to _____ *(mm/dd/yyyy),* I am able to work _____ (*hours per day*) _____ (*days per week).*

Employee Signature _____ **Date** _____ *(mm/dd/yyyy)*

SECTION III - HEALTH CARE PROVIDER

Please provide your contact information, complete all relevant parts of this Section, and sign the form below. A family member of your patient has requested leave under the FMLA to care for your patient. The FMLA allows an employer to require that the employee submit a timely, complete, and sufficient medical certification to support a request for FMLA leave to care for a family member with a serious health condition. For FMLA purposes, a "serious health condition" means an illness, injury, impairment, or physical or mental condition that *involves inpatient care* or *continuing treatment by a health care provider*. For more information about the definitions of a serious health condition under the FMLA, see the chart at the end of the form.

You also may, but are **not required** to, provide other appropriate medical facts including symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment. Please note that some state or local laws may not allow disclosure of private medical information about the patient's serious health condition, such as providing the diagnosis and/or course of treatment.

Health Care Provider's name: *(Print)* _____

Health Care Provider's business address: _____

Type of practice / Medical specialty: _____

Telephone: (_____) _____ Fax: (____) _____ E-mail: _____

PART A: Medical Information

Limit your response to the medical condition for which the employee is seeking FMLA leave. Your answers should be your **best estimate** based upon your medical knowledge, experience, and examination of the patient. **After completing Part A, complete Part B to provide information about the amount of leave needed.** Note: For FMLA purposes, "incapacity" means the inability to work, attend school, or perform regular daily activities due to the condition, treatment of the condition, or recovery from the condition. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), genetic services, as defined in 29 C.F.R. § 1635.3(e), or the manifestation of disease or disorder in the employee's family members, 29 C.F.R. § 1635.3(b).

(1) Patient's Name: _____

(2) State the approximate date the condition started or will start: _____ *(mm/dd/yyyy)*

(3) Provide your **best estimate** of how long the condition lasted or will last: _____

(4) For FMLA to apply, care of the patient must be medically necessary. Briefly describe the type of care needed by the patient (*e.g., assistance with basic medical, hygienic, nutritional, safety, transportation needs, physical care, or psychological comfort).*

_____

_____

Employee Name: _____

(5) Check the box(es) for the questions below, as applicable. For all box(es) checked, the amount of leave needed must be provided in Part B.

☐ **Inpatient Care**: The patient (☐ has been / ☐ is expected to be) admitted for an overnight stay in a hospital, hospice, or residential medical care facility on the following date(s): _____

☐ **Incapacity plus Treatment**: *(e.g. outpatient surgery, strep throat)*
Due to the condition, the patient (☐ has been / ☐ is expected to be) incapacitated for *more than* three consecutive, full calendar days from _____ *(mm/dd/yyyy)* to _____ *(mm/dd/yyyy)*.

The patient (☐ was / ☐ will be) seen on the following date(s): _____

_____

The condition (☐ has / ☐ has not) also resulted in a course of continuing treatment under the supervision of a health care provider *(e.g. prescription medication (other than over-the-counter) or therapy requiring special equipment)*

☐ **Pregnancy**: The condition is pregnancy. List the expected delivery date: _____ *(mm/dd/yyyy)*.

☐ **Chronic Conditions**: *(e.g. asthma, migraine headaches)* Due to the condition, it is medically necessary for the patient to have treatment visits at least twice per year.

☐ **Permanent or Long Term Conditions**: *(e.g. Alzheimer's, terminal stages of cancer)* Due to the condition, incapacity is permanent or long term and requires the continuing supervision of a health care provider (even if active treatment is not being provided).

☐ **Conditions requiring Multiple Treatments**: (*e.g. chemotherapy treatments, restorative surgery)* Due to the condition, it is medically necessary for the patient to receive multiple treatments.

☐ **None of the above**: If none of the above condition(s) were checked, (i.e., inpatient care, pregnancy) no additional information is needed. Go to page 4 to sign and date the form.

(6) If needed, briefly describe other appropriate medical facts related to the condition(s) for which the employee seeks FMLA leave. *(e.g., use of nebulizer, dialysis)* _____

_____

PART B: Amount of Leave Needed

For the medical condition(s) checked in Part A, complete all that apply. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your **best estimate** based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine if the benefits and protections of the FMLA apply.

(7) Due to the condition, the patient (☐ had / ☐ will have) **planned medical treatment(s)** (scheduled medical visits) *(e.g. psychotherapy, prenatal appointments)* on the following date(s): _____

_____

(8) Due to the condition, the patient (☐ was / ☐ will be) **referred to other health care provider(s)** for evaluation or treatment(s).

State the nature of such treatments: *(e.g. cardiologist, physical therapy)* _____

Provide your **best estimate** of the beginning date _____ *(mm/dd/yyyy)* and end date _____ *(mm/dd/yyyy)* for the treatment(s).

Provide your **best estimate** of the duration of the treatment(s), including any period(s) of recovery

_____ *(e.g. 3 days/week)*

Employee Name: _____

(9) Due to the condition, the patient (☐ was / ☐ will be) **incapacitated for a continuous period of time**, including any time for treatment(s) and/or recovery.

Provide your **best estimate** of the beginning date: _____ *(mm/dd/yyyy)* and end date _____ *(mm/dd/yyyy)* for the period of incapacity.

(10) Due to the condition it, (☐ was / ☐ is / ☐ will be) medically necessary for the employee to be absent from work to provide care for the patient on an **intermittent basis** (periodically), including for any episodes of incapacity i.e., episodic flare-ups. Provide your **best estimate** of how often (frequency) and how long (duration) the episodes of incapacity will likely last.

Over the next 6 months, episodes of incapacity are estimated to occur _____ times per (☐ day / ☐ week / ☐ month) and are likely to last approximately _____ (☐ hours / ☐ days) per episode.

Signature of
Health Care Provider _____ **Date** _____ *(mm/dd/yyyy)*

Definitions of a Serious Health Condition *(See 29 C.F.R. §§ 825.113-.115)*
Inpatient Care
• An overnight stay in a hospital, hospice, or residential medical care facility. • Inpatient care includes any period of incapacity or any subsequent treatment in connection with the overnight stay.
Continuing Treatment by a Health Care Provider (any one or more of the following)
Incapacity Plus Treatment: A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves either: o Two or more in-person visits to a health care provider for treatment within 30 days of the first day of incapacity unless extenuating circumstances exist. The first visit must be within seven days of the first day of incapacity; or, o At least one in-person visit to a health care provider for treatment within seven days of the first day of incapacity, which results in a regimen of continuing treatment under the supervision of the health care provider. For example, the health provider might prescribe a course of prescription medication or therapy requiring special equipment.
Pregnancy: Any period of incapacity due to pregnancy or for prenatal care.
Chronic Conditions: Any period of incapacity due to or treatment for a chronic serious health condition, such as diabetes, asthma, migraine headaches. A chronic serious health condition is one which requires visits to a health care provider (or nurse supervised by the provider) at least twice a year and recurs over an extended period of time. A chronic condition may cause episodic rather than a continuing period of incapacity.
Permanent or Long-term Conditions: A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, but which requires the continuing supervision of a health care provider, such as Alzheimer's disease or the terminal stages of cancer.
Conditions Requiring Multiple Treatments: Restorative surgery after an accident or other injury; or, a condition that would likely result in a period of incapacity of more than three consecutive, full calendar days if the patient did not receive the treatment.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 15 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR. RETURN TO THE PATIENT.

Certification for Military Family Leave for Qualifying Exigency under the Family and Medical Leave Act

U.S. Department of Labor
Wage and Hour Division

WAGE AND HOUR DIVISION

DO NOT SEND FORM TO THE DEPARTMENT OF LABOR.
RETURN THE COMPLETED FORM TO THE EMPLOYER.

OMB Control Number: 1235-0003
Expires: 6/30/2023

The Family and Medical Leave Act (FMLA) provides that eligible employees may take FMLA leave for a qualifying exigency while the employee's spouse, child, or parent (the military member) is on covered active duty or has been notified of an impending call or order to covered active duty. The FMLA allows an employer to require an employee seeking FMLA leave due to a qualifying exigency to submit a certification. 29 U.S.C. §§ 2613, 2614(c)(3). The employer must give the employee **at least 15 calendar days** to provide the certification. 29 C.F.R. § 825.305(b). If the employee fails to provide complete and sufficient certification, the employee's FMLA leave request may be denied. 29 C.F.R. § 825.313. Information about the FMLA may be found on the WHD website at http://www.dol.gov/agencies/whd/fmla.

SECTION I - EMPLOYER

Either the employee or the employer may complete Section I. While use of this form is optional, it asks the employee for the information necessary for a complete and sufficient qualifying exigency certification, which is set out at 29 C.F.R. § 825.309. **You may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.309.**

(1) Employee name: _____
First *Middle* *Last*

(2) Employer name: _____ Date: _____ *(mm/dd/yyyy)*
(List date certification requested)

(3) This certification must be returned by_____ *(mm/dd/yyyy).*
(Must allow at least 15 calendar days from the date requested, unless it is not feasible despite the employee's diligent, good faith efforts.)

SECTION II - EMPLOYEE

Please complete all Parts of Section II and sign the form before returning it to your employer. The FMLA allows an employer to require that you submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a qualifying exigency. If requested by your employer, your response is required to obtain the benefits and protections of the FMLA**.** 29 C.F.R. § 825.309. Failure to provide a complete and sufficient certification may result in a denial of your FMLA leave request. A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes written documentation confirming a military member's covered active duty or call to covered active duty status. **You are responsible for making sure the certification is provided to your employer within the time frame requested, which must be at least 15 calendar days.** 29 C.F.R. § 825.313.

(1) Provide the name of the military member on covered active duty or call to covered active duty status:

_____
First *Middle* *Last*

(2) Select your relationship of the military member. The military member is your:

☐ Spouse ☐ Parent ☐ Child, of any age

Spouse means a husband or wife as defined or recognized in the state where the individual was married, including a common law marriage or same-sex marriage. The terms "child" and "parent" include *in loco parentis* relationships in which a person assumes the obligations of a parent to a child. An employee may take FMLA leave for a qualifying exigency related a military member who assumed the obligations of a parent to the employee when the employee was a child. An employee may also take FMLA leave for a qualifying exigency related a military member for whom the employee has assumed the obligations of a parent. No legal or biological relationship is necessary.

Employee Name: _____

PART A: COVERED ACTIVE DUTY STATUS

Covered active duty or call to covered active duty in the case of a member of the Regular Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country. Covered active duty or call to covered active duty in the case of a member of the Reserve components means duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code; Section 12301(a) of Title 10 of the United States Code; Section 12302 of Title 10 of the United States Code; Section 12304 of Title 10 of the United States Code; Section 12305 of Title 10 of the United States Code; Section 12406 of Title 10 of the United States Code; chapter 15 of Title 10 of the United States Code; or, any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. 10 U.S.C. § 101(a)(13)(B).

An employer may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military which indicates that the military member is on covered active duty or call to covered active duty status, and the dates of the military member's covered active duty service. **This information need only be provided to the employer once, unless additional leave is needed for a different military member or different deployment**.

(3) Provide the dates of the military member's covered active duty service: _____

(4) Please check one of the following and attach the indicated written document to support that the military member is on covered active duty or call to covered active duty status:

- ☐ A copy of the military member's covered active duty orders
- ☐ Other documentation from the military indicating that the military member is on covered active duty or has been notified of an impending call to covered active duty, such as official military correspondence from the military member's chain of command
- ☐ I have previously provided my employer with sufficient written documentation confirming the military member's covered active duty or call to covered active duty status

PART B: APPROPRIATE FACTS

Under the FMLA, leave can be taken for a number of qualifying exigencies. 29 C.F.R. § 825.126(b). Complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes available written documentation which supports the need for leave such as a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming the military member's Rest and Recuperation leave, or other documentation issued by the military which indicates that the military member has been granted Rest and Recuperation leave, or a document confirming an appointment with a third party (*e.g.*, a counselor or school official, or staff at a care facility, a copy of a bill for services for the handling of legal or financial affairs). Please provide appropriate facts related to the particular qualifying exigency to support the FMLA leave request, including information on the type of qualifying exigency and any available written documentation of the exigency event.

(5) Select the appropriate **Qualifying Exigency Category** and, if needed, provide additional information related to the event:

- ☐ Short notice deployment (*i.e.,* deployment within seven or fewer days of notice)
- ☐ Military events and related activities *(e.g., official ceremonies or events, or family support and assistance programs):*

  _____
- ☐ Childcare related activities for the child of the military member *(e.g., arranging for alternative childcare):*

  _____

Employee Name: _____

- ☐ Care for the military member's parent *(e.g., admitting or transferring the parent to a new care facility):*

  _____

- ☐ Financial and legal arrangements related to the deployment *(e.g., obtaining military identification cards)*
- ☐ Counseling related to the deployment (*i.e.*, counseling provided by someone other than a health care provider)
- ☐ Military member's short-term, temporary Rest and Recuperation leave (R&R) (leave for this reason is limited to 15 calendar days for each instance of R&R)
- ☐ Post deployment activities *(e.g., arrival ceremonies, or reintegration briefings and events):*_____

  _____

- ☐ Any other event that the employee and employer agree is a qualifying exigency: _____

  _____

(6) **Available written documentation** supporting this request for leave is (☐ attached / ☐ not attached / ☐ not available).

PART C: AMOUNT OF LEAVE NEEDED

Provide information concerning the amount of leave that will be needed. Several questions in this section seek a response as to the frequency or duration of the qualifying exigency leave needed. Be as specific as you can; terms such as "*unknown"* or *"indeterminate"* may not be sufficient to determine FMLA coverage.

(7) List the approximate date exigency started or will start: _____ *(mm/dd/yyyy)*

(8) Provide your best estimate of how long the exigency lasted or will last:

From _____ *(mm/dd/yyyy)* to _____ *(mm/dd/yyyy)*

(9) Due to a qualifying exigency, I need to work a **reduced schedule**. Provide your **best estimate** of the reduced schedule you are able to work:

From _____ *(mm/dd/yyyy)* to _____ *(mm/dd/yyyy)*

I am able to work _____
(e.g., 5 hours/day, up to 25 hours a week)

(10) Due to a qualifying exigency, I will need to be absent from work for a **continuous period of time**. Provide your **best estimate** of the beginning and ending dates for the period of absence:

From _____ *(mm/dd/yyyy)* to _____ *(mm/dd/yyyy)*

Employee Name: _____

(11) Due to a qualifying exigency, I will need to be absent from work on an **intermittent basis** (periodically).

Provide your **best estimate** of the frequency (how often) and duration (how long) of each appointment, meeting, or leave event, including any travel time.

Over the next 6 months, absences on an **intermittent basis** are estimated to occur: _____ times per (☐ day / ☐ week / ☐ month) and are likely to last approximately _____ (☐ hours / ☐ days) per episode.

(12) My leave is due to a qualifying exigency that involves **Rest and Recuperation leave** (R & R) of the military member (leave for this reason is limited to 15 calendar days for each instance of R & R leave).

List the dates of the military member's R &R leave:

From _____ *(mm/dd/yyyy)* to _____ *(mm/dd/yyyy)*

PART D: THIRD PARTY INFORMATION

If applicable, please provide information below that may be used by your employer to verify meetings or appointments with a third party related to the qualifying exigency. Examples of meetings with third parties include: arranging for childcare or parental care, to attend non-medical counseling, to attend meetings with school, childcare or parental care providers, to make financial or legal arrangements, to act as the military member's representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits, or to attend any event sponsored by the military or military service organizations. This information may be used by your employer to verify that the information contained on this form is accurate.

Individual *(e.g., name and title)* or Entity / Organization: _____

Address: _____

Telephone: (___) _____ Fax: (___) _____ E-mail: _____

Describe purpose of meeting: _____

Employee Signature _____ **Date** _____ *(mm/dd/yyyy)*

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

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DO NOT SEND THE COMPLETED FORM TO THE DEPARTMENT OF DEPARTMENT OF LABOR. RETURN FORM TO THE EMPLOYER.

Certification for Serious Injury or Illness of a Current Servicemember for Military Caregiver Leave under the Family and Medical Leave Act

U.S. Department of Labor
Wage Hour Division

WAGE AND HOUR DIVISION

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR. RETURN TO THE PATIENT.

OMB Control Number: 1235-0003
Expires: 6/30/2023

The Family and Medical Leave Act (FMLA) provides that eligible employees may take FMLA leave to care for a covered servicemember with a serious illness or injury. The FMLA allows an employer to require an employee seeking FMLA leave for this purpose to submit a medical certification. 29 U.S.C. §§ 2613, 2614(c)(3). The employer must give the employee **at least 15 calendar days** to provide the certification. If the employee fails to provide complete and sufficient certification, his or her FMLA leave request may be denied. 29 C.F.R. § 825.313. Information about the FMLA may be found on the WHD website at www.dol.gov/agencies/whd/fmla.

SECTION I - EMPLOYER

Either the employee or the employer may complete Section I. While use of this form is optional, it asks the health care provider for the information necessary for a complete and sufficient medical certification. **You may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.310. Recertifications are not allowed for FMLA leave to care for a covered servicemember. Where medical certification is requested by an employer, an employee may not be held liable for administrative delays in the issuance of military documents, despite the employee's diligent, good-faith efforts to obtain such documents.** An employer requiring an employee to submit a certification for leave to care for a covered servicemember **must** accept as sufficient certification invitational travel orders (ITOs) or invitational travel authorizations (ITAs) issued to any family member to join an injured or ill servicemember at the servicemember's bedside. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA.

Employers must generally maintain records and documents relating to medical information, medical certifications, recertifications, or medical histories of employees or employees' family members created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

(1) Employee name: _____
First *Middle* *Last*

(2) Employer name: _____ Date: _____ *(mm/dd/yyyy)*
(List date certification requested)

(3) This certification must be returned by: _____ *(mm/dd/yyyy)*
(Must allow at least 15 calendar days from the date requested, unless it is not feasible despite the employee's diligent, good faith efforts.)

SECTION II - EMPLOYEE and/or CURRENT SERVICEMEMBER

Please complete all Parts of Section II before having the servicemember's health care provider complete Section III. The FMLA allows an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a serious injury or illness of a covered servicemember. If requested by your employer, your response is required to obtain or retain the benefit of FMLA-protected leave.

PART A: EMPLOYEE INFORMATION

(1) Name of the current servicemember for whom employee is requesting leave:_____

Employee Name: _____

(2) Select your relationship to the current servicemember. You are the current servicemember's:

☐ Spouse ☐ Parent ☐ Child ☐ Next of Kin

Spouse means a husband or wife as defined or recognized in the state where the individual was married, including a common law marriage or same-sex marriage. The terms "child" and "parent" include *in loco parentis* relationships in which a person assumes the obligations of a parent to a child. An employee may take FMLA leave to care for a covered servicemember who assumed the obligations of a parent to the employee when the employee was a child. An employee may also take FMLA leave to care for a covered servicemember for whom the employee has assumed the obligations of a parent. No biological or legal relationship is necessary. "Next of kin" is the servicemember's nearest blood relative, other than the spouse, parent, son, or daughter, in the following order of priority: (1) a blood relative as designated in writing by the servicemember for purposes of FMLA leave, (2) blood relatives granted legal custody of the servicemember, (3) brothers and sisters, (4) grandparents, (5) aunts and uncles, and (6) first cousins.

PART B: SERVICEMEMBER INFORMATION AND CARE TO BE PROVIDED TO THE SERVICEMEMBER

(3) The servicemember (☐ is / ☐ is not) a current member of the Regular Armed Forces, the National Guard or Reserves. If yes, provide the servicemember's military branch, rank and unit currently assigned to: _____

_____

(4) The servicemember (☐ is / ☐ is not) assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients, such as a medical hold or warrior transition unit. If yes, provide the name of the medical treatment facility or unit: _____

(5) The servicemember (☐ is / ☐ is not) on the Temporary Disability Retired List (TDRL).

(6) Briefly describe the care you will provide to the servicemember: *(Check all that apply)*

☐ Assistance with basic medical, hygienic, nutritional, or safety needs

☐ Psychological Comfort ☐ Physical Care

☐ Transportation ☐ Other: _____

(7) Give your **best estimate** of the amount of leave needed to provide the care described: _____

_____

(8) If a reduced work schedule is necessary to provide the care described, give your **best estimate** of the reduced work schedule you are able to work. From _____ *(mm/dd/yyyy)* to _____ *(mm/dd/yyyy),* I am able to work: _____ *(hours per day)* _____ (*days per week).*

SECTION III - HEALTH CARE PROVIDER

Please provide your contact information, complete all Parts of this Section fully and completely, and sign the form below. The employee listed at Section I has requested leave under the FMLA to care for a family member who is a current member of the Regular Armed Forces, the National Guard, or the Reserves who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness. Note: For purposes of FMLA leave, a serious injury or illness is one that was incurred in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces that may render the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating. "Need for care" includes both physical and psychological care. It includes situations where, for example, due to his or her serious injury or illness, the servicemember is not able to care for his or her own basic medical, hygienic, or nutritional needs or safety, or needs transportation to the doctor. It also includes providing psychological comfort and reassurance which would be beneficial to the servicemember who is receiving inpatient or home

care. A complete and sufficient certification to support a request for FMLA leave due to a current servicemember's serious injury or illness includes written documentation confirming that the servicemember's injury or illness was incurred in the line of duty on active duty or if not, that the current servicemember's injury or illness existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that the current servicemember is undergoing treatment for such injury or illness by a health care provider listed above.

PART A: HEALTH CARE PROVIDER INFORMATION

Health Care Provider's Name: *(Print)* _____

Health Care Provider's business address: _____

Type of practice/Medical specialty: _____

Telephone: (___) _____ Fax: (___) _____ E-mail: _____

Please select the type of FMLA health care provider you are:

- ☐ DOD health care provider
- ☐ VA health care provider
- ☐ DOD TRICARE network authorized private health care provider
- ☐ DOD non-network TRICARE authorized private health care provider
- ☐ Health care provider as defined in 29 C.F.R. § 825.125

PART B: MEDICAL INFORMATION

Please provide appropriate medical information of the patient as requested below. Limit your responses to the servicemember's condition for which the employee is seeking leave. If you are unable to make some of the military-related determinations contained below, you are permitted to rely upon determinations from an authorized DOD representative, such as a DOD recovery care coordinator. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), or genetic services, as defined in 29 C.F.R. §1635.3(e).

(1) Patient's Name: _____

(2) List the approximate date condition started or will start: _____ *(mm/dd/yyyy)*

(3) Provide your **best estimate** of how long the condition will last: _____

(4) The servicemember's injury or illness: *(Select as appropriate)*

- ☐ Was incurred in the line of duty on active duty.
- ☐ Existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty.
- ☐ None of the above.

(5) The servicemember (☐ is / ☐ is not) undergoing medical treatment, recuperation, or therapy for this condition.
If yes, briefly describe the medical treatment, recuperation or therapy: _____

Employee Name: _____

(6) The current servicemember's medical condition is classified as: *(Select as appropriate)*

☐ **(VSI) Very Seriously Ill/Injured** Illness/Injury is of such a severity that life is imminently endangered. Family members are requested at bedside immediately. *Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.*

☐ **(SI) Seriously Ill/Injured** Illness/injury is of such severity that there is cause for immediate concern, but there is no imminent danger to life. Family members are requested at bedside. *Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.*

☐ **OTHER Ill/Injured** A serious injury or illness that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating.

☐ **NONE OF THE ABOVE.** *Note to Employee: If this box is checked, you may still be eligible to take leave to care for a covered family member with a "serious health condition" under 29 C.F.R. § 825.113 of the FMLA. If such leave is requested, you may be required to complete DOL FORM WH-380-F or an employer-provided form seeking the same information.*

PART C: AMOUNT OF LEAVE NEEDED

For the medical condition checked in Part B, complete all that apply. Some questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your **best estimate** based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage.

(7) Due to the condition, the servicemember will need care for a **continuous period of time**, including any time for treatment and recovery. Provide your **best estimate** of the beginning date _____ *(mm/dd/yyyy)* and end date _____ *(mm/dd/yyyy)* for this period of time.

(8) Due to the condition, it is medically necessary for the servicemember to attend **planned medical treatment** appointments (scheduled medical visits). Provide your **best estimate** of the duration of the treatment(s), including any period(s) of recovery _____ *(e.g. 3 days/week)*

(9) Due to the condition, it is medically necessary for the servicemember to receive care on an **intermittent basis** (periodically), such as the care needed because of episodic flare-ups of the condition or assisting with the servicemember's recovery. Provide your **best estimate** of how often (frequency) and how long (the duration) the intermittent episodes will likely last.

Over the next 6 months, intermittent care is estimated to occur _____ times per (☐ day / ☐ week / ☐ month) and are likely to last approximately _____ (☐ hours / ☐ days) per episode.

Signature of Health Care Provider _____ **Date** _____ *(mm/dd/yyyy)*

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

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DO NOT SEND THE COMPLETED FORM TO THE DEPARTMENT OF LABOR. RETURN IT TO THE PATIENT.

Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave under the Family and Medical Leave Act

U.S. Department of Labor
Wage and Hour Division

WAGE AND HOUR DIVISION

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR.
RETURN TO THE PATIENT.

OMB Control Number: 1235-0003
Expires: 6/30/2023

The Family and Medical Leave Act (FMLA) provides that eligible employees may take FMLA leave to care for a covered veteran with a serious illness or injury. The FMLA allows an employer to require an employee seeking FMLA leave for this purpose to submit a medical certification. 29 U.S.C. §§ 2613, 2614(c)(3). The employer must give the employee **at least 15 calendar days** to provide the certification. If the employee fails to provide complete and sufficient certification, his or her FMLA leave request may be denied. 29 C.F.R. § 825.313. Information about the FMLA may be found on the WHD website at www.dol.gov/agencies/whd/fmla.

SECTION I – EMPLOYER

Either the employee or the employer may complete Section I. While use of this form is optional, it asks the health care provider for the information necessary for a complete and sufficient medical certification. **Recertifications are not allowed for FMLA leave to care for a covered servicemember. Where medical certification is requested by an employer, an employee may not be held liable for administrative delays in the issuance of military documents, despite the employee's diligent, good-faith efforts to obtain such documents.** In lieu of this form or your own certification form, you **must** accept as sufficient certification of the veteran's serious injury or illness documentation indicating the veteran's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. **You may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.310**.

Employers must generally maintain records and documents relating to medical information, medical certifications, recertifications, or medical histories of employees or employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

(1) Employee name: _____
First *Middle* *Last*

(2) Employer Name: _____ Date: _____ *(mm/dd/yyyy)*
(List date certification requested)

(3) This certification must be returned by: _____ *(mm/dd/yyyy)*
(Must allow at least 15 calendar days from the date requested, unless it is not feasible despite the employee's diligent, good faith efforts.)

SECTION II - EMPLOYEE and/or VETERAN

Please complete all Parts in Section II before having the veteran's health care provider complete Section III. The FMLA allows an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for military caregiver leave under the FMLA due to a serious injury or illness of a covered veteran. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. The employer must give an employee **at least 15 calendar days** to return this form to the employer. 29 U.S.C. §§ 2613, 2614(c)(3).

PART A: EMPLOYEE INFORMATION

(1) Name of veteran for whom employee is requesting leave: _____
First *Middle* *Last*

Employee Name: _____

(2) Select your relationship to the veteran. You are the veteran's:

☐ Spouse ☐ Parent ☐ Child ☐ Next of Kin

Spouse means a husband or wife as defined or recognized in the state where the individual was married, including a common law marriage or same-sex marriage. The terms "child" and "parent" include *in loco parentis* in which a person assumes the obligations of a parent to a child. An employee may take FMLA leave to care for a covered servicemember who assumed the obligations of a parent to the employee when the employee was a child. An employee may also take FMLA leave to care for a covered servicemember for whom the employee has assumed the obligations of a parent. No biological or legal relationship is necessary. "Next of kin" is the veteran's nearest blood relative, other than the spouse, parent, son, or daughter, in the following order of priority: (1) a blood relative as designated in writing by the veteran for purposes of FMLA leave, (2) blood relatives granted legal custody of the veteran, (3) brothers and sisters, (4) grandparents, (5) aunts and uncles, and (6) first cousins.

PART B: VETERAN INFORMATION AND CARE TO BE PROVIDED TO THE VETERAN

(3) The veteran was (☐ honorably / ☐ dishonorably) discharged or released from the Armed Forces, including the National Guard or Reserves. List the date of the veteran's discharge: _____ *(mm/dd/yyyy)*

(4) Please provide the veteran's military branch, rank and unit at the time of discharge: _____

_____

(5) The veteran (☐ is / ☐ is not) receiving medical treatment, recuperation, or therapy for an injury or illness.

(6) Briefly describe the care you will provide to the veteran: *(Check all that apply)*

☐ Assistance with basic medical, hygienic, nutritional, or safety needs ☐ Transportation

☐ Psychological Comfort ☐ Physical Care ☐ Other: _____

(7) Give your **best estimate** of the amount of FMLA leave needed to provide the care described: _____

_____

(8) If a **reduced work schedule** is necessary to provide the care described, give your **best estimate** of the reduced work schedule you are able to work. From _____ *(mm/dd/yyyy)* to _____ *(mm/dd/yyyy)* I am able to work: _____ *(hours per day)* _____ *(days per week).*

SECTION III - HEALTH CARE PROVIDER

Please provide your contact information, complete all Parts of this Section fully and completely, and sign the form below. The employee named in Section I has requested leave under the military caregiver leave provision of the FMLA to care for a family member who is a veteran.

Note: For purposes of FMLA military caregiver leave, a serious injury or illness means an injury or illness incurred by the servicemember in the line of duty on active duty in the Armed Forces (or that existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the servicemember became a veteran, and is: a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans' Affairs Program of Comprehensive Assistance for Family Caregivers.

Employee Name: _____

"Need for care" includes both physical and psychological care. It includes situations where, for example, due to his or her serious injury or illness, the veteran is not able to care for his or her own basic medical, hygienic, or nutritional needs or safety, or needs transportation to the doctor. It also includes providing psychological comfort and reassurance which would be beneficial to the veteran who is receiving inpatient or home care.

A complete and sufficient certification to support a request for FMLA military caregiver leave due to a covered veteran's serious injury or illness includes written documentation confirming that the veteran's injury or illness was incurred in the line of duty on active duty or existed before the beginning of the veteran's active duty and was aggravated by service in the line of duty on active duty, and that the veteran is undergoing treatment, recuperation, or therapy for such injury or illness by a health care provider listed above. Information about the FMLA may be found on the WHD website at www.dol.gov/agencies/whd/fmla.

PART A: HEALTH CARE PROVIDER INFORMATION

Health Care Provider's Name: *(Print)* _____

Health Care Provider's business address: _____

Type of Practice/Medical Specialty: _____

Telephone: (___) _____ Fax: (___) _____ E-mail: _____

Please select the type of FMLA health care provider you are:

- ☐ DOD health care provider
- ☐ VA health care provider
- ☐ DOD TRICARE network authorized private health care provider
- ☐ DOD non-network TRICARE authorized private health care provider
- ☐ Health care provider as defined in 29 CFR 825.125

PART B: MEDICAL INFORMATION

Please provide appropriate medical information of the patient as requested below. Limit your responses to the veteran's condition for which the employee is seeking leave. If you are unable to make certain military-related determinations contained below, you are permitted to rely upon determinations from an authorized DOD representative, such as a DOD Recovery Care Coordinator, or an authorized VA representative. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), or genetic services, as defined in 29 C.F.R. § 1635.3(e).

(1) Patient's Name: _____

(2) List the approximate date condition started or will start: _____ *(mm/dd/yyyy)*

(3) Provide your **best estimate** of how long the condition will last: _____

(4) The veteran's injury or illness: *(Select as appropriate)*

- ☐ Was incurred in the line of duty on active duty
- ☐ Existed before the beginning of the veteran's active duty and was aggravated by service in the line of duty on active duty
- ☐ None of the above

The veteran (☐ is / ☐ is not) undergoing medical treatment, recuperation, or therapy for this condition. If yes, briefly describe the medical treatment, recuperation, or therapy: _____

_____

Employee Name: _____

(5) The veteran's medical condition is: *(Select as appropriate)*

☐ A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember not able to perform the duties of the servicemember's office, grade, rank, or rating.

☐ A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service Related Disability Rating (VASRD) of 50% or higher, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave.

☐ A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment.

☐ An injury, including a psychological injury, on the basis of which the covered veteran is enrolled in the Department of Veterans' Affairs Program of Comprehensive Assistance for Family Caregivers.

☐ None of the above. *Note to Employee: If this box is checked, you may still be eligible to take leave to care for a covered family member with a "serious health condition" under 29 C.F.R. § 825.113 of the FMLA. If such leave is requested, you may be required to complete DOL FORM WH-380-F or an employer-provided form seeking the same information.*

Part C: Amount of Leave Needed

For the medical condition checked in Part B, complete all that apply. Some questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your **best estimate** based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA military caregiver leave coverage.

(1) Due to the condition, the veteran will need care for a **continuous period of time**, including any time for treatment and recovery. Provide your **best estimate** of the beginning date _____ *(mm/dd/yyyy)* and end date _____ *(mm/dd/yyyy)* for this period of time.

(2) Due to the condition, it is medically necessary for the veteran to attend **planned medical treatment** appointments (scheduled medical visits). Provide your **best estimate** of the duration of the treatment(s), including any period(s) of recovery _____ *(e.g. 3 days/week)*

(3) Due to the condition, it is medically necessary for the veteran to receive care on an **intermittent basis** (periodically), such as the care needed because of episodic flare-ups of the condition or assisting with the veteran's recovery. Provide your **best estimate** of how often (frequency) and how long (duration) the episodes of incapacity will likely last.

Over the next 6 months, intermittent care is estimated to occur _____ times per (☐ day / ☐ week / ☐ month) and are likely to last approximately _____ (☐ hours / ☐ days) per episode.

Signature of
Health Care Provider_____ **Date** _____ *(mm/dd/yyyy)*

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 15 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, DC 20210.

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR. RETURN TO THE PATIENT.

REQUEST TO RETURN FROM FMLA LEAVE

Employee's Name: _____

This acknowledges that I am prepared to return to work from my FMLA Leave on _____. If my FMLA Leave was due to my illness, I understand that I must provide medical clearance signed by my medical provider indicating my fitness for duty and my release date.

_____ Date: _____
Employee's Signature

_____

Health Care Provider's Statement:

This is to certify that _____may return to work on _____.

Restrictions or limitations? ___ NONE ___ Yes

(If yes,
explain: _____)

Signature of Health Care Provider:

_____Date_____

PRINT NAME of Health Care Provider:

_____Phone: _____

XV. MILITARY LEAVE

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Military Leave – Uniformed Services Employment and Reemployment Rights Act

Subject to certain rules and exceptions, the Uniformed Services Employment and Reemployment Rights Act (USERRA) guarantees an employee returning from military service or training the right to be reemployed at his or her former job (or as nearly comparable a job as possible) with the same benefits. USERRA applies to virtually all employers, regardless of size.

Reemployment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- Active duty and active duty for training.
- Initial active duty for training.
- Inactive duty training.
- Full-time National Guard duty.
- Absence from work for an examination to determine a person's fitness for any of the above types of duty.
- Funeral honors duty performed by National Guard or Reserve members.
- Duty performed by intermittent employees of the National Disaster Medical System (NDMS), which is part of the Department of Health and Human Services, when activated for a public health emergency, and approved training to prepare for such service.

The "uniformed services" consist of the following:

- Army, Navy, Marine Corps, Air Force and Coast Guard.
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve and Coast Guard Reserve.
- Army National Guard and Air National Guard.
- Commissioned Corps of the Public Health Service.
- Any other category of persons designated by the President in time of war or emergency.

The law requires employees to provide their employers with advance notice of military service, with some exceptions. Notice may be either written or oral. It may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving. However, no notice is required if:

- Military necessity prevents the giving of notice; or
- The giving of notice is otherwise impossible or unreasonable.

"Military necessity" for purposes of the notice exception is defined in regulations of the Secretary of Defense as "a mission, operation, exercise or requirement that is classified, or a pending or ongoing mission, operation, exercise or requirement that may be compromised or otherwise adversely affected by public knowledge."

USERRA reemployment rights apply if the cumulative length of service that causes a person's absences from a position does not exceed five years. Most types of service will be counted in the computation of the five-year period. Eight categories of service are exempt from the five-year limitation. These include:

1. **Service required beyond five years to complete an initial period of obligated service.** Some military specialties, such as the Navy's nuclear power program, require initial active service obligations beyond five years.

2. **Service from which a person, through no fault of the person, is unable to obtain a release within the five-year limit**. For example, the five-year limit will not be applied to members of the Navy or Marine Corps whose obligated service dates expire while they are at sea. Nor will it be applied when service members are involuntarily retained on active duty beyond the expiration of their obligated service date.

3. **Required training for Reservists and National Guard members**. The two-week annual training sessions and monthly weekend drills mandated by statute for Reservists and National Guard members are not counted toward the five-year limitation. Also excluded are additional training requirements certified in writing by the Secretary of the service concerned to be necessary for individual professional development.

4. **Ordered to involuntary service or retained on active duty during domestic emergency or national security related situations.**

5. **Ordered to service, or to remain on active duty (other than for training) because of a war or national emergency declared by the President or Congress.** This category includes service not only by persons ordered to involuntary active duty, but also service by volunteers who receive orders to active duty.

6. **Active duty (other than for training) by volunteers supporting "operational missions" for which Selected Reservists have been ordered to active duty without their consent.** Such operational missions involve circumstances other than war or national emergency for which, under presidential authorization, members of the Selected Reserve may be involuntarily ordered to active duty.

7. **Service by members who are ordered to active duty in support of a "critical mission or requirement" of the uniformed services as determined by the Secretary involved.** The Secretaries of the various military branches each have authority to designate a military operation as a critical mission or requirement.

8. **Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States.**

There are four circumstances that would disqualify a person from asserting USERRA rights:

1. Separation from the service with a dishonorable or bad conduct discharge.
2. Separation from the service under other than honorable conditions. Regulations for each military branch specify when separation from the service would be considered "other than honorable."
3. Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war.
4. Dropping an individual from the rolls when the individual has been absent without authority for more than three months or is imprisoned by a civilian court.

To qualify for USERRA's protections, a service member must be available to return to work within certain time limits. These time limits for returning to work depend (except for fitness-for-service examinations) on the duration of a person's military service, as follows:

Service of 1 to 30 Days

The person must report to his or her employer by the beginning of the first regularly scheduled work period that begins on the next calendar day following completion of service, after allowance for safe travel home from the military duty location and an 8-hour rest period. If, due to no fault of the employee, timely reporting back to work would be impossible or unreasonable, the employee must report back to work as soon as possible after the expiration of the 8-hour period.

If a person is absent from work in order to take a military fitness-for-service examination, the time limit for reporting back to work is the same as for persons who are absent for 1 to 30 days. This period will apply regardless of the length of the person's absence.

Service of 31 to 180 Days

An application for reemployment must be submitted to the employer no later than 14 days after completion of a person's service. If submission of a timely application is impossible or unreasonable through no fault of the person, the application must be submitted as soon as possible on the next day when submitting the application becomes possible.

Service of 180 or More Days

An application for reemployment must be submitted to the employer no later than 90 days after completion of a person's military service.

The reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing because of an injury or illness incurred or aggravated during the performance of military service. The two-year period will be extended by the minimum time required to accommodate a circumstance beyond an individual's control that would make reporting within the two-year period impossible or unreasonable. A person's reemployment rights are not automatically forfeited if the person fails to report to work or to apply for reemployment within the required time limits. In such cases, the person will be subject to the employer's established rules governing unexcused absences.

An employer has the right to request that a person who is absent for a period of service of 31 days or more provide documentation showing that:

- The person's application for reemployment is timely;
- The person has not exceeded the five-year service limitation; and,
- The person's separation from service was other than disqualifying.

If a person does not provide satisfactory documentation because it is not readily available or does not exist, the employer must still promptly reemploy the person. However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person and any rights or benefits that may have been granted. If a person has been absent for military service for 91 or more days, an employer may delay treating the person as not having incurred a break in service for pension purposes until the person submits satisfactory documentation establishing reemployment eligibility. However, such contributions have to be made promptly for persons who are absent for 90 or fewer days.

Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of a person's military service, as follows:

1 to 90 Days

A person whose military service lasted 1 to 90 days must be "promptly reemployed" in the following order of priority:

1. (a) In the job the person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer; or
   (b) In the job in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to

perform the duties of the position referred to in subparagraph (a) after reasonable efforts by the employer to qualify the person.

2. If the employee cannot become qualified for either position described in (a) or (b) above (other than for a disability incurred in or aggravated by the military service) even after reasonable employer efforts, the person must be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the person is qualified to perform, with full seniority.

91 or More Days

The law requires employers to promptly reemploy persons returning from military service of 91 or more days in the following order of priority:

1. (a) In the job the person would have held had the person remained continuously employed, or a position of like seniority status and pay so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer; or,
   (b) In the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (a) after reasonable efforts by the employer to qualify the person.

2. If the employee cannot become qualified for either position in described (a) or (b) above, in any position that most nearly approximates the above positions (in that order) that the employee is qualified to perform with full seniority.

These reemployment priorities reflect the "escalator" principle, which requires that each returning service member be reemployed in the position the person would have occupied with reasonable certainty if the person had remained continuously employed, with full seniority. The position may not necessarily be the same job the person previously held and can move up or down, depending on the circumstances.

Employers must make reasonable efforts to qualify a returning service member for the reemployment position. Employers must provide refresher training and any other training necessary to update a returning employee's skills so that he or she has the ability to perform the essential tasks of the position.

If the employee has a disability incurred or aggravated during the performance of uniformed service, the employer must make reasonable efforts to accommodate the disability and to help the employee become qualified to perform the duties of the reemployment position. If the disabled person cannot become qualified for the reemployment position despite reasonable efforts by the employer to accommodate the employee and qualify him or her to perform the duties of the position, the employee must be reemployed in a position according to the following priority: (a) a position that is

equivalent in seniority, status, and pay to the escalator position, or (b) a position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case. Such a position may be a higher or lower position, depending on the circumstances.

Reemployment of a person is excused if an employer's circumstances have changed so that reemployment of the person would be impossible or unreasonable. An employer is not required to reemploy a person if the pre-service position was for a brief or non-recurrent period and there was no reasonable expectation that employment would continue indefinitely or for a significant period. The employer carries the burden of proving any affirmative defense to reemployment by a preponderance of the evidence.

EMPLOYMENT PRACTICES GUIDELINE

Military Leave – Rights and Benefits of Reemployed Servicemembers

Reemployed service members are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed. A right or benefit is seniority-based if it is determined by or accrues with length of employment. On the other hand, a right or benefit is not seniority-based if it is compensation for work performed or is made available without regard to length of employment.

With regard to nonseniority-based benefits, during a period of service, employees absent from work due to military service must be treated as if they are on a furlough or leave of absence. Consequently, during their period of service, they are entitled to participate in any rights and benefits not based on seniority that are available to employees on comparable nonmilitary leaves of absence, whether paid or unpaid. If there is a variation in benefits among different types of nonmilitary leaves of absence, the service member is entitled to the most favorable treatment so long as the nonmilitary leave is comparable. Employees are entitled not only to nonseniority rights and benefits available at the time they left for military service, but also those that become effective during their service and that are provided to similarly situated employees on furlough or leave of absence. Service members may be required to pay the employee cost, if any, of any funded benefit to the extent that other employees on leave of absence are so required.

If, prior to leaving for military service, an employee knowingly provides clear written notice of an intent not to return to work after military service, the employee waives entitlement to leave-of-absence rights and benefits not based on seniority. At the time of providing the notice, the employee must be aware of the specific rights and benefits to be lost. A notice of intent not to return can waive only leave-of-absence rights and benefits. It cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights after service.

Pension plans, which are tied to seniority, are given separate, detailed treatment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The law provides that:

- A reemployed person must be treated as not having incurred a break in service with the employer maintaining a pension plan.
- Military service must be considered service with the employer for vesting and benefit accrual purposes.
- The employer is liable for funding any obligation of the plan to provide required benefits.
- The reemployed person is entitled to any accrued benefits contingent upon employee contributions only to the extent that the person repays the employee contributions.

A “pension plan” that must comply with the requirements of USERRA is any plan that provides retirement income to employees upon the termination of employment or later. Defined benefit plans, defined contribution plans, and profit-sharing plans that are retirement plans are covered.

Repayment of employee contributions or elective deferrals attributable to the period of service can be made over three times the period of military service but no longer than five years from the date of reemployment. For purposes of determining an employer’s liability or an employee’s contributions under a pension benefit plan, the employee’s compensation during the period of his or her military service will be based on the rate of pay the employee would have received from the employer but for the absence during the period of service. If the employee’s compensation was not based on a fixed rate, or the determination of such rate is not reasonably certain, the employee’s compensation during the period of service is computed on the basis of the employee’s average rate of compensation during the 12-month period immediately preceding the employee’s period of military service (or, if shorter, the period of employment immediately preceding such period).

Employers are not required to compensate employees for absences due to military service. Service members must, at their request, be permitted to use any vacation leave that had accrued before the beginning of their military service instead of unpaid leave. However, service members cannot be forced to use vacation time for military service.

USERRA provides for health benefits continuation for persons who have coverage under a health plan in connection with their employment who are absent from work to serve in the military. If a person’s health plan coverage would terminate because of an absence due to military service, the person may elect to continue the health plan coverage for up to 24 months after the absence begins or for the period of service (plus the time allowed to apply for reemployment), whichever period is shorter. The person cannot be required to pay more than 102 percent of the full premium for the coverage. If the military service was for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.

In the event a person’s coverage under a health plan is terminated because of military service, a waiting period or exclusion cannot be imposed upon reinstatement of health coverage of the reemployed service member or an eligible dependents if one would not have been imposed had the person not been absent for military service.

Under USERRA, a reemployed employee may not be discharged without cause: (1) for one year after the date of reemployment if the person’s period of military service was for 181 days or more; (2) for 180 days after the date of reemployment if the person’s period of military service was for 31 to 180 days. Cause for discharge may be based on conduct or the application of legitimate nondiscriminatory reasons. Persons who serve for 30 or fewer days are not protected from discharge without cause. However, they are protected from discrimination because of military service or obligation. Employment discrimination because of past, current, or future military obligations is prohibited. If an individual’s past, present, or future connection with military service is a

motivating factor in an employer's adverse employment action against that individual, the employer has committed a violation of USERRA, unless the employer can prove that it would have taken the same action regardless of the individual’s connection with that service.

EMPLOYMENT PRACTICES GUIDELINE

Military Leave – Michigan Veterans Preference Act

Michigan's Veterans Preference Act (VPA), MCL 35.401(1), provides:

> In every public department and upon the public works of the state and every county and municipal corporation of this state, an honorably discharged veteran … shall be preferred for appointment and employment. Age, loss of limb, or other physical impairment that does not, in fact, incapacitate, does not disqualify them.

For purposes of the Act, a veteran is defined as a person who served in the United States Armed Forces, including the reserve components, and discharged or released under conditions other than dishonorable.

The VPA establishes that an honorably discharged veteran who meets the established criteria shall be given preference for appointment and employment. In *Carter* v *Ann Arbor City Attorney*, 271 Mich App 425 (2006), the Michigan Court of Appeals held:

> While the VPA clearly states that veterans shall be given a preference for appointment and employment, it does not describe the nature or strength of the preference. Further, the VPA provides that a veteran is not entitled to the preference unless he or she meets the residency requirements and possesses "other requisite qualifications." However, the VPA neither defines "other requisite qualifications" nor mandates who is responsible for determining what the requisite qualifications are and whether an applicant possesses those qualifications.

The Court of Appeals cited the Michigan Supreme Court ruling in *Patterson* v *Boron*, 153 Mich 313 (1908), to reach the conclusion that, to be entitled to veteran's preference, a veteran must possess the requisite qualifications for the position, as determined by the hiring authority. The Court of Appeals went on to say, "We further clarify that the veteran's preference is not absolute. Although the veteran's qualifications need not be equal to the qualifications of a nonveteran to trigger the preference, his or her qualifications must be at least comparable."

The Court of Appeals ruled in *Carter* that, although the veteran's qualifications need not be equal to the qualifications of a nonveteran to trigger the preference, the veteran's qualifications must be at least comparable in the estimation of the hiring authority. The veteran's preference does not come into play until the veteran can establish that he or she possesses the requisite qualifications for the position. The VPA does not preclude a public employer from hiring a nonveteran applicant if the employer reasonably believes that the nonveteran applicant is substantially better qualified than the veteran.

With regard to discipline and discharge of covered veterans under the Act, the VPA provides that discipline and discharge must be "for cause," and the VPA outlines the

specific criteria, notices and hearings which are required. Specifically, MCL 35.402 provides:

> No veteran or other soldier, sailor, marine, nurse or member of women's auxiliaries holding an office or employment in any public department or public works of the state or any county, city, or township or village of the state; except heads of departments, members of commissions, and boards and heads of institutions appointed by the governor and officers appointed directly by the mayor of a city under the provisions of a charter, and first deputies of such heads of departments, heads of institutions and officers **may be removed or suspended, or, without his consent, be transferred from such office or employment, only except for official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxications, conviction of felony, or incompetency**; and **the veteran may not be removed, transferred or suspended for any of these reasons except after a full hearing** before the Governor, if a state employee, or before the prosecutor, if a county employee, or before the mayor of any city or the president of any village, or before the commissions of any city or village, if an employee of a city or village, or before the township board, if a township employee; and, **at the hearing, the veteran has the right to be present, to be represented by counsel, and to defend himself against the charges**. Further, **the veteran is entitled to a notice in writing stating the cause for removal, transfer, or suspension at least 15 days before the hearing**; and **any removal, suspension, or transfer may be imposed only upon written order** of the Governor, prosecutor, mayor, commission, or township board . . . (Emphasis added).

Notably, the VPA does not apply to heads of departments; however, in *Cremer* v *Board of County Road Commissioners of Alger County*, 325 Mich 27 (1949), the Michigan Supreme Court held that a maintenance foreman of a county road commission was not a "head of department" or "first deputy of a head of department" so as to be excluded from the benefits of the VPA and was entitled to reinstatement to his former position after he was wrongfully discharged from the county road commission. In that case, the county road commission had refused to give the foreman a veterans preference hearing because it had concluded that the foreman was exempt from the protections of the VPA. The Michigan Supreme Court disagreed and reinstated the foreman, awarding him back pay from the date of his dismissal.

MCL 35.402 goes on to provide that, if a veteran has been removed, transferred, or suspended other than in accordance with the provisions of the VPA, he or she must file a written protest with the officer whose duty it is to make the removal, transfer, or suspension, withing 30 days from the day the veteran is removed, transferred, or suspended. If the veteran fails to file such a written protest, he or she shall be deemed to have waived the benefits and privileges of the VPA. If a written protest is filed, a hearing must be held within 30 days of the filing. Where such a hearing is held and the veteran is reinstated to employment, then the veteran is entitled to receive compensation for the time lost from the

date of such dismissal or suspension to the date of reinstatement at the same rate of pay received by him or her at the date of dismissal or suspension.

Essentially, the VPA protects veterans holding at-will public employment positions by converting those positions to ones that are terminable only for just cause. However, a veteran holding a position of employment may be discharged without the notice required by the VPA if the discharge is in good faith and because of lack of work or for reasons of economy, or because the position has been abolished. *Fricke* v *City of Grand Rapids*, 278 Mich 323 (1936). A veteran who quits his or her public employment is not entitled to a veteran's preference hearing. An involuntary termination is necessary to invoke the protection afforded by the VPA.

EMPLOYMENT PRACTICES GUIDELINE

Military Leave – Michigan Reemployment Protection Act

The Michigan Reemployment Protection Act, MCL 32.271, et seq., expands on the protections offered to members of the military under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and requires employers to reemploy employees returning from military leave. The Act provides that an employer shall not discharge any person from employment because of being or performing his or her duty as an officer or enlisted member of the military or naval forces of the State of Michigan or the any other state, or hinder or prevent him or her from performing any military service or from attending any military encampment or place of drill or instruction he or she may be called upon to perform or attend by proper authority, or dissuade any person from enlistment or accepting a commission in the National Guard or naval militia by threat of injury to him or her in respect to his or her employment.

An employee who gives advance notice for a period of leave from his or her employment may not be denied a leave of absence by his or her employer for the purpose of being inducted into or entering active service, active state service, or the service of the United States, for the purpose of determining his or her physical fitness to enter the service, or for performing service as an officer or enlisted member of the military or naval forces of the State of Michigan, any other state, or the United States. If the employee reports to work or applies to the employer within 45 days or, if the service was for more than 180 days, within 90 days following release from service, release from duty, or rejection, the employer shall reemploy the employee in the following order of priority:

(a) Following service of 1 to 90 days, in the position of employment in which the person would have been employed if the continuous employment of the person with the employer had not been interrupted by service, the duties of which the person is qualified to perform.
(b) Following service of 1 to 90 days, in the position of employment in which the person was employed on the date of the commencement of service, only if the person is not qualified to perform the duties of the position referred to in subdivision (a) and after reasonable efforts by the employer to qualify the person have been made.
(c) Following service of 91 or more days, in a position described under subdivision (a) or (b), or in a position that is the nearest approximation in status and pay to a position described in subdivision (a) or (b) that the person is qualified to perform only if the person is not qualified and cannot become qualified with reasonable efforts by the employer to be employed as described in subdivision (b).

A person who is reemployed under the Act is entitled to the seniority and other rights and benefits that are determined by seniority that the person had on the date of the commencement of service plus the additional seniority and rights and benefits that the person would have attained if the person had been continually employed. Additionally, a

person who is reemployed under the Act is entitled to rights and benefits, not determined by seniority, that are generally provided by the employer to employees who have similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of the service or established while the person performs service.

The employee is not entitled to reemployment if the employee has an uninterrupted period of service in the uniformed services that exceeds 5 years. However, for that purpose, a period of service shall not include:

(a) Any service that is required, beyond 5 years, to complete an initial period of obligated service.
(b) Any service during which the person was unable to obtain orders releasing him or her from a period of service in the uniformed services before the expiration of the 5-year period and the inability was through no fault of the person.
(c) Any service performed to fulfill additional training requirements determined and certified in writing by the appropriate service secretary to be necessary for professional development or for completion of skill training or retraining.
(d) Any service performed by a member in active duty, active state service, or the service of the United States if any of the following occur:
    (i) The member is ordered to or retained on active duty, active service, or active state service.
    (ii) The member is ordered to or retained on active duty, active service, or active state service, other than for training, under any provision of law because of a war or national emergency declared by the president, the Congress, or the governor of the State of Michigan or any other state.
    (iii) The member is ordered to active duty, other than for training, in support, as determined by the appropriate service secretary, of an operational mission for which personnel have been ordered to active duty.
    (iv) The member is ordered to active duty in support, as determined by the appropriate service secretary, of a critical mission or requirement of the uniformed services.
    (v) The member is called into federal service as a member of the National Guard.

An employee is not entitled to reemployment if the service of the employee in any of the uniformed services is terminated under any of the following circumstances:

(a) A separation of the person from the uniformed service or National Guard with a dishonorable or bad conduct discharge.
(b) A separation of the person from the uniformed service or National Guard under other than honorable conditions, as characterized pursuant to regulations prescribed by the appropriate service secretary.
(c) A dismissal of the person.
(d) A dropping from the rolls.

An employee who is otherwise entitled to reinstatement under the Act and is denied reemployment after reporting to work or applying to the employer may bring an action against the employer in Circuit Court for the employee's county of residence and shall be awarded reinstatement and reasonable attorney fees. Additionally, any person violating the Act shall be guilty of a misdemeanor.

There are two additional statutory provisions in Michigan affecting reemployment and the rights of individuals performing military service which employers need to be aware of. First, MCL 35.402a, which is part of the Michigan Veterans Preference Act, allows covered employees who were in public employment prior to and at the time of entering military service to add the time spent in military service to the period of employment if the employees return to the same or similar public employment following discharge from military service. This statute has an impact if there is a need for workforce reduction.

Second, MCL 35.353 provides that employers shall not discharge employees returning from military service from such position without cause within one (1) year after such restoration unless all employees in the same classification with less seniority are first laid off. Employers must consider these employees as having been on furlough or leave of absence during their period of military duty. Therefore, employers must restore them to their positions without loss of seniority, including, upon promotion or other advancement following completion of any period of employment required for a seniority date in the advanced position. Such employees shall also be entitled on reinstatement to participate in insurance (including pensions plans and medical insurance) and other benefits depending on length of employment to the same extent as if they had remained continuously at work; they shall have the option to continue during the term of military service payments which would have been required of them for benefits had they remained at work and shall have the option upon reinstatement to make up any contributions which were not made during the period of military duty. However, employers are not required to grant more than a total of 6 years' credit toward retirement. Employers shall make on the employees' behalf any payments they would have made had the employees remained at work. Such employees shall be protected against reduction in their seniority, status or pay during their employment except as such reduction may be made for all employees whose employment situations are similar.

YOUR RIGHTS UNDER USERRA

THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service or certain types of service in the National Disaster Medical System. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.

REEMPLOYMENT RIGHTS

You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:

- ☆ you ensure that your employer receives advance written or verbal notice of your service;
- ☆ you have five years or less of cumulative service in the uniformed services while with that particular employer;
- ☆ you return to work or apply for reemployment in a timely manner after conclusion of service; and
- ☆ you have not been separated from service with a disqualifying discharge or under other than honorable conditions.

If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.

RIGHT TO BE FREE FROM DISCRIMINATION AND RETALIATION

If you:

- ☆ are a past or present member of the uniformed service;
- ☆ have applied for membership in the uniformed service; or
- ☆ are obligated to serve in the uniformed service;

then an employer may not deny you:

- ☆ initial employment;
- ☆ reemployment;
- ☆ retention in employment;
- ☆ promotion; or
- ☆ any benefit of employment

because of this status.

In addition, an employer may not retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

HEALTH INSURANCE PROTECTION

- ☆ If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.
- ☆ Even if you don't elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

ENFORCEMENT

- ☆ The U.S. Department of Labor, Veterans Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.
- ☆ For assistance in filing a complaint, or for any other information on USERRA, contact VETS at **1-866-4-USA-DOL** or visit its website at https://www.dol.gov/agencies/vets/. An interactive online USERRA Advisor can be viewed at https://webapps.dol.gov/elaws/vets/userra
- ☆ If you file a complaint with VETS and VETS is unable to resolve it, you may request that your case be referred to the Department of Justice or the Office of Special Counsel, as applicable, for representation.
- ☆ You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.

The rights listed here may vary depending on the circumstances. The text of this notice was prepared by VETS, and may be viewed on the internet at this address: https://www.dol.gov/agencies/vets/programs/userra/poster Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying the text of this notice where they customarily place notices for employees.

U.S. Department of Labor
1-866-487-2365

U.S. Department of Justice

Office of Special Counsel

1-800-336-4590

Publication Date — May 2022

XVI. VIOLENCE IN THE WORKPLACE

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Violence in the Workplace – General Considerations

The Michigan Occupational Safety and Health Act (MIOSHA) includes a general duty clause requiring employers to "furnish to each employee, employment and a place of employment that is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to the employee." MCL 408.1011(a). In a MIOSHA Agency Instruction concerning Workplace Violence Inspection Procedures, MIOSHA adopted the federal OSHA enforcement procedures and scheduling for occupational exposure to workplace violence. According to OSHA's Enforcement Procedures, "employers may be found in violation of the General Duty Clause if they fail to reduce or eliminate serious recognized hazards. Under the Instruction, inspectors are required to gather evidence to demonstrate whether an employer recognized, either individually or through its industry, the existence of a potential workplace violence hazard affecting his or her employees. Furthermore, investigations should focus on whether feasible means of preventing or minimizing such hazards were available to employers. Notably, there is currently no federal OSHA or MIOSHA standard specific to workplace violence.

According to OSHA's informational materials, workplace violence is any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. It ranges from threats and verbal abuse to physical assaults and even homicide. It can affect and involve employees, clients, customers, and visitors. Acts of violence are currently the third leading cause of fatal occupational injuries in the United States. However, it manifests itself, workplace violence is a major concern for employers and employees.

In addition to OSHA requirements, employers also need to be cautious about negligent hiring, supervision, or retention. Negligent hiring, supervision, or retention of an employee occurs when (1) the employer owed a duty to the victim; (2) the employer breached that duty; and (3) the breach of duty was the proximate cause of the victim's injuries. The amount of contact the employee has with the public, the nature of that contact, and the employer's knowledge of the employee's dangerous propensities are all relevant considerations. If an employer is found to have a duty of care to protect third parties coming in contact with its employees, it can be found to have breached that duty if it knew or should have known of the employee's propensity to act in a violent way but nevertheless hired or retained the employee or failed to reasonably investigate the employee's background or take appropriate remedial steps.

Discrimination and harassment claims may also arise when workplace violence is motivated by a protected characteristic such as race, gender, or religion.

The common law doctrine of respondeat superior may be used to impose obligations on employers under an employment or agency relationship. Under this doctrine, an employer may be held vicariously liable for torts committed by its employees or agents within the

scope of their employment, even if the employer is not directly responsible for the conduct. As a general rule, under the doctrine of respondeat superior, an employer is liable for injuries to another individual proximately resulting from an employee's acts that are done within the scope of employment.

Regardless of the theory of liability, workplace violence is a significant issue for employers. Employers should take appropriate steps to reduce the risks of violence in the workplace.

EMPLOYMENT PRACTICES GUIDELINE

Violence in the Workplace – Reducing Workplace Violence Hazards

In most workplaces where risks can be identified, the potential for workplace violence can be prevented or minimized if employers take appropriate precautions. One of the best protections a Road Commission can offer its employees is to establish a zero-tolerance policy toward workplace violence. This policy should cover all employees, visitors, vendors, and anyone else who may come in contact with Road Commission personnel.

There are several additional steps to reducing the potential for workplace violence. These include establishing safe hiring practices, safe work environments, and safe management techniques.

Safe Hiring Practices

One of the best deterrents to violence in the workplace is to not hire violence prone individuals in the first place. Screen all applicants carefully before bringing them into your workforce, utilizing the following steps:

First, carefully review the application. If it looks sloppy or incomplete, the candidate may be trying to hide something, or simply may not be serious about the job. Look carefully at the way it is written. Noticeably hard pen pressure, excessive smearing, or overuse of all capital letters, underlines, and exclamation points may indicate repressed anger. Similarly, excessively small handwriting may indicate a lack of self-esteem. Look to see if there are any "holes." Investigate any employment gaps longer than 30 days. Require references. Don't accept the response that "there is no one to ask." People who lead itinerant, transient lifestyles often use the "no contacts available" ploy to hide damaging information about their past.

Second, conduct a thorough background check: work history, military history, criminal history, credit history, and driving record. Ask the candidate's permission to conduct each background check. If they refuse, remember that you are under no obligation to hire them. Once permission is obtained, be careful about how you evaluate the information. A candidate with a criminal record, for example, cannot necessarily be rejected for that fact alone. The employer must show a connection between the crime and the job.

Be meticulous and keep all information confidential. With regard to work and military history, contact former employers and/or supervisors. Verify work dates and gaps in employment or service. Many former employers will not disclose anything more than employment dates for fear of defamation suits. However, some former supervisors may be willing to answer the question, "If given the chance, would you hire this person back again?" If the answer is an emphatic "no," perhaps this candidate should not be considered.

Criminal convictions are a matter of public record. However, it is unlawful to inquire about former misdemeanor arrests. Any convictions for crimes of violence, spousal abuse, child abuse, workplace assaults, theft, burglary, arson, animal abuse, auto theft, robbery, and so on should force you to think hard about this person. Also consider whether the person has had a single brush with the law or is often "in trouble."

Safe Work Environment

First and foremost, establish a zero-tolerance policy for violence in the workplace. The policy should, at a minimum, prohibit weapons at work and on Road Commission property, as well as violent acts or threats of violent acts, fighting, pranks, or horseplay at work and on Road Commission property. Notify all employees that violence is unacceptable and will be reacted to swiftly and seriously. Have all managers establish an "open door" policy so that employees feel comfortable reporting threats of violence. Employee reports of suspicious or threatening behavior are critical to effective violence prevention programs, and management should ensure that the internal culture supports such reporting. Workers need to have confidence that their reports will be taken seriously, that their identities won't be divulged unnecessarily, and that leaders will take appropriate action. Investigate all complaints thoroughly and seriously and do not overlook misconduct. Any incidents of fighting or bringing weapons to work should subject the perpetrator to serious discipline or discharge. Threats of violence, harassment, and intimidation should also be dealt with severely.

Two, make a "no return" policy and enforce it. Tell all former employees that they are not allowed on Road Commission property without permission from the Road Commission, except to conduct necessary business. Even employees who left on "good terms" should not be allowed to roam the shop or office without supervision. This may be a difficult rule to enforce, especially if your employees are a close-knit team. However, there have been cases where an employee left peaceably and came back several months later with a weapon. Don't put yourself in the awkward position of treating some former employees differently than others, especially if one is of a protected class. This may be considered evidence of discrimination. If a former employee refuses to comply with this policy, consider seeking a temporary restraining order against them. Contact your legal counsel and local law enforcement agency for assistance with this type of action.

Safe Management Techniques

One of the leading causes of workplace violence is stress. Management can play a positive role in decreasing on-the-job stress. Treat employees fairly and kindly. Be open to suggestions and criticisms. Be willing to sit down and address grievances. Consider holding mandatory stress-management workshops for all employees.

Provide employee assistance programs (EAPs) and make referrals to employees who are clearly troubled. If you have an EAP provider, make sure the contract with your service provider requires the service provider to notify you if an employee is a threat to himself or herself or to others. If you need information about an employee's ability to work or return

to work, an EAP release isn't enough. You should require the employee to provide information from health care providers.

The entire management team should be trained in spotting violence risk factors. There are several "warning signs" that may indicate when an employee is dangerous. A disturbed employee may exhibit:

- Changes from usual behavior;
- Noted anxiety and irritability;
- Mention of sleep disturbance;
- Depression, withdrawal, and comments about suicide;
- Excessive drinking or drug abuse;
- Noted sexual problems, including harassing behavior;
- Excessive altercations with or intimidation of others;
- Being more accident-prone, either physical or traffic-related;
- Being argumentative or feeling persecuted;
- Talk of physical complaints;
- Talk of home problems; and,
- Loss of interest and confidence in life or work.

Keep in mind that there is no absolute "profile" of the potentially violent worker. Avoid snap judgments. You may be liable for discrimination or wrongful termination if your reaction is deemed inappropriate.

Bear in mind that any employee facing disciplinary action may become upset. Remain calm and speak in a clear and steady voice. Do not touch the employee. Do not be dragged into an argument with him or her. Try not to blame the employee but focus instead on the behavior as being intolerable. Offer the employee assistance through the EAP program or free counseling if they are highly agitated. Ask him or her to sit down and "cool off" before leaving for home. Make sure the employee is supervised during this time, by security or a member of management and their union steward.

In cases of termination, make your "no return" policy clear to the employee. Have everything ready, i.e., benefits and paperwork, so that the employee will not need to come back or go to other parts of the facility. Do not allow the employee to empty his or her locker or desk without supervision. If necessary, have the employee escorted off the premises.

Follow these procedures anytime you must discipline an employee that exhibits a potential for violence, such as for absenteeism or insubordination. Proceed cautiously with all disciplinary cases to protect your safety as well as the safety of other employees.

_____County Road Commission
Policy Against Violence in the Workplace

The _____ County Road Commission is committed to a policy against violence in the workplace. There shall be zero tolerance towards violence in the workplace. The _____ County Road Commission will not tolerate any incident of fighting, bringing weapons into the workplace, threats of violence, verbal or physical assault, harassment, or intimidation. Any employee found guilty of any of the above-listed prohibited acts shall be subject to discipline, up to and including termination. Any employee who observes any violation of this policy must immediately report the violation to his or her supervisor. _____ County Road Commission's supervisory staff will objectively investigate reports of any violation of this policy. In cases where an allegation is made of a violation of this policy involving a supervisor, the report shall be made to the Managing Director.

The _____ County Road Commission reserves the right to use any lawful method of investigation that it deems necessary to determine whether an employee has engaged in conduct which violates this policy. Employees entering and leaving the Road Commission's premises are subject to questions and search at its discretion. Lockers, vehicles, and personal possessions will also be subject to search. Failure to comply may result in termination. Any search will be undertaken as discreetly as possible and only after the Road Commission has formed a reasonable belief that a violation of this policy has occurred.

XVII. DISCIPLINE AND DISCHARGE

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Discipline and Discharge – At-Will Versus Just Cause Employment

In Michigan, most employment relationships are considered to be "at-will," meaning that they can be terminated by either the employer or the employee, for any reason or no reason at all, and with or without notice. However, even when employment is at-will, an employer may not fire an employee for an illegal reason. For instance, an employer cannot terminate an employee's employment if such termination violates discrimination laws. Additionally, an employer cannot terminate an employee if such termination is in violation of public policy, e.g., for exercising a right conferred by a well-established legislative enactment.

Not all employees are considered at-will employees. If an employee is subject to an employment contract which contains a provision forbidding discharge absent just cause, then the employee is not at-will. For instance, most union contracts provide that members of the collective bargaining unit may only be terminated for cause or just cause.

Other exceptions to at-will employment include when an individual is hired pursuant to a contract for a definite period of time. When this occurs, the law implies the employment relationship to be one in which the employer must have just cause to terminate the employee before the expiration of the agreed-upon term. The presumption may be overcome, however, if the employer includes a specific statement in a written employment agreement or document to the employee, clearly stating that employment is on an at-will basis and may be terminated at any time prior to completion of the anticipated period of employment.

Another exception to at-will employment occurs when an employer makes a clear and unequivocal promise for a just cause employment relationship. Where an employee can demonstrate an indication of actual negotiations or a specific intent to contract for permanent or just cause employment, a just cause relationship may be found. However, a simple expression of optimistic hope for a long and satisfying relationship is insufficient to convert at-will employment to one of just cause.

Lastly, Michigan law also provides an exception to at-will employment when there is evidence of a legitimate expectation of just cause employment. Under this theory, an employee must rely on an employer's promises to the workforce in general, rather than promises to an individual employee. Specifically, the court engages in a two-step analysis. First, it must determine what, if anything, the employer has expressly or impliedly promised. And second, the court must determine whether the promise is reasonably capable of instilling a legitimate expectation of just cause employment in the employer's employees. Only employer policies and procedures reasonably related to employee termination may serve as the basis for any such purported legitimate expectation.

EMPLOYMENT PRACTICES GUIDELINE

Discipline and Discharge – Seven Tests for Just Cause

The concepts of "just cause," "cause," and "good cause" have been used interchangeably in labor-management relations and regularly dealt with in labor arbitration cases. This has resulted in a universally understood set of tests for what constitutes just cause for discipline or discharge.

Specifically, in the ***Enterprise Wire Company*** case, 46 LA 359 (1966), Arbitrator Carroll R. Daugherty reduced the basis elements of just cause to seven (7) tests. He advised that a "no" answer to any one of these seven (7) tests meant that either just cause standard was not met or was seriously weakened because some arbitrary, capricious, or discriminatory element was present when discipline was imposed.

The seven (7) tests are:

1. NOTICE: "Did the Employer give the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?"

2. REASONABLE RULE OR ORDER: "Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business, and (b) the performance that the Employer might properly expect of the employee?"

3. INVESTIGATION: Did the Employer, before administering the discipline to an employee, make an effort to discover whether the employee did, in fact, violate or disobey a rule or order of management?"

4. FAIR INVESTIGATION: "Was the Employer's investigation conducted fairly and objectively?"

5. PROOF: "At the investigation, did the 'judge' obtain substantial evidence or proof that the employee was guilty as charged?"

6. EQUAL TREATMENT: "Has the employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?"

7. PENALTY: "Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Employer?"

Each of these tests is described in further detail on the pages which follow.

EMPLOYMENT PRACTICES GUIDELINE

Discipline and Discharge – Notice and Reasonable Rule or Order

In order to satisfy the "notice" test for just cause, make sure that employees know what is expected of them and are given advance warning that, if they fail to live up to those expectations, they will be subject to discipline. Before disciplining an employee, you should look at all written communications that the employee has been provided with in advance of the action under investigation. Sources of written communication include:

- The Union Contract;
- Work Rules;
- Employee Handbook;
- Policy and Procedures Manuals;
- Safety Manuals;
- Employee Bulletins;
- Prior Disciplinary Notices or Counseling Memoranda;
- Audio and/or Video Presentations; and,
- Seminar or Training Session Handouts.

Management should make certain that there are no conflicts in the messages being sent to employees as between any one or all the sources of notice to any employee of what conduct is required. Bear in mind that some misconduct is so serious that advance warning is not necessary before discipline can be administered. Examples of such serious offenses include theft, dishonesty, insubordination, sexual harassment, violence in the workplace, and drinking on the job or taking controlled substances.

The test of just cause also requires that management not implement a rule or order that is unreasonable. If a rule exists, you should examine its reasonableness. Ask whether the rule or work order is reasonably related to the efficient and safe operation of the Road Commission. Is the rule current or have there been changes in the law or elsewhere that make the rule or order obsolete? Has the rule been routinely enforced, or has it been ignored? If not routinely and uniformly enforced, you should put all employees on notice that, while the rule has not been enforced in the past, it will be in the future. Forego disciplinary action against the current offender if you find that there has been lax rule enforcement.

EMPLOYMENT PRACTICES GUIDELINE

Discipline and Discharge – Investigation

Never discipline an employee until you have thoroughly and fairly investigated the entire circumstances surrounding the incident that gave rise to the possibility of discipline. Never discipline an employee before you have interviewed the target employee and always delay imposing discipline for some time after you have conducted the employee's interview.

Learn the art of fact gathering. Ask the who, what, when, where, and how questions necessary to any complete investigation. Require written statements from co-workers and witnesses. If the statements that are presented are too broad or not complete, take a taped statement from the witness, including the statement from the target employee, tape recorded and transcribed. Get the witnesses committed to a position. Don't let them off the hook with generalities that will let the wrongdoer build a defense around the holes in your investigation.

Proper investigation means taking statements individually, outside the hearing of other witnesses. This avoids the taint one witness' statement might have on another's testimony. After all, some people have an easier time telling the truth than others. Some witnesses, including the involved employee, are going to lie. Just make certain that you commit them to a strong lie with no room to move later.

The purpose of the investigation is to determine, before discipline is administered, if the employee under investigation did, in fact, violate or disobey a rule or order of management.

You should attempt to reconstruct the facts and circumstances that:

1. Came before the incident or occurrence;
2. Occurred during its course; and,
3. Took place after the incident or occurrence.

Find out who was involved so that you can set up interviews with these witnesses. Interview all of the collateral witnesses first before interviewing the target employee. Why? Because you can then frame very specific questions to ask the target of your investigation and you can begin to make assessments about how truthful an employee or witness has been in the interview process. Public sector employees should be truthful during internal investigations.

Every disciplinary interview should be thoroughly planned. To increase the chances that an interview will be a positive experience, consider observing the following guidelines:

1. Organize and review all relevant and pertinent information from the investigation, including documents, records, and testimony.
2. Set a time and place for the meeting. The meeting should be private, face-to-face, and attended by as few people as possible—preferably one-on-one.

3. In most cases, give the employee at least a day's notice about the meeting's time, place, and purpose.
4. Keep in mind that conducting the meeting in your office puts the employee at a psychological disadvantage. Unless a psychological advantage is desired, consider holding the meeting in a more neutral place, such as a conference room.
5. Consider the effect the arrangement of chairs, desks, spatial distance, and even ventilation and lighting could have on attitude and behavior.
6. Learn as much as is relevant and realistically possible about the employee's background, record of service, character, and attitude. This information should be used to plan the physical and psychological climate for the meeting.
7. Remember that judgment of guilt or innocence should not be made until the employee has been heard and listened to. Though it may be impossible not to have some feelings about the employee's guilt or innocence prior to the interview, prejudgment is a miscarriage of justice.
8. Control your own emotions and actions when conducting the interview.
9. If the employee is known to be hostile, intimidating, or a hothead, take steps prior to the meeting to induce the employee to exercise self-restraint or change. Let the employee know that if such behavior is shown, it will hurt his or her case.

Immundo, *The Effective Supervisor's Handbook*, Second Edition (New York AMACOM, a division of American Management Association, 1991), pages 144-145.

At the beginning of all interviews, tell the witness that they are expected to answer all questions truthfully. Tell them that if they fail to answer truthfully that this, in and of itself, will result in discipline up to and including discharge. Order witnesses, including the target employee, at the beginning of the interview to answer all questions and inform the witness/employee that refusal to interview will be deemed an act of insubordination and punishable accordingly.

EMPLOYMENT PRACTICES GUIDELINE

Discipline and Discharge – Fair Investigation and Proof

Fairness of investigation should be determined both internally and externally. Internally, you must look to any contractual protection afforded employees under investigation. The most basic protection is the right to Union representation if the possibility exists that an employee's interview might result in discipline. Try to set up the target employee's interview sufficiently far enough in advance to afford the employee access to his or her Union representative. If, for some reason, the Union representative can't be present, try to reschedule the interview to accommodate. You don't have to delay the interview for a long period of time. If the Union appears to be stalling and doesn't present you with a good reason for the delay, give the employee and the Union written notice of when the employee must be present to be interviewed. Document the original request for a delay and the failure to provide any reasonable basis for the delay.

What Arbitrator Daugherty in the ***Enterprise Wire Company*** case, 46 LA 359 (1966) felt was relevant to a determination of fairness was that the investigator not be both prosecutor, judge, and witness. If you can't detach yourself from the facts, let some other supervisor who is unbiased do the investigation. If the case involves the word of a supervisor versus the word of an employee, subject the supervisor to the same rigorous questioning you would any other employee.

As for the proof element of the tests for just cause, proof must be directed toward and adequately prove the Employer's case. Just as with a civil complaint or criminal charge, the plaintiff or prosecutor must charge the other party or accused with certain, specific acts of misconduct, so must the Employer charge the target employee. Charges against the target employee:

1. Must be reasonably clear and specific—identify the misconduct; and,
2. Must be made known to the employee before discipline is imposed. Have the charge in mind and read it to the employee during the investigative interview so that the employee doesn't later say, "I didn't know what I was being charged with." If you have a prepared list of charges, tell the employee that you are exploring whether the employee committed these acts and that you have made no determination as to whether discipline will be imposed. Your decision on discipline will be made only after the investigation is complete and the evidence is reviewed.

The Employer should obtain "proof" of the charged conduct by a preponderance of the evidence before imposing discipline.

EMPLOYMENT PRACTICES GUIDELINE

Discipline and Discharge – Equal Treatment and Penalty

The best defense against a claim that the Employer has not applied its discipline even-handedly as between employees is good record keeping. If employees are given different penalties for the same violation, the Employer needs to carefully document why a certain penalty was imposed in one case and not another. It should go without saying that in no event should discipline vary as between employees because of their gender, age, race, color, religious beliefs, national origin, height, weight, disability, marital status, or any other recognized protected basis.

Listen to any claims, at any time, of unequal treatment. Force the person stating that the Employer is unfair or discriminatory to name reasons. Get the names of those employees that the employee contends were treated differently. Fully and promptly investigate any such contention and if your research reveals an unjustified difference in discipline, then compromise your stance. Make sure you get the target employee and the Union, if the employee is represented, to sign off on any compromise.

If you are supervising in a work environment that has negotiated work rules, i.e., rules of conduct that have been agreed upon between the Employer and the Union, and if those rules require specific penalties for specific offenses, then you are responsible for enforcing the contract as written. Where you have negotiated work rules with established penalties, you will be constrained to follow these penalties unless there is an express waiver from the Union. If you do make such a settlement, do so without precedent and state the reason that discipline has been reduced.

If you are supervising in a work environment where management has retained the right to adopt, revise, and implement work rules without bargaining with the Union and those rules do not set forth certain penalties, then your analysis of the proper penalty deserves serious consideration. The following factors should be considered in applying discipline:

- The seriousness of the misconduct;
- The employee's record of conduct;
- The employee's length and quality of service;
- The employee's position in the organization;
- The employee's response to prior discipline;
- Previous notices of misconduct;
- Past and present disciplinary policies and practices;
- Similar cases; and,
- Mitigating or aggravating circumstances.

Two factors that should not be considered are the employee's replaceability and popularity.

Once a determination has been made on the level of discipline to be imposed, you should schedule a private meeting with the employee and his or her Union steward. Present the discipline and make certain that the employee understands it. Disciplinary notices should contain the following:

1. The basis for cause to discipline;
2. Specific violations of rules, orders, responsibilities, or acts of misconduct;
3. The extent to which previous discipline is being considered. (Remember to look at the Union contract to see if there is any limitation on the use of prior discipline. Many contracts prohibit the use of old discipline beyond a certain date.);
4. The specific form and degree of corrective action being imposed;
5. Expectation for change in behavior; and,
6. What discipline will be imposed for any future violation.

If the misconduct is so serious that discharge is warranted and the employee came clean during the investigation, you might want to consider allowing the employee to resign rather than be discharged. Get a complete release of all claims whenever possible.

If you are investigating allegations of misconduct for a non-union employee or an at-will employee, you should invoke the same organized approach to the investigation. You should view everything you do during the investigation from the standpoint that some stranger or strangers (an arbitrator, judge, or jury) will be reviewing your conduct.

EMPLOYMENT PRACTICES GUIDELINE

Discipline and Discharge – Weingarten Rights

The right to union representation at an investigatory interview is based on the right of public employees under section 9 of the Public Employment Relations Act (PERA), MCL 423.209, "to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for . . . mutual aid and protection." A public employer is prohibited under PERA from interfering with, restraining, or coercing public employees in the exercise of their rights guaranteed in section 9. MCL 423.210(1)(a). A public employer may also not refuse to bargain collectively with the representatives of its public employees. MCL 423.210(1)(e). Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment and shall be so recognized by the public employer. MCL 423.211. However, any individual employee at any time may present grievances to the employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of the collective bargaining agreement, then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment. *Id.*

The act of requesting union assistance is, in and of itself, engaging in concerted activity. *Wayne-Westland Cmty Sch* v *Wayne-Westland Ed Assn*, 176 Mich App 361 (1989). The Michigan Employment Relations Commission (MERC) has held that the presence of a union representative is essential to aid the employee in answering the questions asked by the employer and in presenting facts. *City of Oak Park*, 1995 MERC Lab Op 576. The presence of a union representative is meant to provide the employee with a person who will act as an advocate on the employee's behalf. The employee's right to representation where the employee reasonably believes that the interview may lead to disciplinary action being taken against him or her was set forth in *NLRB* v *J. Weingarten Inc*, 420 U.S. 251 (1975), and the doctrine was adopted by MERC in *University of Michigan*, 1977 MERC Lab Op 496.

When a public employee is required to submit to an investigatory interview that the employee reasonably believes may result in discipline, the employee is entitled to union representation upon request. Reasonable belief is measured by objective standards under all the circumstances of the case. The right to union representation is triggered by the employee's request. No particular language is required for the request; the employee must merely put the employer on notice that representation is desired. An employee's query as to whether union representation is needed is sufficient to constitute a request for union representation as it puts the employer on notice that union representation is desired.

EMPLOYMENT PRACTICES GUIDELINE

Discipline and Discharge – Best Practices for Discipline

The following rules should be adhered to by management in all its dealings with employees:

1. Employees should be treated equally; they should be viewed alike without regard to any discriminatory criteria, i.e., race, sex, religion, disability, etc.

2. Policies should be applied uniformly. Consistency is the key—haphazard enforcement of rules will leave the employer open to charges of discrimination.

3. There should be no condonation of rule violations.

4. Hasty actions should be avoided, and yet delays should not be countenanced; there should be an awareness of the meaning and implication of all decisions.

5. Policies and decisions should be coordinated from the top all the way down to the department level; every measure should be taken to avoid the granting of benefits denied to others.

6. Contract procedures should be strictly followed. If there is a certified union, make certain that all disciplinary actions are taken in conformity with the collective bargaining agreement. This means having a union representative present at all disciplinary sessions. Be careful not to bypass the Union when taking a disciplinary action.

7. Whenever an event occurs which may lead to termination, conduct a complete thorough investigation. Never discharge an employee in a fit of anger.

8. Make a paper trail whenever you take an action that may or does result in discipline. Make sure the employee signs a counseling or disciplinary form (or if he or she refuses, have that so noted). At least two supervisory/executive personnel should be present whenever disciplinary action is taken against an employee.

By paying close attention to the seven (7) just cause tests and following the above rules, you will significantly reduce the likelihood that the discipline you impose will be reversed in arbitration.

EMPLOYEE NOTICE CONCERNING INVESTIGATION

To: _____ (Employee Name)
From: _____ (Employer Representative)
Re: Incident Investigation
Date: _____ Time: _____
Persons Present:
_____
_____

You are being interviewed as part of an incident investigation by _____ County Road Commission. The investigation pertains to information that has come to the Road Commission's attention that: [Insert description of dates and events investigated]
_____
_____
_____

The purpose of this notice is to inform you of your rights and obligations in advance of the commencement of questioning, as follows:

You are directed and ordered to answer all questions and answer them truthfully. You are not required, as a condition of your employment with the Road Commission, to surrender your right against use in a criminal prosecution of any statements obtained from you by the Road Commission. You are hereby notified, however, that failure to answer questions related to this administrative investigation (including on grounds of the constitutional privilege against self-incrimination), and/or failure to be truthful in your responses, will be considered insubordination and will result in disciplinary action against you, up to and including termination from employment.

This interview is an opportunity for you to present pertinent information to the employer that will assist the employer in its evaluation and assessment of the incident. Failure by you to participate and fully cooperate in the interview will force the employer to evaluate and assess this incident from the information and data developed solely through other sources. Further, you are advised that you are free to request clarification of questions you do not understand.

If you are represented by a Union, you also have the right to have a Union representative, who is not involved in the investigation, present with you during your interview.

Please sign below to attest to your understanding of your rights and obligations as set forth above.

Date: _____ _____
Employee

Date: _____ _____
Employer Representative

DISCIPLINARY ACTION FORM

Employee: _____ Date: _____

Department: _____ Position: _____

Supervisor: _____

TYPE OF ACTION:

[ ] Verbal Warning

[ ] Written Warning

[ ] Suspension Begins: _____ Ends: _____

[ ] Termination Effective: _____

Date of Incident: _____ Time of Incident: _____

Violation of Policy or Work Rule #: _____

Description of the Incident(s) or Behavior(s):

_____

_____

_____

_____

Further incidents of this kind or any other violations of other Road Commission rules or procedures will result in disciplinary action up to and including termination.

I acknowledge receipt of this disciplinary action and that its contents have been discussed with me. I understand that my signature does not necessarily indicate agreement and refusal to sign will not invalidate the disciplinary action. I understand that this form will be placed in my personnel file. I further have been informed that I may submit a written response to the information in this form and that my response will be kept in my personnel file.

_____ _____

Employee's Signature Date

_____ _____

Manager's Signature Date

Copies of this form and any attachments should be given to Employee and Union Representative.
The original should be placed in Employee's personnel file.

XVIII. COBRA

Forms:

EMPLOYMENT PRACTICES GUIDELINE

COBRA – General Provisions

The Consolidated Omnibus Budget Reconciliation Act (COBRA) requires group health plans to offer continuation coverage to covered employees, former employees, spouses, former spouses, and dependent children when group health coverage would otherwise be lost due to certain events. Those events include:

- A covered employee's death;
- A covered employee's job loss or reduction in hours for reasons other than gross misconduct;
- A covered employee's becoming entitled to Medicare;
- A covered employee's divorce or legal separation; and,
- A child's loss of dependent status (and therefore coverage) under the plan.

COBRA sets rules for how and when plan sponsors must offer and provide continuation coverage, how employees and their families may elect continuation coverage, and what circumstances justify terminating continuation coverage.

Employers may require individuals to pay for COBRA continuation coverage. Premiums cannot exceed the full cost of the coverage, plus a 2 percent administration charge.

COBRA applies to all group health plans sponsored by state and local governments under the provisions of the Public Health Service Act. A group health plan is any arrangement that an employer establishes or maintains to provide employees or their families with medical care, whether it is provided through insurance, by a health maintenance organization, out of the employer's assets, or through any other means. "Medical care" includes for this purpose:

- Inpatient and outpatient hospital care;
- Physician care;
- Surgery and other major medical benefits;
- Prescription drugs: and
- Dental and vision care.

Life insurance and disability benefits are not considered "medical care." COBRA does not cover plans that provide only life insurance or disability benefits.

Many group health plans are administered by the employer that sponsors the plan, but group health plans are also frequently administered, in whole or in part, by a separate individual or organization, such as a professional benefits administration firm. Carrying out the requirements of COBRA is the direct responsibility of the plan administrator.

A group health plan must offer COBRA continuation coverage only to qualified beneficiaries and only after a qualifying event has occurred.

A qualified beneficiary is an employee who was covered by a group health plan on the day before a qualifying event occurred or that employee's spouse, former spouse, or dependent child. In addition, any child born to or placed for adoption with a covered employee during a period of continuation coverage is automatically considered a qualified beneficiary. An employer's directors who participate in the group health plan may also be qualified beneficiaries.

"Qualifying events" are events that cause an individual to lose group health coverage. The type of qualifying event determines who the qualified beneficiaries are and the period of time that a plan must offer continuation coverage. COBRA establishes the minimum requirements for continuation coverage. A plan may always choose to provide longer periods of continuation coverage and/or to contribute toward the cost.

The following are qualifying events for a covered employee if they cause the covered employee to lose coverage:

- Termination of the covered employee's employment for any reason other than "gross misconduct;" or
- Reduction in the covered employee's hours of employment.

The following are qualifying events for a spouse and dependent child of a covered employee if they cause the spouse or dependent child to lose coverage:

- Termination of the covered employee's employment for any reason other than "gross misconduct;"
- Reduction in hours worked by the covered employee;
- Covered employee becomes entitled to Medicare;
- Divorce or legal separation from the covered employee; or
- Death of the covered employee.

In addition to the above, the following is a qualifying event for a dependent child of a covered employee if it causes the child to lose coverage:

- Loss of "dependent child" status under the plan rules. Under the Affordable Care Act, plans that offer coverage to children on their parents' plan must make coverage available until the adult child reaches the age of 26.

Those entitled to COBRA continuation coverage may have more affordable or generous alternatives for coverage. One option may be "special enrollment" in other group health coverage. Under the Health Insurance Portability and Accountability Act (HIPAA), upon certain events, group health plans and health insurance issuers are required to provide a special enrollment period. During that period, individuals who previously declined coverage for themselves and their dependents, and who are otherwise eligible, may enroll without waiting until the next open season for enrollment. One event that triggers special enrollment is an employee or dependent losing eligibility for other health coverage. For

example, an employee who loses group health coverage may be able to special enroll in a spouse's health plan. The employee or dependent must request special enrollment within 30 days of losing other coverage.

Losing employment-based health coverage also gives the employee an opportunity to enroll in the Health Insurance Marketplace in their state of residence. The Marketplace allows individuals and small businesses to find and compare private health insurance options. Through the Marketplace, individuals may qualify for cost-sharing reductions and a tax credit that lowers monthly premiums. Being offered COBRA continuation coverage does not limit eligibility for coverage or for a tax credit through the Marketplace. The employee or dependent must select Marketplace coverage within 60 days before or after the loss of other coverage or will have to wait until the next open enrollment period.

EMPLOYMENT PRACTICES GUIDELINE

COBRA – Required Notices

Under COBRA, group health plans must provide covered employees and their families with specific notices explaining their COBRA rights. Plans must also have rules for how COBRA continuation coverage is offered, how qualified beneficiaries may elect continuation coverage, and when it can be terminated.

General Notice

Group health plans must give each employee and spouse a general notice describing COBRA rights within the first 90 days of coverage.

The general notice must include:

- The name of the plan and the name, address, and telephone number of someone the employee and spouse can contact for more information on COBRA and the plan;
- A general description of the continuation coverage provided under the plan;
- An explanation of what qualified beneficiaries must do to notify the plan of qualifying events or disabilities;
- An explanation of the importance of keeping the plan administrator informed of addresses of the participants and beneficiaries; and
- A statement that the general notice does not fully describe COBRA or the plan and that more complete information is available from the plan administrator.

The Department of Labor (DOL) had developed a model general notice that single-employer group health plans may use to satisfy the general notice requirement. The DOL considers using the model general notice, appropriately completed, to be good faith compliance with COBRA's general notice content requirements.

Qualifying Event Notice

A group health plan must offer continuation coverage if a qualifying event occurs. The employer, employee or beneficiary must notify the group health plan of the qualifying event, and the plan is not required to act until it receives an appropriate notice. Who must give notice depends on the type of qualifying event.

The employer must notify the plan if the qualifying event is:

- Termination or reduction in hours of employment of the covered employee;
- Death of the covered employee;
- Covered employee becoming entitled to Medicare; or,
- Employer bankruptcy.

The employer must notify the plan within 30 days after the event occurs.

The covered employee or one of the qualified beneficiaries must notify the plan if the qualifying event is:

- Divorce;
- Legal separation; or,
- A child's loss of dependent status under the plan.

Group health plans must have procedures for how the covered employee or qualified beneficiaries can provide notice of these types of qualifying events. The plan can set a time limit for providing this notice, but the time limit cannot be shorter than 60 days, starting from the latest of:

- The date the qualifying event occurs;
- The date the qualified beneficiary loses (or would lose) coverage under the plan as a result of the qualifying event; or,
- The date the qualified beneficiary is informed, through the furnishing of the COBRA general notice, of the responsibility to notify the plan and the procedures for doing so.

The procedures must describe how, and to whom, notice should be given, and what information must be included in the qualifying event notice. If one person gives notice of a qualifying event, the notice covers all qualified beneficiaries affected by that event.

If the group health plan does not have reasonable procedures for how to give notice of a qualifying event, the employee can give written or oral notice by contacting the person or department that handles the employee's employee benefits matters. If the plan is administered by an insurance company (or the benefits are provided through insurance), notice can be given to the insurance company.

COBRA Election Notice

After receiving notice of a qualifying event, the plan must provide the qualified beneficiaries with an election notice within 14 days. The election notice describes their rights to continuation coverage and how to make an election.

The election notice should include:

- The name of the plan and the name, address, and telephone number of the plan's COBRA administrator;
- Identification of the qualifying event;
- Identification of the qualified beneficiaries (by name or by status);
- An explanation of the qualified beneficiaries' right to elect continuation coverage;
- The date coverage will terminate (or has terminated) if continuation coverage is not elected;

- How to elect continuation coverage;
- What will happen if continuation coverage is not elected or is waived;
- What continuation coverage is available, for how long, and (if it is for less than 36 months), how it can be extended for disability or second qualifying events;
- How continuation coverage might terminate early;
- Premium payment requirements, including due dates and grace periods;
- A statement of the importance of keeping the plan administrator informed of the addresses of qualified beneficiaries; and
- A statement that the election notice does not fully describe COBRA or the plan and that more information is available from the plan administrator.

The DOL has a model election notice that plans may use to satisfy their obligation to provide the election notice. The DOL will consider use of the model election notice, appropriately completed, good faith compliance with the election notice content requirements of COBRA.

COBRA Notice of Unavailability of Continuation Coverage

Group health plans may sometimes deny a request for continuation coverage or for an extension of continuation coverage, when the plan determines the requester is not entitled to receive it. When a group health plan denies a request for continuation coverage or a request for extension, the plan must give the denied individual a notice of unavailability of continuation coverage within 14 days after the request is received and explain the reason for denying the request.

COBRA Notice of Early Termination of Continuation Coverage

Continuation coverage must generally be available for a maximum period (either 18, 29, or 36 months). The group health plan may terminate continuation coverage early, however, for any of a number of specific reasons. When a group health plan decides to terminate continuation coverage early for any of these reasons, the plan must give the qualified beneficiary a notice of early termination. The notice must be given as soon as practicable after the decision is made, and it must describe the date coverage will terminate, the reason for termination, and any rights the qualified beneficiary may have under the plan or applicable law to elect alternative group or individual coverage.

EMPLOYMENT PRACTICES GUIDELINE

COBRA – Election Procedures and Benefits

COBRA requires group health plans to give qualified beneficiaries an election period to decide whether to elect continuation coverage, and COBRA also gives qualified beneficiaries specific election rights.

Plans must give each qualified beneficiary at least 60 days to choose whether or not to elect COBRA coverage, beginning from the date the election notice is provided, or the date the qualified beneficiary would otherwise lose coverage under the group health plan due to a qualifying event, whichever is later.

Each qualified beneficiary has an independent right to elect continuation coverage. This means that when several individuals (such as an employee, spouse, and their dependent children) become qualified beneficiaries due to the same qualifying event, each individual can make a different choice. The plan must allow the covered employee or the covered employee's spouse, however, to elect continuation coverage on behalf of all of the other qualified beneficiaries for the same qualifying event. A parent or legal guardian of a qualified beneficiary must also be allowed to elect on behalf of a minor child.

If qualified beneficiaries waive continuation coverage during the election period, they must be permitted to later revoke the waiver of coverage and elect continuation coverage, as long as they do so before the election period ends. In such cases, the plan may make continuation coverage begin on the date the waiver was revoked.

COBRA also sets standards for the continuation coverage that plans must provide. The continuation coverage must be identical to the coverage currently available under the plan to similarly situated individuals who are not receiving continuation coverage. (Generally, this is the same coverage that the qualified beneficiary had immediately before the qualifying event.) A qualified beneficiary receiving continuation coverage must receive the same benefits, choices, and services that a similarly situated participant or beneficiary currently receives under the plan, such as the right during an open enrollment season to choose among available coverage options. The qualified beneficiary is also subject to the same plan rules and limits that would apply to a similarly situated participant or beneficiary, such as co-payment requirements, deductibles, and coverage limits. The plan's rules for filing benefit claims and appealing any claims denials also apply.

Any changes made to the plan's terms that apply to similarly situated active employees and their families will also apply to qualified beneficiaries receiving COBRA continuation coverage. If a child is born to or adopted by a covered employee during a period of continuation coverage, the child is automatically considered to be a qualified beneficiary receiving continuation coverage. The plan must allow the child to be added to the continuation coverage.

EMPLOYMENT PRACTICES GUIDELINE

COBRA – Duration of Continuation Coverage

Maximum Periods

COBRA requires that continuation coverage extend from the date of the qualifying event for a limited period of 18 or 36 months. The length of time for which continuation coverage must be made available depends on the type of qualifying event. A plan, however, may provide longer of periods of coverage beyond the maximum period required by law.

When the qualifying event is the covered employee's termination of employment (for reasons) other than gross misconduct) or reduction in work hours, qualified beneficiaries must be eligible for 18 months of continuation coverage.

When the qualifying event is the end of employment or reduction of the employee's hours, and the employee became entitled to Medicare less than 18 months before the qualifying event, COBRA coverage for the employee's spouse and dependents must be available for up to 36 months after the date the employee became entitled to Medicare. For example, if a covered employee becomes entitled to Medicare 8 months before the date their employment ends (termination of employment is the qualifying event), COBRA coverage for their spouse and children must be available for up to 28 months (36 months minus 8 months).

For all other qualifying events, qualified beneficiaries must receive 36 months of continuation coverage.

The following chart shows the maximum period for which continuation coverage must be offered for the specific qualifying events and the qualified beneficiaries who are entitled to elect continuation coverage when the specific event occurs. Note that an event is a qualifying event only if it causes the qualified beneficiary to lose coverage under the plan.

Qualifying Event	Qualified Beneficiaries	Maximum Period of Continuation Coverage
Termination (for reasons other than gross misconduct) or reduction in hours of employment	Employee Spouse Dependent Child	18 months
Employee enrollment in Medicare	Spouse Dependent Child	36 months
Divorce or legal separation	Spouse Dependent Child	36 months
Death of employee	Spouse Dependent Child	36 months
Loss of "dependent child" status under the plan	Dependent Child	36 months

Early Termination

A group health plan may terminate continuation coverage earlier than the end of the maximum period for any of the following reasons:

- Premiums are not paid in full on a timely basis;
- The employer ceases to maintain any group health plan;
- A qualified beneficiary begins coverage under another group health plan after electing continuation coverage;
- A qualified beneficiary becomes entitled to Medicare benefits after electing continuation coverage; or,
- A qualified beneficiary engages in fraud or other conduct that would justify terminating coverage of a similarly situated participant or beneficiary not receiving continuation coverage.

If continuation coverage is terminated early, the plan must provide the qualified beneficiary with an early termination notice.

Extension of an 18-month Period of Continuation Coverage

There are two circumstances under which individuals entitled to an 18-month maximum period of continuation coverage can become entitled to an extension of that maximum period. The first is when one of the qualified beneficiaries is disabled; the second is when a second qualifying event occurs.

Disability

If one of the qualified beneficiaries in a family is disabled and meets certain requirements, all of the qualified beneficiaries in that family are entitled to an 11-month extension of the maximum period of continuation coverage (for a total maximum period of 29 months of continuation coverage). The plan can charge qualified beneficiaries an increased premium, up to 150 percent of the cost of coverage, during the 11-month disability extension.

The requirements are, first, that the Social Security Administration (SSA) determines that the qualified beneficiary is disabled before the 60th day of continuation coverage and, second, that the disability continues during the rest of the initial 18-month period of continuation coverage.

The disabled qualified beneficiary (or another person on his or her behalf) also must notify the plan of the SSA determination. The plan can set a time limit for providing this notice of disability, but the time limit cannot be shorter than 60 days, starting from the latest of:

- The date the SSA issues the disability determination;
- The date the qualifying event occurs;
- The date the qualified beneficiary loses (or would lose) coverage under the plan as a result of the qualifying event; or,

- The date the qualified beneficiary is informed, through the furnishing of the COBRA general notice, of the responsibility to notify the plan and the procedures for doing so.

The right to the disability extension may be terminated if SSA determines that the qualified beneficiary is no longer disabled. The plan can require disabled beneficiaries to provide notice when such a determination is made. The plan must give the qualified beneficiaries at least 30 days after the SSA determination to provide such notice.

The rules for how to give a disability notice and a notice of no longer being disabled should be described in the election notice for any offer of an 18-month period of continuation coverage.

Second Qualifying Event

An 18-month extension may be available to qualified beneficiaries receiving an 18-month maximum period of continuation coverage (giving a total maximum period of 36 months of continuation coverage) if the qualified beneficiaries experience a second qualifying event, for example, death of the covered employee, divorce or legal separation of the covered employee and spouse, Medicare entitlement (in certain circumstances), or loss of dependent child status under the plan. The second event can be a second qualifying event only if it would have caused the qualified beneficiary to lose coverage under the plan in the absence of the first qualifying event.

The plan must have procedures for how a qualified beneficiary should provide notice of a second qualifying event. These rules should be described in the election notice for any offer of an 18-month period of continuation coverage. The plan set a time limit for providing this notice, but the time limit cannot be shorter than 60 days from the latest of:

- The date on which the qualifying event occurs;
- The date on which the qualified beneficiary loses (or would lose) coverage under the plan as a result of the qualifying event; or,
- The date on which the qualified beneficiary is informed, through the furnishing of the COBRA general notice, of the responsibility to notify the plan and the procedures for doing so.

EMPLOYMENT PRACTICES GUIDELINE

COBRA – Paying for Continuation Coverage

Group health plans can require qualified beneficiaries to pay for COBRA continuation coverage, although plans can choose to provide continuation coverage at reduced or no cost. The maximum amount charged to qualified beneficiaries cannot exceed 102 percent of the cost to the plan for similarly situated individuals covered under the plan who have not incurred a qualifying event. In calculating premiums for continuation coverage, a plan can include the costs paid by both the employee and the employer, plus an additional 2 percent for administrative costs. For qualified beneficiaries receiving the 11-month disability extension of continuation coverage, the premium for those additional months may be increased to 150 percent of the plan's total cost of coverage.

Plans may increase COBRA premiums for qualified beneficiaries if the cost to the plan increases, but generally plans must fix premiums before each 12-month premium cycle. The plan must allow qualified beneficiaries to pay the required premiums on a monthly basis if they ask to do so and may allow payments at other intervals (for example, weekly or quarterly). The COBRA election notice should describe all the necessary information about COBRA premiums, when they are due, and the consequences of payment and nonpayment.

Plans cannot require qualified beneficiaries to pay a premium when they make the COBRA election. Plans must provide at least 45 days after the election (that is, the date the qualified beneficiary mails the election form if using first-class mail) for making an initial premium payment. If a qualified beneficiary fails to make any payment before the end of the initial 45-day period, the plan can terminate the qualified beneficiary's COBRA rights. The plan should establish due dates for any premiums for subsequent periods of coverage, but it must provide a minimum 30-day grace period for each payment.

Plans can terminate continuation coverage if full payment is not received before the end of a grace period. If the amount of a payment made to the plan is incorrect, but is not significantly less that the amount due, the plan must notify the qualified beneficiary of the deficiency and grant a reasonable period (for this purpose, 30 days is considered reasonable) to pay the difference. The plan is not obligated to send monthly premium notices but must provide a notice of early termination if it terminates continuation coverage early due to failure to make a timely payment.

EMPLOYMENT PRACTICES GUIDELINE

COBRA –
Coordination with Other Federal Benefit Laws

The Family and Medical Leave Act (FMLA) requires employers to maintain coverage under any "group health plan" for employees on FMLA leave under the same conditions coverage would have been provided if the employee had continued working. Group health coverage that is provided under FMLA during a family or medical leave is not COBRA continuation coverage, and taking leave under the Act is not a qualifying event under COBRA. A COBRA qualifying event may occur, however, when an employer's obligation to maintain health benefits under FMLA ceases, such as when an employee taking FMLA decides not to return to work and notifies an employer of his or her intent.

The Affordable Care Act (ACA) provides additional protections for coverage under an employment-based group health plan, including COBRA continuation coverage. These protections include:

- Extending dependent child coverage to age 26;
- Prohibiting limits or exclusions from coverage for preexisting conditions;
- Banning lifetime or annual dollar limits on coverage for essential health benefits; and,
- Requiring group health plans and insurers to provide an easy-to-understand summary of a health plan's benefits and coverage.

Additional protections that may apply to health plans include coverage for:

- Certain preventive services (such as blood pressure, diabetes and cholesterol tests, regular well-baby and well-child visits, routine vaccinations, and many cancer screenings) without cost sharing; and,
- Emergency services in an emergency department of a hospital outside of the plan's network without prior approval from the health plan.

The HIPAA certificate of creditable coverage is no longer a required notice. The certificate was eliminated at the end of 2014 because its primary function was to address pre-existing condition exclusions (PCEs). The ACA has since prohibited all PCEs, which is why the certificate is no longer required. Nonetheless, it is not uncommon for employers to receive requests for documentation of prior coverage. The most common situation is when a former employee attempts to enroll mid-year in a spouse's or parent's plan after terminating and experiencing a HIPAA special enrollment event caused by the loss of coverage. Many employers still request proof of the date of loss of prior coverage, which in the past was easily handled by the required HIPAA certificate of creditable coverage. In some cases, the insurance carrier (if fully insured) or the third-party administrator (if self-insured) will still provide a document resembling the old certificates of creditable coverage. There is no issue

with continuing to provide such documents, but they should not be labelled as a HIPAA certificate or include the information relating to HIPAA portability rights (which are now obsolete).

Model COBRA Continuation Coverage General Notice Instructions

The Department of Labor has developed a model Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) continuation coverage general notice that plans may use to provide the general notice. To use this model general notice properly, the Plan Administrator must fill in the blanks with the appropriate plan information. The Department considers use of the model general notice to be good faith compliance with the general notice content requirements of COBRA. The use of the model notices isn't required. The model notices are provided to help facilitate compliance with the applicable notice requirements.

NOTE: Plans do *not* need to include this instruction page with the model general notice.

Paperwork Reduction Act Statement

According to the Paperwork Reduction Act of 1995 (Pub. L. 104-13) (PRA), no persons are required to respond to a collection of information unless such collection displays a valid Office of Management and Budget (OMB) control number. The Department notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. See 44 U.S.C. 3507. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. See 44 U.S.C. 3512.

The public reporting burden for this collection of information is estimated to average approximately four minutes per respondent. Interested parties are encouraged to send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, Office of Policy and Research, Attention: PRA Clearance Officer, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email **ebsa.opr@dol.gov** and reference the OMB Control Number 1210-0123.

Model General Notice of COBRA Continuation Coverage Rights
(For use by single-employer group health plans)

** Continuation Coverage Rights Under COBRA**

Introduction

You're getting this notice because you recently gained coverage under a group health plan (the Plan). This notice has important information about your right to COBRA continuation coverage, which is a temporary extension of coverage under the Plan. **This notice explains COBRA continuation coverage, when it may become available to you and your family, and what you need to do to protect your right to get it.** When you become eligible for COBRA, you may also become eligible for other coverage options that may cost less than COBRA continuation coverage.

The right to COBRA continuation coverage was created by a federal law, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). COBRA continuation coverage can become available to you and other members of your family when group health coverage would otherwise end. For more information about your rights and obligations under the Plan and under federal law, you should review the Plan's Summary Plan Description or contact the Plan Administrator.

You may have other options available to you when you lose group health coverage. For example, you may be eligible to buy an individual plan through the Health Insurance Marketplace. By enrolling in coverage through the Marketplace, you may qualify for lower costs on your monthly premiums and lower out-of-pocket costs. Additionally, you may qualify for a 30-day special enrollment period for another group health plan for which you are eligible (such as a spouse's plan), even if that plan generally doesn't accept late enrollees.

What is COBRA continuation coverage?

COBRA continuation coverage is a continuation of Plan coverage when it would otherwise end because of a life event. This is also called a "qualifying event." Specific qualifying events are listed later in this notice. After a qualifying event, COBRA continuation coverage must be offered to each person who is a "qualified beneficiary." You, your spouse, and your dependent children could become qualified beneficiaries if coverage under the Plan is lost because of the qualifying event. Under the Plan, qualified beneficiaries who elect COBRA continuation coverage [*choose and enter appropriate information:* must pay *or* aren't required to pay] for COBRA continuation coverage.

If you're an employee, you'll become a qualified beneficiary if you lose your coverage under the Plan because of the following qualifying events:

- Your hours of employment are reduced, or
- Your employment ends for any reason other than your gross misconduct.

If you're the spouse of an employee, you'll become a qualified beneficiary if you lose your coverage under the Plan because of the following qualifying events:

- Your spouse dies;
- Your spouse's hours of employment are reduced;
- Your spouse's employment ends for any reason other than his or her gross misconduct;
- Your spouse becomes entitled to Medicare benefits (under Part A, Part B, or both); or
- You become divorced or legally separated from your spouse.

Your dependent children will become qualified beneficiaries if they lose coverage under the Plan because of the following qualifying events:

- The parent-employee dies;
- The parent-employee's hours of employment are reduced;
- The parent-employee's employment ends for any reason other than his or her gross misconduct;
- The parent-employee becomes entitled to Medicare benefits (Part A, Part B, or both);
- The parents become divorced or legally separated; or
- The child stops being eligible for coverage under the Plan as a "dependent child."

[If the Plan provides retiree health coverage, add the following paragraph:]

Sometimes, filing a proceeding in bankruptcy under title 11 of the United States Code can be a qualifying event. If a proceeding in bankruptcy is filed with respect to [*enter name of employer sponsoring the Plan*], and that bankruptcy results in the loss of coverage of any retired employee covered under the Plan, the retired employee will become a qualified beneficiary. The retired employee's spouse, surviving spouse, and dependent children will also become qualified beneficiaries if bankruptcy results in the loss of their coverage under the Plan.

When is COBRA continuation coverage available?

The Plan will offer COBRA continuation coverage to qualified beneficiaries only after the Plan Administrator has been notified that a qualifying event has occurred. The employer must notify the Plan Administrator of the following qualifying events:

- The end of employment or reduction of hours of employment;
- Death of the employee;
- *[add if Plan provides retiree health coverage:* Commencement of a proceeding in bankruptcy with respect to the employer;]; or
- The employee's becoming entitled to Medicare benefits (under Part A, Part B, or both).

For all other qualifying events (divorce or legal separation of the employee and spouse or a dependent child's losing eligibility for coverage as a dependent child), you must notify the Plan Administrator within 60 days [*or enter longer period permitted under the terms of the Plan*] after the qualifying event occurs. You must provide this notice to: [*Enter name of appropriate party*]. [*Add description of any additional Plan procedures for this notice, including a description of any required information or documentation.*]

How is COBRA continuation coverage provided?

Once the Plan Administrator receives notice that a qualifying event has occurred, COBRA continuation coverage will be offered to each of the qualified beneficiaries. Each qualified beneficiary will have an independent right to elect COBRA continuation coverage. Covered employees may elect COBRA continuation coverage on behalf of their spouses, and parents may elect COBRA continuation coverage on behalf of their children.

COBRA continuation coverage is a temporary continuation of coverage that generally lasts for 18 months due to employment termination or reduction of hours of work. Certain qualifying events, or a second qualifying event during the initial period of coverage, may permit a beneficiary to receive a maximum of 36 months of coverage.

There are also ways in which this 18-month period of COBRA continuation coverage can be extended:

Disability extension of 18-month period of COBRA continuation coverage

If you or anyone in your family covered under the Plan is determined by Social Security to be disabled and you notify the Plan Administrator in a timely fashion, you and your entire family may be entitled to get up to an additional 11 months of COBRA continuation coverage, for a maximum of 29 months. The disability would have to have started at some time before the 60th day of COBRA continuation coverage and must last at least until the end of the 18-month period of COBRA continuation coverage. [*Add description of any additional Plan procedures for this notice, including a description of any required information or documentation, the name of the appropriate party to whom notice must be sent, and the time period for giving notice.*]

Second qualifying event extension of 18-month period of continuation coverage

If your family experiences another qualifying event during the 18 months of COBRA continuation coverage, the spouse and dependent children in your family can get up to 18 additional months of COBRA continuation coverage, for a maximum of 36 months, if the Plan is properly notified about the second qualifying event. This extension may be available to the spouse and any dependent children getting COBRA continuation coverage if the employee or former employee dies; becomes entitled to Medicare benefits (under Part A, Part B, or both); gets divorced or legally separated; or if the dependent child stops being eligible under the Plan as a dependent child. This extension is only available if the second qualifying event would have caused the spouse or dependent child to lose coverage under the Plan had the first qualifying event not occurred.

Are there other coverage options besides COBRA Continuation Coverage?

Yes. Instead of enrolling in COBRA continuation coverage, there may be other coverage options for you and your family through the Health Insurance Marketplace, Medicare, Medicaid, Children's Health Insurance Program (CHIP), or other group health plan coverage options (such as a spouse's plan) through what is called a "special enrollment period." Some of these options may cost less than COBRA continuation coverage. You can learn more about many of these options at **www.healthcare.gov**.

Can I enroll in Medicare instead of COBRA continuation coverage after my group health plan coverage ends?

In general, if you don't enroll in Medicare Part A or B when you are first eligible because you are still employed, after the Medicare initial enrollment period, you have an 8-month special enrollment period[1] to sign up for Medicare Part A or B, beginning on the earlier of

- The month after your employment ends; or
- The month after group health plan coverage based on current employment ends.

If you don't enroll in Medicare and elect COBRA continuation coverage instead, you may have to pay a Part B late enrollment penalty and you may have a gap in coverage if you decide you want Part B later. If you elect COBRA continuation coverage and later enroll in Medicare Part A or B before the COBRA continuation coverage ends, the Plan may terminate your continuation coverage. However, if Medicare Part A or B is effective on or before the date of the COBRA election, COBRA coverage may not be discontinued on account of Medicare entitlement, even if you enroll in the other part of Medicare after the date of the election of COBRA coverage.

If you are enrolled in both COBRA continuation coverage and Medicare, Medicare will generally pay first (primary payer) and COBRA continuation coverage will pay second. Certain plans may pay as if secondary to Medicare, even if you are not enrolled in Medicare.

For more information visit https://www.medicare.gov/medicare-and-you.

[1] https://www.medicare.gov/sign-up-change-plans/how-do-i-get-parts-a-b/part-a-part-b-sign-up-periods.

If you have questions

Questions concerning your Plan or your COBRA continuation coverage rights should be addressed to the contact or contacts identified below. For more information about your rights under the Employee Retirement Income Security Act (ERISA), including COBRA, the Patient Protection and Affordable Care Act, and other laws affecting group health plans, contact the nearest Regional or District Office of the U.S. Department of Labor's Employee Benefits Security Administration (EBSA) in your area or visit **www.dol.gov/ebsa**. (Addresses and phone numbers of Regional and District EBSA Offices are available through EBSA's website.) For more information about the Marketplace, visit **www.HealthCare.gov**.

Keep your Plan informed of address changes

To protect your family's rights, let the Plan Administrator know about any changes in the addresses of family members. You should also keep a copy, for your records, of any notices you send to the Plan Administrator.

Plan contact information

[*Enter name of the Plan and name (or position), address and phone number of party or parties from whom information about the Plan and COBRA continuation coverage can be obtained on request.*]

Model COBRA Continuation Coverage Election Notice
Instructions

The Department of Labor has developed a model Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) continuation coverage election notice that the Plan may use to provide the election notice. To use this model election notice properly, the Plan Administrator must fill in the blanks with the appropriate plan information. The Department considers use of the model election notice to be good faith compliance with the election notice content requirements of COBRA. The use of the model notices isn't required. The model notices are provided to help facilitate compliance with the applicable notice requirements.

NOTE: Plans do *not* need to include this instruction page with the model election notice.

Paperwork Reduction Act Statement

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OMB Control Number 1210-0123 (expires 1/31/2026)

Model COBRA Continuation Coverage Election Notice
(For use by single-employer group health plans)

IMPORTANT INFORMATION: COBRA Continuation Coverage and other Health Coverage Alternatives

[*Enter date of notice*]

Dear: [*Identify the qualified beneficiary(ies), by name or status*]

This notice has important information about your right to continue your health care coverage in the [*enter name of group health plan*] (the Plan), as well as other health coverage options that may be available to you, including coverage through the Health Insurance Marketplace at www.HealthCare.gov or call 1-800-318-2596**. You may be able to get coverage through the Health Insurance Marketplace that costs less than COBRA continuation coverage.** Please read the information in this notice very carefully before you make your decision. If you choose to elect COBRA continuation coverage, you should use the election form provided later in this notice.

Why am I getting this notice?

You're getting this notice because your coverage under the Plan will end on [*enter date*] due to [*check appropriate box*]:

☐ End of employment
☐ Death of employee
☐ Entitlement to Medicare
☐ Reduction in hours of employment
☐ Divorce or legal separation
☐ Loss of dependent child status

Federal law requires that most group health plans (including this Plan) give employees and their families the opportunity to continue their health care coverage through COBRA continuation coverage when there's a "qualifying event" that would result in a loss of coverage under an employer's plan.

What's COBRA continuation coverage?

COBRA continuation coverage is the same coverage that the Plan gives to other participants or beneficiaries who aren't getting continuation coverage. Each "qualified beneficiary" (described below) who elects COBRA continuation coverage will have the same rights under the Plan as other participants or beneficiaries covered under the Plan.

Who are the qualified beneficiaries?

Each person ("qualified beneficiary") in the category(ies) checked below can elect COBRA continuation coverage:

☐ Employee or former employee
☐ Spouse or former spouse
☐ Dependent child(ren) covered under the Plan on the day before the event that caused the loss of coverage
☐ Child who is losing coverage under the Plan because he or she is no longer a dependent under the Plan

Are there other coverage options besides COBRA Continuation Coverage?

Yes. Instead of enrolling in COBRA continuation coverage, there may be other more affordable coverage options for you and your family through the Health Insurance Marketplace, Medicaid, Medicare, or other group health plan coverage options (such as a spouse's plan) through what is called a "special enrollment period." Some of these options may cost less than COBRA continuation coverage.

You should compare your other coverage options with COBRA continuation coverage and choose the coverage that is best for you. For example, if you move to other coverage you may pay more out of pocket than you would under COBRA because the new coverage may impose a new deductible.

When you lose job-based health coverage, it's important that you choose carefully between COBRA continuation coverage and other coverage options, because once you've made your choice, it can be difficult or impossible to switch to another coverage option.

If I elect COBRA continuation coverage, when will my coverage begin and how long will the coverage last?

If elected, COBRA continuation coverage will begin on [*enter date*] and can last until [*enter date*].
[*Add, if appropriate:* You may elect any of the following options for COBRA continuation coverage: [*list available coverage options*].
Continuation coverage may end before the date noted above in certain circumstances, like failure to pay premiums, fraud, or the individual becomes covered under another group health plan.

Can I extend the length of COBRA continuation coverage?

If you elect continuation coverage, you may be able to extend the length of continuation coverage if a qualified beneficiary is disabled, or if a second qualifying event occurs. You must notify [*enter name of party responsible for COBRA administration*] of a disability or a second qualifying event within a certain time period to extend the period of continuation coverage. If you don't provide notice of a disability or second qualifying event within the required time period, it will affect your right to extend the period of continuation coverage.

For more information about extending the length of COBRA continuation coverage visit https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/an-employees-guide-to-health-benefits-under-cobra.pdf.

How much does COBRA continuation coverage cost?

COBRA continuation coverage will cost: [*enter amount each qualified beneficiary will be required to pay for each option per month of coverage and any other permitted coverage periods.*]

Other coverage options may cost less. If you choose to elect continuation coverage, you don't have to send any payment with the Election Form. Additional information about payment will be provided to you after the election form is received by the Plan. Important information about paying your premium can be found at the end of this notice.

You may be able to get coverage through the Health Insurance Marketplace that costs less than COBRA continuation coverage. You can learn more about the Marketplace below.

What is the Health Insurance Marketplace?

The Marketplace offers "one-stop shopping" to find and compare private health insurance options. In the Marketplace, you could be eligible for a new kind of tax credit that lowers your monthly premiums and cost-sharing reductions (amounts that lower your out-of-pocket costs for deductibles, coinsurance, and copayments) right away, and you can see what your premium, deductibles, and out-of-pocket costs will be before you make a decision to enroll. Through the Marketplace you'll also learn if you qualify for free or low-cost coverage from Medicaid or the Children's Health Insurance Program (CHIP). You can access the Marketplace for your state at www.HealthCare.gov.

Coverage through the Health Insurance Marketplace may cost less than COBRA continuation coverage. Being offered COBRA continuation coverage won't limit your eligibility for coverage or for a tax credit through the Marketplace.

When can I enroll in Marketplace coverage?

You always have 60 days from the time you lose your job-based coverage to enroll in the Marketplace. That is because losing your job-based health coverage is a "special enrollment" event. **After 60 days your special enrollment period will end and you may not be able to enroll, so you should take action right away.** In addition, during what is called an "open enrollment" period, anyone can enroll in Marketplace coverage.

To find out more about enrolling in the Marketplace, such as when the next open enrollment period will be and what you need to know about qualifying events and special enrollment periods, visit www.HealthCare.gov.

If I sign up for COBRA continuation coverage, can I switch to coverage in the Marketplace? What about if I choose Marketplace coverage and want to switch back to COBRA continuation coverage?

If you sign up for COBRA continuation coverage, you can switch to a Marketplace plan during a Marketplace open enrollment period. You can also end your COBRA continuation coverage early and switch to a Marketplace plan if you have another qualifying event such as marriage or birth of a child through something called a "special enrollment period." But be careful though - if you terminate your COBRA continuation coverage early without another qualifying event, you'll have to wait to enroll in Marketplace coverage until the next open enrollment period, and could end up without any health coverage in the interim.

Once you've exhausted your COBRA continuation coverage and the coverage expires, you'll be eligible to enroll in Marketplace coverage through a special enrollment period, even if Marketplace open enrollment has ended.

If you sign up for Marketplace coverage instead of COBRA continuation coverage, you cannot switch to COBRA continuation coverage once your election period ends.

Can I enroll in another group health plan?

You may be eligible to enroll in coverage under another group health plan (like a spouse's plan), if you request enrollment within 30 days of the loss of coverage.

If you or your dependent chooses to elect COBRA continuation coverage instead of enrolling in another group health plan for which you're eligible, you'll have another opportunity to enroll in the other group health plan within 30 days of losing your COBRA continuation coverage.

Can I enroll in Medicare instead of COBRA continuation coverage after my group health plan coverage ends?

In general, if you don't enroll in Medicare Part A or B when you are first eligible because you are still employed, after the initial enrollment period for Medicare Part A or B, you have an 8-month special enrollment period[1] to sign up, beginning on the earlier of

- The month after your employment ends; or
- The month after group health plan coverage based on current employment ends.

If you don't enroll in Medicare Part B and elect COBRA continuation coverage instead, you may have to pay a Part B late enrollment penalty and you may have a gap in coverage if you decide you want Part B later. If you elect COBRA continuation coverage and then enroll in Medicare Part A or B before the COBRA continuation coverage ends, the Plan may terminate your continuation coverage. However, if Medicare Part A or B is effective on or before the date of the COBRA election, COBRA coverage may not be discontinued on account of Medicare entitlement, even if you enroll in the other part of Medicare after the date of the election of COBRA coverage.

[1] https://www.medicare.gov/sign-up-change-plans/how-do-i-get-parts-a-b/part-a-part-b-sign-up-periods. These rules are different for people with End Stage Renal Disease (ESRD).

If you are enrolled in both COBRA continuation coverage and Medicare, Medicare will generally pay first (primary payer) and COBRA will pay second. Certain COBRA continuation coverage plans may pay as if secondary to Medicare, even if you are not enrolled in Medicare.

For more information visit https://www.medicare.gov/medicare-and-you.

What factors should I consider when choosing coverage options?

When considering your options for health coverage, you may want to think about:

- Premiums: Your previous plan can charge up to 102% of total plan premiums for COBRA coverage. Other options, like coverage on a spouse's plan or through the Marketplace, may be less expensive.
- Provider Networks: If you're currently getting care or treatment for a condition, a change in your health coverage may affect your access to a particular health care provider. You may want to check to see if your current health care providers participate in a network as you consider options for health coverage.
- Drug Formularies: If you're currently taking medication, a change in your health coverage may affect your costs for medication – and in some cases, your medication may not be covered by another plan. You may want to check to see if your current medications are listed in drug formularies for other health coverage.
- Severance payments: If you lost your job and got a severance package from your former employer, your former employer may have offered to pay some or all of your COBRA payments for a period of time. In this scenario, you may want to contact the Department of Labor at 1-866-444-3272 to discuss your options.
- Service Areas: Some plans limit their benefits to specific service or coverage areas – so if you move to another area of the country, you may not be able to use your benefits. You may want to see if your plan has a service or coverage area, or other similar limitations.
- Other Cost-Sharing: In addition to premiums or contributions for health coverage, you probably pay copayments, deductibles, coinsurance, or other amounts as you use your benefits. You may want to check to see what the cost-sharing requirements are for other health coverage options. For example, one option may have much lower monthly premiums, but a much higher deductible and higher copayments.

For more information

This notice doesn't fully describe continuation coverage or other rights under the Plan. More information about continuation coverage and your rights under the Plan is available in your summary plan description or from the Plan Administrator.

If you have questions about the information in this notice, your rights to coverage, or if you want a copy of your summary plan description, contact [*enter name of party responsible for COBRA administration for the Plan, with telephone number and address*].

For more information about your rights under the Employee Retirement Income Security Act (ERISA), including COBRA, the Patient Protection and Affordable Care Act, and other laws affecting group health plans, visit the U.S. Department of Labor's Employee Benefits Security

Administration (EBSA) website at http://www.dol.gov/ebsa or call their toll-free number at 1-866-444-3272. For more information about health insurance options available through the Health Insurance Marketplace, and to locate an assister in your area who you can talk to about the different options, visit www.HealthCare.gov.

Keep Your Plan Informed of Address Changes

To protect your and your family's rights, keep the Plan Administrator informed of any changes in your address and the addresses of family members. You should also keep a copy of any notices you send to the Plan Administrator.

COBRA Continuation Coverage Election Form

Instructions: To elect COBRA continuation coverage, complete this Election Form and return it to us. Under federal law, you have 60 days after the date of this notice to decide whether you want to elect COBRA continuation coverage under the Plan.

Send completed Election Form to: [*Enter Name and Address*]

This Election Form must be completed and returned by mail [*or describe other means of submission and due date*]. If mailed, it must be post-marked no later than [*enter date*].

If you don't submit a completed Election Form by the due date shown above, you'll lose your right to elect COBRA continuation coverage. If you reject COBRA continuation coverage before the due date, you may change your mind as long as you submit a completed Election Form before the due date. However, if you change your mind after first rejecting COBRA continuation coverage, your COBRA continuation coverage will begin on the date you submit the completed Election Form.

Read the important information about your rights included in the pages after the Election Form.

I (We) elect COBRA continuation coverage in the [*enter name of plan*] (the Plan) listed below:

Name Date of Birth Relationship to Employee SSN (or other identifier)

a. _____

[*Add if appropriate:* Coverage option elected: _____]

b. _____

[*Add if appropriate:* Coverage option elected: _____]

c. _____

[*Add if appropriate:* Coverage option elected: _____]

_____ _____
Signature Date

_____ _____
Print Name Relationship to individual(s) listed above

_____

_____

_____ _____
Print Address Telephone number

Important Information About Payment

First payment for continuation coverage

You must make your first payment for continuation coverage no later than 45 days after the date of your election (this is the date the Election Notice is postmarked). If you don't make your first payment in full no later than 45 days after the date of your election, you'll lose all continuation coverage rights under the Plan. You're responsible for making sure that the amount of your first payment is correct. You may contact [*enter appropriate contact information, e.g., the Plan Administrator or other party responsible for COBRA administration under the Plan*] to confirm the correct amount of your first payment.

Periodic payments for continuation coverage

After you make your first payment for continuation coverage, you'll have to make periodic payments for each coverage period that follows. The amount due for each coverage period for each qualified beneficiary is shown in this notice. The periodic payments can be made on a monthly basis. Under the Plan, each of these periodic payments for continuation coverage is due [*enter due day for each monthly payment*] for that coverage period. [*If Plan offers other payment schedules, enter with appropriate dates:* You may instead make payments for continuation coverage for the following coverage periods, due on the following dates:]. If you make a periodic payment on or before the first day of the coverage period to which it applies, your coverage under the Plan will continue for that coverage period without any break. The Plan [*select one:* will *or* will not] send periodic notices of payments due for these coverage periods.

Grace periods for periodic payments

Although periodic payments are due on the dates shown above, you'll be given a grace period of 30 days after the first day of the coverage period [*or enter longer period permitted by Plan*] to make each periodic payment. You'll get continuation coverage for each coverage period as long as payment for that coverage period is made before the end of the grace period. [*If Plan suspends coverage during grace period for nonpayment, enter and modify as necessary:* If you pay a periodic payment later than the first day of the coverage period to which it applies, but before the end of the grace period for the coverage period, your coverage will be suspended as of the first day of the coverage period and then retroactively reinstated (going back to the first day of the coverage period) when the periodic payment is received. This means that any claim you submit for benefits while your coverage is suspended may be denied and may have to be resubmitted once your coverage is reinstated.]

If you don't make a periodic payment before the end of the grace period for that coverage period, you'll lose all rights to continuation coverage under the Plan.

Your first payment and all periodic payments for continuation coverage should be sent to:

[*enter appropriate payment address*]

NOTICE OF UNAVAILABILITY OF CONTINUATION COVERAGE

Date of Notice: **(Current Date)**

_____ and _____, and all covered dependents (if any)
Mailing Address
City, State, Zip Code

RE: NOTICE OF UNAVAILABILITY OF CONTINUATION COVERAGE

It is important that all covered individuals read this notice. Notification to the covered spouse or domestic partner is deemed notification to any covered dependent children.
In addition, if there is a covered dependent not living at the above address, please provide the Road Commission with the appropriate address in order that a notice can be sent to him/her as well.

No COBRA Group Coverage(s) Continuation Rights

Effective on **(date coverage(s) cease)**, you are no longer covered under the Road Commission- sponsored **(coverage plan name)** plan. This means a claim for services occurring on or after this date will not be paid. Your loss of coverage is resulting from a **(event)** on **(event date)**. The above event and loss of coverage would normally result in you having the opportunity to continue your Road Commission-sponsored **(coverage plan name)** plan under the federal Consolidated Omnibus Budget Reconciliation Act (COBRA). However, the right to elect COBRA continuation is not available to you for the following reason:

As indicated in the Initial General COBRA Notice which you received when you first became covered by the plan(s), you were required to make notification to the Road Commission within 60 days from the date of the qualifying event or the date on which coverage is lost. Notification to the Road Commission was not made within the required timeline, therefore, your COBRA rights have been lost.

Questions/Appeal - If any covered individual has questions regarding this notice or wish to appeal the decision not to offer you COBRA continuation coverage, please contact the Road Commission at **(phone number, address, and name of Road Commission representative)** for assistance.

Signed:

_____

Title:

_____

Notice of Early Termination of COBRA Coverage

Date: _____

Name of Qualified Beneficiary: _____

Address of Beneficiary: _____

City, State, Zip: _____

Status of Qualified Beneficiary: ❑ Employee/Former Employee
❑ Spouse ❑ Dependent

Please be advised that your COBRA continuation coverage will end on [*Date*] for the following reason(s):

- ❑ Failure to make payment of the required premium for continuation coverage on time or within specified grace period.
- ❑ [*Name of Road Commission*] has terminated or will terminate group health care coverage for all employees.
- ❑ You are now covered by another group health care plan.
- ❑ Subsequent to your election of COBRA continuation coverage, you became entitled to Medicare benefits.
- ❑ The Social Security Administration has determined that you or another qualified beneficiary whose disability resulted in extension of your maximum COBRA coverage period is no longer disabled.
- ❑ For cause (e.g., fraud).
- ❑ Other _____

Claims incurred on or after the date your COBRA continuation coverage terminates (see date above) will not be paid by the Plan. Any claims incurred prior to this date should be filed immediately for processing.

If your coverage has been terminated due to your entitlement to Medicare, your spouse and dependents will still be entitled to COBRA continuation coverage for ____ months.

If you have any questions about the termination of your COBRA continuation coverage benefits, please contact [*Name, Phone Number, and Email of Contact Person*].

CERTIFICATE OF GROUP HEALTH PLAN COVERAGE

1. Date of this certificate: _____
2. Name of participant: _____
3. Name of group health plan: _____
4. Identification number of participant: _____
5. Name of any dependents to whom this certificate applies: _____

   _____
6. Name, address, and telephone number of issuer responsible for providing this certificate:

   _____

   _____

   _____

   _____
7. For further information, call: _____
8. Date waiting period or affiliation period (if any) began: _____
9. Date coverage began: _____
10. Date coverage ended: _____
    (or check if coverage is continuing as of the date of this certificate_____).

NOTE: *Separate certificates will be furnished if information is not identical for the participant and each covered dependent.*

_____ _____

Signature of Issuer Date

XIX. FRAUD

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Fraud - General Considerations

In Michigan, to establish a claim of fraud, a plaintiff must establish:

(1) The defendant made a material representation;
(2) The representation was false;
(3) When the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion;
(4) The defendant made it with the intention that the plaintiff should act upon it;
(5) The plaintiff acted in reliance upon the representation; and,
(6) The plaintiff thereby suffered injury.

In the employment context, employee fraud can come in many forms and expands beyond the above legal definition. Some of the more common are:

- Conversion and/or theft of the employer's or other's property.
- Cash misappropriation.
- Destruction of the employer's records.
- False statements about coworkers or the employer.
- Falsification concerning work, including time cards.
- Falsification of job applications.
- Aiding and abetting others in committing dishonest acts.

Preventing employee fraud is a difficult task. Employees are a trusted part of the organization. They have access to inventory, payroll, financial statements, vendor account details, and more. They need access to these materials to do their jobs. Employee fraud occurs when opportunities for dishonesty are presented, especially when there are no checks and balances in place for prevention.

To fight employee fraud, employers need to look at their employment practices and internal controls. Specifically, employers should:

- When hiring, screen employees thoroughly and check references.
- Have clear and unambiguous written policies in place prohibiting fraud and establishing a code of conduct for employees.
- Make sure all employees understand the rules and responsibilities guiding Road Commission actions and interactions, particularly when it comes to employees' access to and/or use of Road Commission property.
- Promote a "see something, say something" environment, and let employees know that if they report suspected fraud there will be no retaliation for doing so.
- Be consistent in strictly enforcing policies and procedures.

- Segregate duties related to financial transactions, especially payroll and accounts receivable.
- Formalize purchasing and vendor management processes.
- Watch for unusual occurrences in the workplace, such as discrepancies of cash amounts, missing merchandise or supplies, vehicles parked in unusual locations, and suspiciously unlocked doors.

If employee fraud is suspected, the employer should immediately undertake a full and complete investigation. An allegation of fraud and/or theft is a serious one which requires a thorough investigation. Ideally, there should be at least two individuals involved in the investigation and one of them should not know the subject of the investigation well.

The investigator(s) should review all related records and interview potential witnesses. Witnesses should be interviewed separately, and their independent recollections/statements preserved. During the investigation, it is important that the employer document the entire process with records, witness statements, and interview notes. If possible, investigatory statements should be recorded. All employees participating in an investigation conducted by the employer should be made aware that such participation is mandatory and that refusal to participate and/or dishonesty may result in discipline.

Employees being investigated must be allowed to tell their side of the story and have it included as part of the record of the investigation. The accused employee should be provided with a written notice that his/her participation is mandatory and that refusal and/or dishonesty may result in termination. A sample notice to this effect is included at the end of this chapter.

When the investigation is completed, the employer must determine whether sufficient evidence exists that the employee engaged in misconduct. In some situations, the accused employee may offer to resign from employment rather than be terminated. If that occurs and the employer is satisfied that the employee has engaged in misconduct, the employer, in most circumstances, should accept the resignation. If the employee denies the charge and/or attempts to provide an explanation for what occurred, the employer will have to decide whether sufficient evidence of misconduct has been proven and the appropriate level of discipline to apply.

Clear evidence of fraud and/or theft will usually support a termination, even in the absence of previous warnings. The primary question will be how strong the evidence of fraud and/or theft is. There may be numerous factors to consider, including whether the employee was given permission by a supervisor to engage in the alleged conduct. This is where having clear written policies prohibiting the conduct in question will be critical. When an employer is considering termination, there are two additional considerations the employer should make. First, the employer should review its history to confirm that this employee is not being treated differently than similarly situated employees in previous situations. Second, although an employer may certainly call law enforcement in response to a suspected theft,

it must not threaten to call the police or prosecute as part of leveraging a resignation or other resolution. Threatening criminal prosecution for civil gain may constitute extortion.

As for whether to report the situation to law enforcement, there is no right or wrong answer. The employer should consider how seriously law enforcement will respond to the allegations. This will vary depending on the size of the alleged theft. If the theft is not taken seriously by law enforcement, an ineffective criminal prosecution may do more harm than good to the employer's defense of its employment action. Second, it might be prudent not to point a finger at the suspected employee, but rather to allow law enforcement to perform its own investigation, to avoid any later claim of malicious prosecution if it turns out someone other than the suspected employee is guilty. Third, the employer should be prepared to fully cooperate with law enforcement in its investigation. This may cause some disruption in the workplace. Lastly, the employer should proceed with its own investigation independently from law enforcement, since the civil standards for upholding and/or defending a termination from employment are different than the standards necessary to charge an individual with a crime and/or to obtain a criminal conviction.

According to the Michigan Bullard-Plawecki Employee Right to Know Act, if an employer has reasonable cause to believe that an employee is engaged in criminal activity that might result in loss or damage to the employer's property or disruption of the employer's business operation, and the employer is engaged in an investigation, then the employer may keep a separate file of information relating to the investigation. Upon completion of the investigation or after 2 years, whichever comes first, the employee must be notified that an investigation was or is being conducted of the suspected criminal activity. Upon completion of the investigation, if disciplinary action is not taken, the investigative file and all copies of the material in it must be destroyed.

EMPLOYMENT PRACTICES GUIDELINE

Fraud -
Michigan Polygraph Protection Act of 1981

When investigating potential fraud, an employer might be tempted to administer a lie detector test to the suspected employee. However, there are statutory protections against doing so. The Federal Employee Polygraph Protection Act of 1988 excludes federal, state, and local governments. However, the Michigan Polygraph Protection Act of 1981, MCL 37.201, et seq, does not exempt governmental employers. That Act defines an employer as "a person who employs 1 or more persons or who accepts applications for employment, including an agent of an employer. A person is defined as "an individual, firm, partnership, association, corporation, or other legal entity, [including] this state or an agency of this state."

Under the Michigan Polygraph Protection Act of 1981, an employer shall not as a condition of employment, promotion, or change in status of employment, or as an express or implied condition of a benefit or privilege of employment, request or require that an employee or applicant for employment take or submit to a polygraph examination or administer, cause to be administered, threaten to administer, or attempt to administer a polygraph examination to an employee or applicant for employment. Additionally, an employer may not require that an employee or applicant for employment give an express or implied waiver of a practice prohibited by this Act.

An employee or an applicant for employment may voluntarily request a polygraph examination, in which case it may be administered by the employer; however, there are numerous conditions which must be followed in that event. First, the employer would have to give the employee or the applicant a copy of Section 3 of the Michigan Polygraph Protection Act of 1981 and Section 19 of the Michigan Forensic Polygraph Examiners Act, being MCL 338.1719, before the employee or the applicant for employment voluntarily takes the polygraph examination. Second, the employer may not use the services of an intern or an examiner who is not licensed under the Michigan Forensic Polygraph Examiners Act, MCL 338.1701, et seq, for the detection of deception, verification of truthfulness, or measuring or recording the presence or absence of stress in the vocal response of the employee or applicant for employment. Third, the examiner would not be allowed to ask questions regarding the employee's or applicant's sexual practices, labor union, political, or religious affiliations, or his or her marital relationship. Instead, the examiner would have to inform the employee or applicant of all specific question areas to be explored before their actual exploration during the examination and inform the employee or applicant of all of the following:

(1) The employee or applicant has the right to accept or refuse the examination.
(2) The employee or applicant has the right to halt an examination in progress at any time.
(3) The employee or applicant is not required to answer any questions or give any information.
(4) Any information the employee or applicant volunteers could be used against the employee or applicant, or made available to the employer, unless otherwise specified and agreed to in writing by the employee or applicant.

The examiner would also have to provide the employee or applicant with a copy of the examination results and all reports or analyses done by the examiner which are shared with the employer.

An employer may not take any action against an employee or applicant for employment based upon an alleged or actual opinion that the employee or applicant for employment did not tell the truth during a polygraph examination. Additionally, an employer may not share with any other person information which communicates the results or analysis of an employee's or applicant's polygraph examination or the fact that an employee or applicant for employment refused to submit to a polygraph examination. Any information obtained from an employee or applicant for employment during a polygraph examination is not admissible in a criminal proceeding.

A person who violates the Act is guilty of a misdemeanor, punishable by a fine of not more than $1,000.00, or by imprisonment for not more than 90 days, or both.

EMPLOYMENT PRACTICES GUIDELINE

Fraud - Disclosure to Third Parties/Possible Libel and Slander

One other concern related to terminating employees for fraud and/or theft is claims of libel and/or slander if information about the misconduct is disclosed to third parties. Michigan cases have handled this issue as follows:

- In *Sias* v *General Motors Corporation*, 372 Mich 542; 127 NW2d 357 (1964), the Michigan Supreme Court considered whether to affirm a jury verdict in favor of a separated employee who had been accused of theft and misappropriation. The employee actually resigned in lieu of a pending discharge. Following the termination, the employer told other employees that the separated employee was released for misappropriation of company property. The Supreme Court affirmed the lower court's decision that this constituted a slanderous statement, was actionable per se, and was not protected by a qualified privilege.
- In *Harrison* v *Arrow Metal Products Corporation*, 20 Mich App 590; 174 NW2d 875 (1970), a Union employee was falsely accused by Company officials of stealing several pairs of white cloth gloves (the employee had in fact paid for them) and was wrongfully discharged. He did not grieve his discharge. Following his discharge, the Company told numerous prospective employers, verbally and in writing, that the employee had worked for the Company and had been discharged for theft of company property. The Company claimed that it had a qualified privilege to make the statement to prospective employers. The Court of Appeals found that, under the circumstances of the case, no such privilege existed. There had been no conviction of the alleged offense in a hearing by a neutral finder of fact. Additionally, the employee had not consented to the publication. Therefore, the Court of Appeals held that neither public policy nor the interests of society created an interest or duty sufficient to justify the Company's publication of the theft accusation.

Since the latter decision, Michigan has enacted legislation designed to limit the liability of employers in giving out information to prospective employers. Specifically, the Disclosure of Employee Job Performance Act, MCL 423.451, et seq, provides that an employer may disclose to an employee or that individual's prospective employer information relating to the individual's job performance that is documented in the individual's personnel file upon the request of the individual or his or her prospective employer. An employer who discloses information under the Act in good faith is immune from civil liability for the disclosure. An employer is presumed to be acting in good faith at the time of the disclosure unless a preponderance of the evidence establishes 1 or more of the following:

(a) That the employer knew the information disclosed was false or misleading.
(b) That the employer disclosed the information with a reckless disregard for the truth.
(c) That the disclosure was specifically prohibited by a state or federal statute.

As can be seen, caution needs to be exercised when providing information about a former employee who was discharged for fraud and/or theft to third parties. The employer may be required to establish the truth of its statement if it is later sued by the affected employee. Accusations of fraud and/or theft are considered actionable per se as libel or slander.

In actions based on libel or slander, the plaintiff is entitled to recover only for the actual damages which he or she has suffered in respect to his or her property, business, trade, profession, occupation, or feelings. Exemplary and punitive damages may be recovered in actions for libel if the plaintiff, before instituting his or her action, gives notice to the defendant to publish a retraction and allows a reasonable time to do so. Retractions are required to be published or communicated in substantially the same manner as the original libel.

It is also important to remember that, under the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 et seq, an employer must review a personnel record before releasing information to a third party and delete disciplinary reports, letters of reprimand, or other records of disciplinary action that are more than four (4) years old, unless:

(a) The release is ordered in a legal action to a party in that legal action.
(b) The release is ordered in an arbitration to a party in that arbitration.

Additionally, an employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not part of the employer's organization, or to a party who is not a part of the labor organization representing the employee, without written notice to the employee by first-class mail to the employee's last known address, mailed on or before the day the information is divulged from the personnel record. This latter provision does not apply if:

(a) The employee has specifically waived written notice as part of a written, signed employment application with another employer.
(b) The disclosure is ordered in a legal action or arbitration to a party in that legal action or arbitration.
(c) Information is requested by a government agency because of a claim or complaint by an employee.

EMPLOYMENT PRACTICES GUIDELINE

Fraud – Garrity Rights

When dealing with potential fraud and/or theft, public employers will need to conduct an administrative investigation to determine whether misconduct in the workplace has occurred and if disciplinary action is warranted. If the alleged misconduct is related to potentially criminal conduct, however, such investigation would be subject to the Fifth Amendment, which states that the government cannot compel a person to incriminate himself/herself. The Fourteenth Amendment makes this applicable not just to the federal government, but to state and local governments as well.

In the case of *Garrity* v *New Jersey*, 385 U.S. 493 (1967), the State of New Jersey was investigating reports of "ticket fixing" in two New Jersey Townships. During the investigation, six employees came under suspicion, four (4) police officers, a court clerk, and a police chief. Before being questioned, each employee was advised that anything he or she said might be used in a criminal proceeding, he or she had the privilege to refuse to answer if the answer would tend to be self-incriminatory, and refusal to answer would be cause for removal from office. Each employee answered questions, and some of their answers were used over their objections in subsequent prosecutions, resulting in convictions. The United States Supreme Court held that this violated the public employees' rights under the Fifth and Fourteenth Amendments and overturned the convictions. Specifically, the Court stated that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic."

Garrity Rights relate to the right not to be compelled to incriminate oneself. Public employers cannot use a threat of termination to force employees to waive their constitutional rights. However, a properly worded statement enables management to question the employee and require that they respond, while protecting the employee's constitutional rights. These advisory statements generally contain language similar to the following:

1. The purpose of this questioning is to obtain information, which will assist in the determination of whether administrative disciplinary action is warranted.
2. We are not questioning you for the purpose of instituting criminal proceedings against you.
3. During the course of this questioning, even if you do disclose information which indicates that you may be guilty of criminal conduct in this matter, neither your self-incriminating statements, nor the fruits thereof, will be used against you in any criminal proceeding.
4. We are ordering you to answer the questions that I direct to you concerning this matter.
5. If you refuse to answer my questions, you will be subject to immediate dismissal.

The Fifth Amendment right against self-incrimination applies only to statements, not physical evidence. Therefore, it does not apply to drug and alcohol tests in the workplace.

EMPLOYEE NOTICE CONCERNING INVESTIGATION

To: _____ (Employee Name)
From: _____ (Employer Representative)
Re: Disciplinary Investigation
Date: _____ Time: _____
Persons Present:

_____

_____

You are being interviewed as part of a personnel investigation by _____ County Road Commission. The investigation pertains to information that has come to the Road Commission's attention that: [Insert description of dates and events investigated]

_____

_____

_____

The purpose of this notice is to inform you of your rights and obligations in advance of the commencement of questioning, as follows:

You are directed and ordered to answer all questions and answer them truthfully. You are not required, as a condition of your employment with the Road Commission, to surrender your right against use in a criminal prosecution of any statements obtained from you by the Road Commission. You are hereby notified, however, that failure to answer questions related to this administrative investigation (including on grounds of the constitutional privilege against self-incrimination), and/or failure to be truthful in your responses, will be considered insubordination and will result in disciplinary action against you, up to and including termination from employment.

This interview is an opportunity for you to present pertinent information to the employer that will assist the employer in its evaluation and assessment of the incident. Failure by you to participate and fully cooperate in the interview will force the employer to evaluate and assess this incident from the information and data developed solely through other sources. Further, you are advised that you are free to request clarification of questions you do not understand.

If you are represented by a Union, you also have the right to have a Union representative, who is not involved in the investigation, present with you during your interview.

Please sign below to attest to your understanding of your rights and obligations as set forth above.

Date: _____ _____
Employee

Date: _____ _____
Employer Representative

FRAUD PREVENTION POLICY

Purpose

The _____County Road Commission is committed to protecting its revenue, property, information, and other assets. The Road Commission will not tolerate any misuse or misappropriation of those assets. This Policy is established to provide guidance to employees when misuse or misappropriation of Road Commission assets is suspected and to facilitate the development of protocols and practices which will aid in the detection and prevention of fraud.

Scope of Policy

This Policy applies to any fraud perpetrated by an employee or official of the Road Commission (collectively "employees"), as well as consultants, vendors, contractors, outside agencies and/or any other parties with a business relationship with the Road Commission. Any investigation commenced pursuant to this Policy shall be undertaken without regard to a person's length of service, position or title, or relationship to the Road Commission.

Actions Constituting Fraud

The term fraud includes, but is not limited to, the following:

- Any dishonest or fraudulent act;
- Forgery or alteration of any Road Commission document or account;
- Unauthorized disclosure of confidential information;
- Fraudulent misuse of Road Commission facilities or equipment (i.e., vehicles, telephones, computers, email, etc.);
- Misappropriation of funds, equipment, supplies, or other assets;
- Assigning an employee to perform non-Road Commission-related tasks;
- Accepting or seeking anything of substantial value from contractors, vendors or other persons providing services/materials to the Road Commission;
- Authorizing or receiving payment for goods not received or services not performed;
- Impropriety in the handling or reporting of money or financial transactions;
- Intentional violation of Road Commission purchasing requirements;
- Theft, destruction, removal or fraudulent use of Road Commission records, property and equipment; and/or
- Action related to concealing or perpetuating the abovementioned activities.

Employee Responsibilities

All employees of the Road Commission, regardless of rank or position, have a stewardship responsibility with regard to Road Commission funds and other assets. Road Commission employees are responsible for safeguarding Road Commission resources and ensuring that those resources are used only for authorized purposes in accordance with Road Commission rules, policies, and applicable federal and state laws.

- When fraud is suspected, observed, or otherwise made known to an employee, the employee must immediately report the activity to his/her supervisor.
- If the employee has reason to believe his/her supervisor may be involved in fraudulent activity, the employee is obligated to report the activity to the Managing Director and/or the Finance Director.
- The reporting employee shall refrain from discussing the matter with any other person within the Road Commission unless directed to do so by the Managing Director and/or the Finance Director.
- All employees shall cooperate fully with any investigation performed by the Road Commission, oversight agencies, and/or law enforcement officials.

Any Road Commission employee reporting suspected, observed or otherwise known fraudulent activity will not be subject to any retaliation for making the report. Any such retaliation will result in disciplinary action, up to and including discharge from employment.

Management Responsibilities

All management personnel are responsible for detecting and preventing fraudulent activities in their respective work areas. All management personnel should be familiar with the types of activities that constitute fraud and be alert for any indication that improper or dishonest activity is or was occurring in his/her work area.

- If a member of management suspects fraud, or has received a report of fraud from an employee, he/she must contact the Managing Director and/or the Finance Director immediately.
- The Managing Director, the Finance Director, and/or his/her designee, will conduct an immediate investigation into the alleged fraudulent activity. Upon investigation, if the Road Commission determines that fraud exists, the Road Commission shall take immediate remedial action to halt the fraudulent activity. Such remedial action may include reporting the activity to appropriate oversight agencies and/or law enforcement officials.
- All management personnel shall cooperate fully with any investigation performed by the Road Commission, oversight agencies, and/or law enforcement officials.
- Following all incidents of fraud, or at least on an annual basis, management personnel shall conduct a review of all internal controls, policies and procedures for the prevention and detection of fraud and implement new and/or modified controls when necessary.

Confidentiality

All participants in a fraud investigation shall treat all information received confidentially. The name of a person reporting suspected fraud may remain undisclosed except as otherwise required by law.

Investigation results will not be disclosed or discussed with anyone other than those who have a legitimate need to know. Any employee contacted by the media with respect to a fraud investigation shall refer the media person to the Managing Director and/or the Finance Director.

Investigation and Discipline

Employees who have committed fraud will be subject to disciplinary action up and including termination of employment. In all cases, the Road Commission reserves the right to refer the matter to appropriate oversight agencies and/or law enforcement officials for independent review, investigation and/or prosecution. The Road Commission's internal investigation and disciplinary process shall be conducted independently from any external review performed.

XX. ETHICS AND CIVILITY

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Ethics and Civility - General Standards

To date, the State Legislature has not enacted a comprehensive statute that sets forth general ethical standards for public officers or employees of local units of government (although there are some State statutes on specific subject matters affecting ethics which are discussed in separate Fact Sheets). Therefore, local units of government, including county road commissions, have discretion in choosing the best approach to take to address ethical conduct within their unit of government.

However, the Standards of Conduct for Public Officers and Employees Act, MCL 15.341, et seq, has some potential applicability to public officers and employees of local units of government. Generally, the Act defines a "public officer" as a person appointed by the governor or another executive department official. Likewise, an "employee" is defined as an employee, classified or unclassified, of the executive branch of this State. However, for purposes of section 2b of the Act, those terms include an elected official, an appointed official, or an employee of this State of a political subdivision of this State.

While Section 2 of the Act does not appear to directly apply to public officers and employees of county road commissions, it nonetheless provides a set of standards which deserve consideration as model ethical rules for such public officers and employees. Specifically, Section 2 of the Act contains the following prohibitions:

(1) A public officer or employee shall not divulge to an unauthorized person, confidential information acquired in the course of employment in advance of the time prescribed for its authorized release to the public.
(2) A public officer or employee shall not represent his or her personal opinion as that of an agency.
(3) A public officer or employee shall use personnel resources, property, and funds under the officer or employee's official care and control judiciously and solely in accordance with prescribed constitutional, statutory, and regulatory procedures and not for personal gain or benefit.
(4) A public officer or employee shall not solicit or accept a gift or loan of money, goods, services, or other thing of value for the benefit of a person or organization, other than the State, which tends to influence the manner in which the public officer or employee or another public officer or employee performs official duties.
(5) A public officer or employee shall not engage in a business transaction in which the public officer or information which the public officer or employee has obtained or may obtain by reason of that position or authority. Instruction which is not done during regularly scheduled working hours except for annual leave or vacation time

shall not be considered a business transaction pursuant to this subsection if the instructor does not have any direct dealing with or influence on the employing or contracting facility associated with his or her course of employment with this State.

(6) With limited exception, a public officer or employee shall not engage in or accept employment or render services for a private or public interest when that employment or service is incompatible or in conflict with the discharge of the officer or employee's official duties or when that employment may tend to impair his or her independence of judgment or action in the performance of official duties.

(7) With limited exception, a public officer or employee shall not participate in the negotiation or execution of contracts, making of loans, granting of subsidies, fixing of rates, issuance of permits or certificates, or other regulation or supervision relating to a business entity in which the public officer or employee has a financial or personal interest.

Under that Act, the latter two sections do not apply and a "public officer" is permitted to vote on, make, or participate in making a governmental decision if all of the following occur:

(a) The requisite quorum necessary for official action on the governmental decision by the public entity to which the public officer has been elected or appointed is not otherwise available;
(b) The public officer is not paid for working more than 25 hours per week for this State or a political subdivision of this State; and,
(c) The public officer promptly discloses any personal, contractual, financial, business, or employment interest he or she may have in the governmental decision and the disclosure is made part of the public record of the official action on the governmental decision.

If a governmental decision involves the awarding of a contract, the following conditions apply:

(a) All of the above-listed conditions are fulfilled;
(b) The public officer will directly benefit from the contract in an amount less than $250.00 or less than 5% of the public cost of the contract, whichever is less;
(c) The public officer files a sworn affidavit containing the information described in subdivision (b) with the legislative or governing body making the governmental decision; and,
(d) The affidavit required by subdivision (c) is made a part of the public record of the official action on the governmental decision.

Section 2b of the Act provides that a public officer or employee who has knowledge that another public officer or employee has violated Section 2 may report the existence of the violation to a supervisor, person, agency, or organization. A public officer or employee who reports or is about to report a violation of section 2 shall not be subject to any of the following sanctions because they reported or were about to report a violation of section 2:

(a) Dismissal from employment or office.
(b) Withholding of salary increases that are ordinarily forthcoming to the employee.
(c) Withholding of promotions that are ordinarily forthcoming to the employee.
(d) Demotion in employment status.
(e) Transfer of employment location.

Whenever a public officer or employee who has reported or who intends to report a violation of section 2 may be subject to any of the above-listed sanctions for reasons other than the public officer's or employee's actions in reporting or intending to report a violation of section 2, the appointing or supervisory authority shall establish by a preponderance of the evidence before the imposition of the sanction that the sanction to be imposed is not imposed because the public officer or employee reported or intended to report a violation of section 2. A person who violates these provisions is liable for a civil fine of not more than $500.00. The Act has a 90-day statute of limitations for commencement of a civil action for appropriate injunctive relief or actual damages. In such civil action, a court may order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of the litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate.

As previously stated, the definition of a public officer or employee for purposes of section 2b include an elected official, an appointed official, or an employee of this State of a political subdivision of this State. According to Michigan's Attorney General, the 1980 amendment which added section 2b imposed the ethical standards of section 2 of the Act upon employees and officers of local units of government by providing local officers and employees with protection against job-related retaliation for "blowing the whistle" upon local conduct in violation of the ethical standards set forth in section 2 of the Act. See 1981 OAG 6005. There has been no judicial decision in that regard, and, therefore, the applicability section 2 of the Standards of Conduct for Public Officers and Employees Act to local public officers and employees is unsettled.

EMPLOYMENT PRACTICES GUIDELINE

Ethics and Civility - Misconduct in Office

Michigan recognizes the common law offense of misconduct in office. Misconduct in office is defined as "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." *People v Waterstone*, 296 Mich App 121, 133 (2012), citing *People v Coutu*, 459 Mich 348, 354 (1999). With misconduct charges, there are three potential theories of liability: (1) malfeasance (committing an act which itself is wrongful), (2) misfeasance (committing a lawful act in a wrongful manner), or (3) nonfeasance (failing to perform any act that the duties of the office require). *People v Waterstone*, 296 Mich App 121 (2012), citing Perkins & Boyce, Criminal Law (3d ed), p. 540. To charge under the malfeasance or misfeasance theories, prosecution must utilize MCL 750.505, which provides the statutory authority to criminally charge any indictable common law offense when there is no specific statute under which to charge. MCL 750.505 provides that any misconduct in office charge under the malfeasance or misfeasance theories would be a felony punishable by up to 5 years in prison and/or a fine of not more than $10,000.00. The elements of common law misconduct in office are "(1) the person must be a public officer, (2) the conduct must be in the exercise of the duties of the office or done under the color of the office, (3) the acts were malfeasance or misfeasance, and (4) the acts must be corrupt behavior." *People v Carlin*, 239 Mich App 49, 64 (1999).

In order to sustain a charge of misconduct in office, there must be a finding that the actor was a "public officer," and "there must be established a 'breach of a positive statutory duty' or 'the performance of a discretionary act with an improper or corrupt motive.'" *Carlin*, 239 Mich App at 66, citing 63C Am Jur 2d, Public Officers and Employees, §373, p. 814. A public officer was distinguished from an employee "in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps to give an official bond." *People v Freedland*, 308 Mich 449, 458 (1944). To determine whether a position constituted public office, the Michigan Supreme Court articulated the following five elements:

> (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate officer or body; (5) it must have some permanency

> and continuity, and not be only temporary or occasional." *Id.* At 457-458 (citation omitted).

Oath and bond requirements are also of assistance in determining whether a position is a public office. *Id.* At 458. MCL 224.7 provides that any person elected or appointed county road commissioner shall, within 10 days after being notified in writing by the clerk of such county of his election or appointment, take and subscribe the constitutional oath of office and file it with the clerk of the county. Article XI, Section 1 of the Michigan Constitution provides that all officers shall take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of _____ according to the best of my ability."

Nonfeasance is punishable under MCL 750.478 which provides that, when any duty is or shall be enjoined by law upon any public officer, or upon any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00.

Misconduct in office does not include acts done by public officers in good faith or honest mistakes. The crime requires evidence of corrupt intent which does not necessarily mean, however, an intent to profit.

EMPLOYMENT PRACTICES GUIDELINE

Ethics and Civility - Contracts of Public Servants with Public Entities (MCL 15.321, et seq.)

Michigan law regulates the contracts that public servants may have with the public entities they serve. For purposes of the statute, a "public servant" is defined to include all persons serving any public entity. A "public entity" means any public body corporate within the State, including all agencies thereof, or any non-incorporated public body within the State of whatever nature, including all agencies thereof.

With limited exceptions, a public servant is prohibited from being a party, directly or indirectly, to any contract between himself or herself and the public entity of which he or she is an officer or employee. Additionally, a public servant may not directly or indirectly solicit any contract between the public entity of which he or she is an officer or employee and any of the following:

(a) Him or herself.
(b) Any firm, meaning a co-partnership or other unincorporated association, of which he or she is a partner, member, or employee.
(c) Any private corporation in which he or she is a stockholder owning more than 1% of the total outstanding stock of any class if the stock is not listed on a stock exchange, or stock with a present total market value in excess of $25,000.00 if the stock is listed on a stock exchange or of which he or she is a director, officer, or employee.
(d) Any trust of which he or she is a beneficiary or trustee.

With regard to any such contract, a public servant may not take any part in the negotiations for such a contract, the renegotiation or amendment of the contract, or in the approval of the contract, nor represent either party in the transaction.

These provisions do not apply to a public servant who is paid for working an average of 25 hours per week or less if the following conditions are met:

- The public servant must promptly disclose any pecuniary interest in the contract to the official body that has power to approve the contract, which disclosure shall be made a matter of record in its official proceedings. Unless the public servant will benefit in an amount less than $250 and less than 5 percent of the public cost and the public servant files a sworn affidavit to that effect or the contract is for emergency services or repairs, the disclosure must be made in one of the following manners:
    - The public servant must notify the presiding officer (or the clerk if the public servant is the presiding officer) in writing seven days before the meeting at which a vote is to be taken. The disclosure shall be made public in the same manner as a public meeting notice.

    - The public servant must disclose the pecuniary interest at a public meeting of the official body. The vote shall be taken at a meeting of the official body held at least 7 days after the meeting at which the disclosure is made. If the amount of the direct benefit to the public servant is more than $5,000.00, disclosure must be made as provided in this paragraph.
- The contract must be approved by a vote of not less than 2/3 of the full membership of the approving body in open session without the vote of the public servant making the disclosure.
- The following summary information is placed in the official minutes:
    - The name of each party involved in the contract.
    - The terms of the contract, including duration, financial consideration between parties, facilities or services of the public entity included in the contract, and the nature and degree of assignment of employees of the public entity for fulfillment of the contract.
    - The nature of any pecuniary interest.

A public servant may participate in making a governmental decision to the extent that the public servant's participation is required by law. If 2/3 of the members are not eligible under the Act to vote or to constitute a quorum, a member may be counted for purposes of a quorum and may vote on the contract if the member's direct benefit from a contract is less than $250 and less than 5 percent of the public cost of the contract, and the member files a sworn affidavit to that effect with the public body. The affidavit shall be made a part of the public record of the official proceedings.

EMPLOYMENT PRACTICES GUIDELINE

Ethics and Civility - Incompatible Public Offices (MCL 15.181, et seq.)

Michigan law generally prohibits a public officer or public employee from holding 2 or more incompatible offices at the same time. MCL 15.181(b) defines "incompatible offices" as being public offices held by a public official which, when the official is performing the duties of any of the public offices held by the official, results in any of the following with respect to those offices held:

(i) The subordination of 1 public office to another.
(ii) The supervision of 1 public office by another.
(iii) A breach of duty of public office.

Road commission employees and road commissioners are included within the definitions of "public employee" and "public officer" for purposes of this statute.

Numerous Michigan court decisions have reviewed the meaning of "breach of duty of public office." The principles they have established are as follows:

- A breach of duty arises when a public official holding dual offices cannot protect, advance, or promote the interest of both offices simultaneously. Public officers and employees owe a duty of loyalty to the public. 63C Am Jur 2d, Public Officers and Employees, §247, p. 690. 'All public officers are agents, and their official powers are fiduciary. They are trusted with public functions of the good of the public; to protect, advance and promote its interests…' *Macomb County Prosecutor v Murphy*, 464 Mich 149, 164 (2001), quoting *People ex rel. Plugger v Twp. Bd. Of Overyssel*, 11 Mich 222, 225 (1863).
- Current case law prohibits a person from simultaneously serving as an officer of one public entity that has entered into a contract or is negotiating a contract with another public entity of which the person is an officer. *Murphy*, 464 Mich 165-167; *Wayne County Prosecutor v Kinney*, 184 Mich App 681, 684-685 (1990); *Contesti v Attorney General*, 164 Mich App 271, 281 (1987).
- Refraining from voting on certain matters does not "cure" incompatibility of offices. The appropriate remedy for incompatibility is to vacate one of the two offices. *Oakland County Prosecutor v Scott*, 237 Mich App 419, 424 (1999); *Kinney*, 184 Mich App 684; *Contesti*, 164 Mich App 281.

Some related Attorney General opinions are summarized on the next page.

Related Attorney General Opinions:

No. 5529 (1979): An employee of a county road commission may not simultaneously be a county commissioner. A county road commission employee elected to the office of county commissioner must either resign from his or her employment or from the elected office.

No. 5626 (1980): Although a county road commission may enter into an agreement with a village or a township, this authority to contract does not render the positions of county road commissioner and township trustee or village council member incompatible unless such a contract is negotiated for or entered into.

No. 5863 (1981): An employee of a county board of road commissioners who is elected to the office of county commissioner of the same county must resign from his or her employment or obtain a leave of absence from the respective board for the term for which the employee was elected. (Opinion involved a county where the "road commission" is a department of the county.)

No. 6718 (1992): An individual may simultaneously serve as a county road commissioner and a township supervisor unless a contract is negotiated or entered into between the county road commission and the township board.

No. 6747 (1993): A person may simultaneously serve as a county road commissioner and as a deputy township supervisor, but if a contract is negotiated or entered into between the county road commission and the township board, the person must vacate one of the two public offices. This is true even if the deputy township supervisor is not involved in negotiating the contract because the deputy township supervisor is an officer of the township, being required to take an oath of office and file the oath with the township clerk.

No. 6748 (1993): A member of a county board of commissioners may also serve as a maintenance worker for the county road commission in the same county of less than 25,000 population if authorized to do so by the county board of commissioners.

No. 6791 (1994): A person may simultaneously serve as township attorney and also provide legal services to a board of county road commissioners unless the attorney represents the two public bodies in the same legal matter in which they have conflicting legal interests.

EMPLOYMENT PRACTICES GUIDELINE

Ethics and Civility - Political Activities by Public Employees (MCL 15.401, et seq.)

Michigan law regulates the political activities that may be engaged in by public employees. For purposes of the statute, "public employee" is defined as an employee of a political subdivision of the State who is not an elected official.

An employee of a political subdivision of the State may engage in any of the following political activities:

- Become a member of a political party formed or authorized under the election laws of this State.
- Be a delegate to a state convention, or a district or county convention held by a political party in this State.
- Become a candidate for nomination and election to any State elective office, or any district, county, city, village, township, school district, or other local elective office without first obtaining a leave of absence from his employment. If the person becomes a candidate for elective office within the unit of government in which he is employed, unless contrary to a collective bargaining agreement, the employer may require the person to request and take a leave of absence without pay when he complies with the candidacy filing requirements, or 60 days before any election relating to that position, whichever date is closer to the election.
- Engage in other political activities on behalf of a candidate or issue in connection with partisan or nonpartisan elections.

However, none of these activities may be actively engaged in by a public employee during those hours when that person is being compensated for the performance of that person's duties as a public employee.

If a public employee is elected to an office within the unit of local government where he or she is employed, he or she must resign his or her employment or may be granted a leave of absence from his or her employment during his or her elected term.

A public employer, public employee or an elected or appointed official may not personally, or through an agent, coerce, attempt to coerce, or command another public employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for the benefit of a person seeking or holding elected office, or for the purpose of furthering or defeating a proposed law, ballot question, or other measure that may be submitted to a vote of the electors.

EMPLOYMENT PRACTICES GUIDELINE

Ethics and Civility - Nepotism

Under Michigan law, employers are expressly prohibited from making preemployment inquiries regarding marital status, unless the employer can establish a bona fide occupational qualification for the inquiry. Specifically, the Michigan Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101, et seq., prohibits discrimination in hiring based on, among other things, marital status.

Despite this restriction, under Michigan law, employers may enforce anti-nepotism policies that prohibit hiring relatives – natural or through marriage – of a current employee. Such policies do not generally constitute discrimination on the basis of marital status in violation of the ELCRA. The Michigan Supreme Court has said that a "no-spouse" rule is not discrimination due to marital status but rather "different treatment based on the fact that one's spouse works in the same place as the applicant" and this is "not discrimination based on a stereotypical view of the characteristics of married or single persons." *Whirlpool Corp v Michigan Civil Rights Commission*, 425 Mich 527 (1986).

If two employees marry after having been hired, an employer's anti-nepotism policy restricting spouses from working together may lawfully require one of the spouses to resign or transfer. However, the policy cannot have an adverse impact on males or females; it must be applied in a nondiscriminatory manner. One way to meet this last requirement would be to allow each couple decide who would transfer or terminate.

Code of Ethics for
Members of the Board of County Road Commissioners

Statement of Purpose

The _____ County Road Commission desires to have fair, ethical and accountable governance to fulfill its mission of keeping the roads under its jurisdiction in reasonable repair so that they are reasonably safe and convenient for public travel. This requires that:

- Public officials comply with both the letter and spirit of the laws and policies affecting the operations of a county road commission;
- Public officials be independent, impartial and fair in their judgment and actions;
- Public office be used for the public good, not for personal gain; and
- Public deliberations and processes be conducted openly, unless legally confidential, in an atmosphere of respect and civility.

To this end, the _____ County Road Commission has adopted this Code of Ethics for the Members of the Board of County Road Commissioners to assure public confidence in the integrity of the Road Commission and its fair and effective operation.

1. **Act in the Public Interest**

Recognizing that stewardship of the public interest must be their primary concern, members will work for the common good of the people of the county and not for any private or personal interest, and they will assure fair and equal treatment of all persons, claims and transactions coming before the Board of County Road Commissioners.

2. **Comply with the Law**

Members shall comply with the laws of the nation and the State of Michigan in the performance of their public duties. These laws include, but are not limited to, the Open Meetings Act and the Freedom of Information Act.

3. **Conduct of Members**

The professional and personal conduct of members must be above reproach and avoid even the appearance of impropriety. Members shall refrain from abusive conduct, personal charges or verbal attacks upon the character or motives of other members of the Board, the staff or public.

4. **Respect for Process**

Members shall perform their duties in accordance with the processes and rules of order established by the Board of County Road Commissioners governing the deliberation of public policy issues, meaningful involvement of the public, and implementation of policy decisions of the Board by Road Commission staff.

5. **Conduct of Public Meetings**

Members shall prepare themselves for public issues; listen courteously and attentively to all public discussions before the body; and focus on the business at hand. They shall refrain from interrupting other speakers, making personal comments not germane to the business of the body, or otherwise interfering with the orderly conduct of meetings.

6. **Decisions Based on Merit**

Members shall base their decisions on the merits and substance of the matter at hand.

7. **Conflict of Interest**

In order to assure their independence and impartiality on behalf of the common good, members shall not use their official positions to influence government decisions in which they have a material financial interest or personal relationship which may give the appearance of a conflict of interest. Additionally, no member shall be a party, directly or indirectly, to any contract between himself or herself and the public entity of which he or she is an official or employee, except as may be otherwise allowed, with full disclosure, under the Contracts of Public Servants with Public Entities Act, being MCL 15.321, et seq.

8. **Gifts and Favors**

In relation to the acceptance and reporting of gifts, members shall not solicit or accept a gift or loan of money, goods, services, or other thing of value for the benefit of a person or organization which tends to influence the manner in which the member performs his or her official duties. Generally, members shall not solicit, accept, or agree to accept, any gift having a market value of greater than $50, lavish entertainment, or other valuable benefits.

9. **Confidential Information**

Members shall respect the confidentiality of information which is deemed confidential by the Open Meetings Act or the Freedom of Information Act and shall not use such confidential information to advance their personal interests.

10. **Use of Public Resources**

Members shall not use public resources unavailable to the public in general, such as Road Commission staff time, equipment, supplies or facilities, for private gain or personal purposes. Members shall not utilize the Road Commission's name or logo for the purpose of endorsing any political candidate or business.

11. **Representation of Private Interests**

In keeping with their role as stewards of the public interest, members of the Board of County Road Commissioners shall not appear on behalf of the private interests of third parties before the Board.

12. **Advocacy**

Members shall represent the official policies or position of the Road Commission to the best of their ability when designated as delegates for this purpose. When presenting their individual opinions and positions, members shall explicitly state they do not represent the Road Commission, nor will they allow the inference that they do.

13. **Policy Role of Members**

Members shall respect and adhere to MCL 224.9, which provides that the Board of County Road Commissioners shall act as an administrative board only and the function of the Board shall be limited to the formulation of policy and the performance of official duties imposed by law and delegated by the County Board of Commissioners. Members shall not interfere with the administrative functions of the Road Commission nor the professional duties of Road Commission staff; nor shall they impair the ability of staff to implement Board policy decisions.

14. **Positive Workplace Environment**

Members shall support the maintenance of a positive and constructive workplace environment for Road Commission employees and for citizens and businesses dealing with the Road Commission. Members shall recognize their special role in dealings with Road Commission employees and refrain from creating the perception of inappropriate direction to staff.

15. **Implementation**

As an expression of the standards of conduct for members expected by the Road Commission, this Code of Ethics is intended to be self-enforcing. It therefore becomes most effective when members are thoroughly familiar with it and embrace its provisions.

16. **Compliance and Enforcement**

This Code of Ethics expresses standards of ethical conduct expected for members of the Board of County Road Commissioners. Members themselves have the primary responsibility to assure that these ethical standards are understood and met, so that the public can continue to have full confidence in the integrity of the Road Commission.

Commissioner Statement of Acknowledgment

As a member of the Board of County Road Commissioners of _____ County, I agree to uphold the Code of Ethics for Members of the Board of County Road Commissioners adopted by the Board and conduct myself in accordance with its provisions. I will:

- Recognize the worth of individuals and appreciate their individual talents, perspectives, and contributions;
- Help create an atmosphere of respect and civility where individual members, Road Commission staff and the public are free to express their ideas and work to their full potential;
- Conduct my personal and public affairs with honesty, integrity, fairness and respect for others;
- Respect the dignity of individuals and organizations;
- Keep the common good as my highest purpose and focus on achieving constructive solutions for the public benefit;
- Avoid and discourage conduct which is divisive or harmful to the best interests of the Road Commission;
- Treat all people with whom I come in contact in the way I wish to be treated.

I affirm that I have read and fully understand the Code of Ethics for Members of the Board of County Road Commissioners.

Signature: Date:

_____ _____

Code of Ethics and Standards for Road Commission Employees

General Principles

It is the policy of the _____ County Road Commission to follow the highest ethics and standards of conduct. The following commitments serve as broad ideals to shape our conduct:

1. All relationships are to be truthful, trustworthy, and honest.

2. In all activities for the Road Commission, employees are to abide by all laws and regulations and adhere to Road Commission policies and procedures.

3. Assignments, duties, and responsibilities are to be carried out in a reliable and exemplary manner and with a commitment to public service.

4. Road Commission resources are to be utilized economically and efficiently.

5. Verbal communications and written statements are to be truthful and accurate.

6. Fellow employees must receive fair and considerate treatment, and they are not to be discriminated against because of race, color, religion, national origin, age, sex (including gender identity, sexual orientation, and pregnancy), height, weight, marital status, genetic information, or disability.

7. Employees are prohibited from having any type of relationship, association or contact with any customer or supplier which compromises, or appears to compromise, the Road Commission's standards of conduct and ethics.

8. Each employee must avoid any investment, arrangement, or other association, whether his/her own or that of an immediate family or household member, which could give the appearance of, or actually interfere with, the independent exercise of sound business judgment in the best interests of the Road Commission, or otherwise represent a real or apparent conflict of interest between the interests of the employee and those of the Road Commission. For purposes of this policy, "immediate family" shall mean an employee's spouse, children, parents, or siblings, including any such step-relatives.

It is the obligation of every employee to be a responsible employee; that is, to be honest, trustworthy, conscientious, and dedicated to the highest standards of ethical business practices.

Code of Ethics

* Employees shall conduct their employment activities with the highest principles of honesty, integrity, truthfulness, and honor. To this end, employees are to avoid not only impropriety, but also the appearance of impropriety.

* Employees have a legal, moral, and ethical responsibility to report to the Road Commission known or suspected violations of law, regulation, or policy, including the Standards of Conduct.

* Employees shall not make, recommend, or cause to be made any expenditure of funds known or believed to be in violation of any law, regulation, or policy.

* Employees shall not use their position in employment to force, induce, coerce, harass, intimidate, or in any manner influence any person, including subordinates, to provide any favor, gift, or benefit, whether financial or otherwise, to themselves or others.

* In business dealings, employees shall not provide, nor offer to provide, any gratuity, favor, or other benefit, or engage in any other activity which could improperly influence, or reasonably be interpreted as improperly influencing, their decisions or activities. All such activities shall be conducted strictly on an arm's length business basis.

* Employees representing the Road Commission to third parties shall not allow themselves to be placed in a position in which an actual or apparent conflict of interest exists. Such conflict of interest may arise, or appear to arise, by reason of the employee's acceptance of gratuities, favors, or other valuable benefits which could improperly influence or reasonably be interpreted as improperly influencing sound business decisions. All such activities shall be conducted strictly on an arm's length basis.

* Employees will exercise great care in situations in which there is a pre-existing relationship between an employee and an industry representative or official of an agency with whom the Road Commission has an existing or potential business relationship. In such a situation, the employee shall immediately report the relationship to his/her supervisor and, pending further direction by the Managing Director, the employee shall take no further action associated with the business in which the personal relationship exists. Where there is any doubt as to the propriety of the relationship, the employee shall discuss the relationship with his/her supervisor as to avoid even the appearance of impropriety.

* Employees shall not engage in outside business activities, either directly or indirectly, with a customer, vendor, supplier, or agent of the Road Commission, or engage in business activities which are inconsistent with, or contrary to, the business activities of the Road Commission.

* Employees shall not use or disclose the Road Commission's confidential information, or any other confidential information gained in the performance of Road Commission duties, as a means for making private profit, gain or benefit.

Standards of Conduct

This policy establishes standards of conduct and behavior for all employees of the _____ County Road Commission. Further, it provides guidance to employees in interpreting and complying with standards of conduct and related Road Commission policies.

Gratuities

The _____ County Road Commission has adopted the following definition of a "gratuity."

> Any gift, favor, entertainment, hospitality, transportation, loan, forbearance, any other tangible item, and any intangible benefits, including discounts, passes, and promotional vendor training, given or extended to or on behalf of a Road Commission employee, the employee's immediate family or household member, for which market value is not paid by the recipient. It does not include such items as modest items of food and refreshments, such as soft drinks, coffee, and donuts, offered other than as part of a meal; and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation.

The Road Commission prohibits any employee from providing, or offering to provide, a gratuity of any value. In connection with this prohibition, the Road Commission will not reimburse an employee for any business expenses found to be a gratuity. It must be remembered that _____ County Road Commission employees are prohibited from providing such gratuities not only because it violates Act 51 uses for Transportation Funds, but also because such gratuities give the appearance of impropriety or favoritism. Remember, no matter how innocent the gratuity may be, it immediately brings into question the integrity and business ethics of the employee and the Road Commission.

Road Commission employees, or members of their families, shall not solicit, accept, or agree to accept, any gratuity having a market value of greater than $50, lavish entertainment, or other valuable benefits for themselves, members of their families, or others, either directly or indirectly, from an interest outside the Road Commission that is engaged in or seeking business or financial relations with the Road Commission, or has business or financial interests which are affected by the performance or non-performance of the employees of the Road Commission.

No Road Commission employee shall accept any payments, fees, commissions or other form of remuneration from sub-contractors, vendors, or other third parties because of transactions or business involving the Road Commission.

Bribery and Kickbacks

The _____ County Road Commission prohibits any employee from participating in any bribery or kickback scheme, whether in the offering or receiving of payments for beneficial or favorable actions in any business matter.

Conflict of Interest

All Road Commission employees are in positions of trust. As such, employees are prohibited from taking official business actions on any matter in which they or their immediate families have a direct or indirect financial interest. Should such a situation arise, the employee shall immediately disclose in writing the connection or interest in the activity or transaction to the Managing Director who, in turn, will take appropriate action to eliminate the conflict of interest.

Employees should be alert to situations in which they suspect a possible conflict of interest. Questions regarding potential conflicts of interest should be directed to the Managing Director. The following are examples of conflicts when a Road Commission employee engages in outside employment activities:

- Employment or activities which benefit, either directly or indirectly, from the Road Commission's activities.

- Employment or activities which so expend the time and effort of a Road Commission employee that it interferes with or otherwise diminishes the expected productivity or effort of the employee in carrying out the Road Commission's employment responsibilities.

- Employment, full, part-time, or temporary, in any organization which does business with the Road Commission.

- Employment that conflicts with the satisfactory or impartial performance of the Road Commission's employment duties.

The following outside employment activities are prohibited, except as may be otherwise allowed under a collective bargaining agreement:

♦ Supplemental employment without the express written consent of the Managing Director.

♦ Supplemental employment during actual Road Commission duty time.

♦ Request for or use of sick leave to engage in supplemental employment.

♦ Use of any Road Commission funds, property, or equipment in or for the benefit of any supplemental employment.

Duty to Report Violations

If an employee observes activities prohibited by this Policy, or if an employee is asked to engage in any activity which is prohibited by this Policy, the employee must report it so that the Road Commission may investigate and resolve the matter. The report should be made to the Managing Director or the Director of Finance. Violations of this Policy will result in disciplinary action, up to and including discharge from employment.

_____

Chairperson

_____

Clerk of the Board

BOARD OF COUNTY ROAD COMMISSIONERS OF _____ COUNTY

Resolution No. _____

A Resolution concerning:

CODE OF CIVILITY

FOR the purpose of establishing a Code of Civility setting forth the manner in which members of the Board of County Road Commissioners should treat one another, staff, and members of the public, and establishing regulations for those attending public meetings in order to maintain proper order and decorum.

WHEREAS, civility is synonymous with courtesy, politeness, graciousness, tolerance, consideration, and respect; and

WHEREAS, civility requires that all members comport themselves in a manner that permits honest efforts at understanding the views and reasoning of others; and

WHEREAS, civility promotes a process that is fair and effective in both appearance and fact; and

WHEREAS, civility is attained through polite action and expression and it promotes a positive collegial atmosphere wherein the Board may operate effectively for the benefits of the citizens of _____ County; and

WHEREAS, civility leads to effective communication and allows the finding of common ground; and

WHEREAS, the presence of the public at all open meetings of the Board of County Road Commissioners is an integral part of a transparent government; and

WHEREAS, public presence and participation must be adequately accommodated; and

WHEREAS, order and decorum must be maintained so that all members of the public may attend and observe the meeting without interference; and

WHEREAS, Section 3(1) of the Michigan Open Meetings Act, being MCL 15.263(1), provides that the right of a person to attend a meeting of a public body includes the right to tape-record, to videotape, to broadcast live on radio, and to telecast live on television the proceedings of a public body at a public meeting; and

WHEREAS, that section goes on to provide that the exercise of this right does not depend on the prior approval of the public body; however, a public body may establish reasonable rules and regulations in order to minimize the possibility of disrupting the meeting; and

WHEREAS, Section 3(6) of the Michigan Open Meetings Act, being MCL 15.263(6), provides that a person must not be excluded from a meeting otherwise open to the public except for a breach of the peace actually committed at the meeting.

Now therefore, pursuant to the above provisions, it is hereby:

RESOLVED, that the members of the Board of County Road Commissioners of _____ County shall in all their proceedings adhere to the "Code of Civility", a copy of which is attached hereto and made a part hereof.

BE IT FURTHER RESOLVED that a copy of this "Code of Civility" shall be posted at the entrance to all meeting rooms and on the Road Commission website and the presiding officer may read aloud all or any part of these regulations prior to the beginning of any meeting.

BE IT FURTHER RESOLVED that each member of the Board of County Road Commissioners shall sign a copy of this "Code of Civility" indicating their willingness and commitment to always act accordingly.

BE IT FURTHER RESOLVED that this Resolution shall take effect immediately.

ADOPTED this ____day of _____, 202__, by the Board of County Road Commissioners for _____ County.

COUNTY ROAD COMMISSIONERS OF
_____ COUNTY

_____

, Chair

_____

, Vice Chair

_____

, Member

_____

, Member

_____

, Member

ATTEST:

_____

, Clerk

CODE OF CIVILITY

A. Conduct of Public Body Members

- Members shall act politely, calmly, and reasonably during all discussion and debate.
- There shall be no personal attacks, name calling or harassment of other members or members of the public.
- Members of the Board shall not engage in debate with speakers or members of the audience.
- While working toward the will of the majority, members shall respect the rights of the minority, and recognize the importance of achieving consensus.
- All staff shall be treated in a professional, courteous and dignified manner at all times by Board members and the public.
- If disagreement or differences of opinion arise, all members shall demonstrate esteem and deference to colleagues.
- Under no circumstance shall members engage in or threaten to engage in any physical attack on any other individual or make public accusations of impropriety.
- Members of the Board and the public shall not use abusive, obscene, or slanderous language, including the use of profanity, insults or other disparaging and inappropriate remarks or gestures.
- Members shall not exhibit conduct that disturbs the order of the public meeting or presents the Road Commission in an unfavorable light.
- It is the Chair's responsibility to maintain order. Members of the Board and the public should honor the Chair's role. Objections about the agenda or the Chair's actions should be voiced politely and with reason, following the Board's rules of procedure.

B. Conduct of General Public Attending Open Meetings

- The general public may attend any open session of the Board of County Road Commissioners.
- Members of the public attending an open session may participate in the session only when the public body has invited public testimony, questions, comments, or other forms of public participation.
- An opportunity to address the public body will be provided at each public meeting.
- All remarks of audience members shall be respectful and courteous, free of name-calling and personal attacks. Profanity, combative and other inappropriate language will not be tolerated.
- All statements in public meetings should relate to the business of the Road Commission, and the speaker shall wait until called upon to speak.
- Appropriate time limits may be established for speakers and enforced by the presiding officer of the public body in a respectful and judicious manner.
- Impeding of members of the public while entering, attending, or leaving an open session is not permitted.
- The presiding officer of the public body may order any person who commits an actual breach of the peace to be removed from the session and may request police assistance to remove the person and restore order. A breach of the peace constitutes seriously disruptive conduct involving abusive, disorderly, dangerous, aggressive, or provocative speech and behaviors tending to threaten or incite violence.
- The presiding officer may recess the session while order is being restored.

Adopted by Resolution No. _____

EMPLOYMENT OF RELATIVES/FAMILY MEMBERS

The _____ County Road Commission is committed to a policy of employment and advancement based on qualifications and merit and does not discriminate in favor of or in opposition to the employment of relatives. This policy applies to all current employees and candidates for employment.

Due to the potential for perceived or actual conflicts, such as favoritism or personal conflicts from outside the work environment, which can be carried into the daily working relationship, _____ County Road Commission will hire qualified relatives of persons currently employed by the Road Commission only if: a) candidates for employment will not be working directly for or supporting a relative, and b) candidates for employment will not occupy a position in the same line of authority in which employees can initiate or participate in decisions involving a direct benefit to the relative. Such decisions include hiring, retention, transfer, promotion, wages and leave requests.

"Family member" is defined as one of the following: spouse or significant other, parent/step-parent, child/step-child, grandparent, grandchild, brother/brother-in-law, sister/sister-in-law, in-laws (father, mother, son, daughter).

If any employee, after employment or a change in employment, enters into one of the above relationships, one of the affected individuals must seek a transfer or a change in the reporting relationship. Employees are responsible for immediately reporting any changes to management. If a decision cannot be made by the affected employees within 14 days of reporting, reassignment or, if necessary, termination of one of the employees will be made at the discretion of the Manager.

XXI. OPEN MEETINGS ACT

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Open Meetings Act (OMA) - Definitions and General Requirements (MCL 15.261, et seq.)

Definitions:

Decision	A determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy.
Meeting	The convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy.
Public Body	Any local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, empowered to exercise governmental or proprietary authority or perform a governmental or proprietary function.
Quorum	A majority of the members of a Road Commission Board (2 in the case of a 3- member Board; 3 in the case of a 5-member Board).

General Requirements:

- All Meetings of a Public Body must be open to the public and must be held in a place available to the general public.
- All Decisions of a Public Body must be made at a Meeting open to the public.
- All deliberations of a Public Body constituting a Quorum of its members must take place at an open Meeting except where a closed session is permitted under the OMA (see separate Fact Sheet).
- All persons must be permitted to attend any Meeting open to the public. The right of a person to attend a Meeting of a Public Body includes the right to tape-record, to videotape, to broadcast live on radio, and to telecast live on television the proceedings of a Public Body at a public Meeting, without the necessity of prior approval of the Public Body.
- A Public Body may establish reasonable rules and regulations to minimize the possibility of disrupting the Meeting.
- A person must not be required as a condition of attendance at a Meeting of a Public Body to register or otherwise provide his or her name or other information or fulfill a condition precedent to attendance.
- A person must be permitted to address a Meeting of a Public Body under rules established and recorded by the Public Body.

- A person must not be excluded from a Meeting otherwise open to the public except for a breach of the peace actually committed at the Meeting. The Michigan Court of Appeals has defined a "breach of the peace" as seriously disruptive conduct involving abusive, disorderly, dangerous, aggressive, or provocative speech and behaviors tending to threaten or incite violence.
- The OMA does not apply to a meeting that is a social or chance gathering or conference not designed to avoid the OMA.
- The attorney general, the prosecuting attorney of the county in which the Public Body serves, or any person may commence a civil action in the circuit court to challenge the validity of a Decision of a Public Body made in violation of the OMA or to compel compliance or to enjoin further noncompliance with the OMA. Venue for such an action shall be the county in which the local Public Body serves.
- If a Public Body is not complying with the OMA, and a person commences a civil action against the Public Body for injunctive relief to compel compliance or to enjoin further noncompliance with the OMA and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.
- A Decision made by a Public Body may be invalidated if the Public Body has not complied with the above-stated requirements of the OMA in making the Decision or if failure to give required notice (see separate Fact Sheet) of a Meeting has interfered with substantial compliance with the OMA and the court finds that the noncompliance or failure has impaired the rights of the public under the OMA.
- The circuit court does not have jurisdiction to invalidate a Decision of a Public Body for a violation of the OMA unless an action is commenced within the following specified period of time:
    - Within 60 days after the approved minutes are made available to the public by the Public Body, or
    - If the Decision involves the approval of contracts, the receipt or acceptance of bids, the making of assessments, the procedures pertaining to the issuance of bonds or other evidences of indebtedness, or the submission of a borrowing proposal to the electors, within 30 days after the approved minutes are made available to the public pursuant to that Decision.
- In any case where an action has been initiated to invalidate a Decision of a Public Body on the ground that it was not taken in conformity with the requirements of the OMA, the Public Body may, without making any admission contrary to its interest, reenact the disputed Decision in conformity with the OMA. A Decision reenacted in this manner is effective from the date of reenactment and may not be declared invalid due to a deficiency in the procedure used for its original enactment.
- A public official who intentionally violates the OMA is guilty of a misdemeanor punishable by a fine of not more than $1,000.00 for a first offense and a misdemeanor punishable by a fine of not more than $2,000.00, or imprisoned for not more than 1 year, or both, for a second offense within the same term.

- A public official who intentionally violates the OMA shall be personally liable in a civil action for actual and exemplary damages of not more than $500.00 total, plus court costs and actual attorney fees to a person or group of persons bringing the action. Not more than one action may be brought against a public official for a single meeting. Any such action must be commenced within 180 days after the date of the violation which gives rise to the cause of action.

EMPLOYMENT PRACTICES GUIDELINE

Open Meetings Act (OMA) - Remote Participation

A Public Body must establish the following procedures to accommodate the absence of a member due to military duty:

- Procedures by which the absent member may participate in, and vote on, business before the Public Body, including, but not limited to, procedures that provide for both of the following:
  - Two-way communication.
  - For each member of the Public Body attending the Meeting remotely, a public announcement at the outset of the Meeting by that member, to be included in the Meeting minutes, that the member is in fact attending the Meeting remotely.
- Procedures by which the public is provided notice of the absence of the member and information about how to contact that member sufficiently in advance of a Meeting of the Public Body to provide input on any business that will come before the Public Body.

The two-way communication must be such that the absent member can hear and be heard by other members of the Public Body, and so that public participants can hear the absent member and can be heard by the absent member during a public comment period.

If a member of a Public Body is not physically present and is not absent due to participation in the military, then the current provisions of the OMA provide that the absent member cannot participate (i.e., speak, vote, or be counted for quorum purposes) in the Meeting.

The OMA's provisions for and restrictions on electronic participation in a Meeting of a Public Body apply only to the members of the Public Body and not to the public generally. In other words, there is no prohibition on providing electronic access to the public and/or other third parties who are unable to attend a public Meeting in person.

EMPLOYMENT PRACTICES GUIDELINE

Open Meetings Act (OMA) - Closed Sessions

A Public Body may meet in Closed Session (defined in the OMA as "a Meeting or part of a Meeting of a Public Body that is closed to the public") for only specific limited circumstances. Some Closed Sessions require a simple majority vote; others require a 2/3 roll call vote of all members elected or appointed and serving. The specific reasons and corresponding required vote to go into Closed Session applicable to Road Commissions are as follows:

OMA Section	Description of Reason	Required Vote
MCL 15.268(1)(a)	To consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, or to consider a periodic personnel evaluation of, a public officer, employee, staff member, or individual agent, **if the named individual requests a closed hearing.**	Majority Vote
MCL 15.268(1)(c)	For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement if either negotiating party requests a closed hearing.	Majority Vote
MCL 15.268(1)(d)	To consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained.	2/3 Roll Call Vote of All Members Elected or Appointed and Serving
MCL 15.268(1)(e)	To consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the Public Body.	2/3 Roll Call Vote of All Members Elected or Appointed and Serving
MCL 15.268(1)(f)	To review and consider the contents of an application for employment to a public office if the candidate requests that the application remain confidential.	2/3 Roll Call Vote of All Members Elected or Appointed and Serving
MCL 15.268(1)(h)	To consider material exempt from discussion or disclosure by state or federal statute.	2/3 Roll Call Vote of All Members Elected or Appointed and Serving

Important Considerations:

- Any votes on matters discussed in Closed Session must occur in an open Meeting.
- The minutes of an open Meeting at which the vote is taken to go into Closed Session must include the purpose or purposes for which the Closed Session is held.
- During the Closed Session, members must not stray into matters outside of the purpose for calling the Closed Session.
- Under MCL 15.268(1)(a), the individual requesting the Closed Session may rescind the request at any time, in which case the matter at issue must be considered after the rescission only in open session.
- All interviews by a Public Body for employment or appointment to a public office must be held in an open meeting.
- A Public Body may ask staff and private citizens to join it in Closed Session.
- A Public Body may, if necessary, exclude an unauthorized individual who intrudes upon a Closed Session by either (1) having the person forcibly removed by a law enforcement officer, or (2) by recessing and removing the Closed Session to a new location.
- Closed Sessions may not be held to receive oral legal opinions. Instead, the legal opinion must be in writing, and any discussion of the written legal opinion in Closed Session must be strictly limited to the meaning of any legal advice presented in the written opinion.
- If a Public Body is going into closed session to discuss specific pending litigation, the Public Body must name the specific pending litigation that it will be discussing in closed session prior to commencing the closed session. *Vermilya* v *Delta College Board of Trustees*, 325 Mich App 416 (2018).
- A separate set of minutes must be taken by the clerk or the designated secretary at the Closed Session. These minutes must be retained by the clerk, are not available to the public, and must only be disclosed if required by a civil action filed in accordance with the OMA. These minutes may be destroyed 1 year and 1 day after approval of the minutes of the regular meeting at which the closed session was approved.
- Closed Session minutes should be approved in open session (with contents of the minutes kept confidential).
- An audiotape of a Closed Session meeting of a Public Body is part of the minutes of the Closed Session and, thus, must be filed with the clerk of the Public Body for retention under the OMA.

Sample Motions to Go into Closed Session:

To discuss specific pending litigation: *"I move that the Board meet in closed session under section 8(1)(e) of the Open Meetings Act, to consult with our attorney regarding trial or settlement strategy in connection with [the name of the specific lawsuit]."*

To discuss a written legal opinion: *"I move that the Board meet in closed session under section 8(1)(h) of the Open Meetings Act, to consider material exempt from discussion or disclosure by state or federal statute, specifically section 13(1)(g) of the Freedom of Information Act which exempts from public disclosure information or records subject to attorney-client privilege."*

EMPLOYMENT PRACTICES GUIDELINE

Open Meetings Act (OMA) - Email Quorum Concerns

- The Michigan Court of Appeals, in the unpublished case of *Markel* v *Mackley*, Case No. 327617 (November 1, 2016), held that email deliberations among a Quorum of Public Body members violates the Open Meetings Act (OMA).
- The use of Road Commission or private email accounts by a Quorum of Public Body members to deliberate/decide on official business is not allowed under the OMA.
- A Road Commissioner's private email account may be subject to inspection and disclosure for OMA compliance, as well as for Michigan Freedom of Information Act requests.
- To avoid OMA problems, Road Commissioners asking questions or making recommendations by email or other communications should direct these communications to the Road Commission's Manager and/or Board Clerk, with no courtesy copies to other Board members. The Manager can then present these questions to the Public Body for discussion in open or appropriate Closed Sessions.

EMPLOYMENT PRACTICES GUIDELINE

Open Meetings Act (OMA) - Notice Requirements

The amount of notice required for a Meeting is specific to the type of Meeting as follows:

Type of Meeting	Notice Required
Regular Meetings of a Public Body	A public notice stating the dates, times, and places of a Public Body's regular Meetings must be posted within **10 days after** the first Meeting of the Public Body in each calendar or fiscal year.
Change in schedule of the regular Meetings of a Public Body	A public notice stating the date, time, and places of a Public Body's regular Meetings must be posted within **3 days after** the Meeting at which the change is made.
Rescheduled regular or special Meeting of a Public Body	A public notice stating the date, time, and place of the Meeting must be posted at least **18 hours before** the Meeting.
Meeting of a Public Body which is recessed for more than 36 hours	A public notice must be posted at least **18 hours before** the reconvened Meeting.

Additional Requirements:

- A public notice shall always be posted at the Public Body's principal office and any other locations considered appropriate by the Public Body.
- **Internet Notice:** For a rescheduled regular or a special Meeting of a Public Body, or a Meeting of the Public Body that is recessed for more than 36 hours, if the Public Body maintains an official internet presence that includes monthly or more frequent updates of public Meeting agendas or minutes, the 18-hour notice must also be posted on a portion of the website that is fully accessible to the public. The public notice on the website must be included on either the homepage or on a separate webpage dedicated to public notices for non-regularly scheduled public Meetings and accessible via a prominent and conspicuous link on the website's homepage that clearly describes its purpose for public notification of those non regularly scheduled public Meetings.
- **Emergency Session**: A Public Body may meet in emergency session in the event of a severe and imminent threat to the health, safety, or welfare of the public when 2/3 of the members serving on the Public Body decide that delay would be detrimental to efforts to lessen or respond to the threat.
    - However, if a Public Body holds an emergency public Meeting that does not comply with the 18-hour posted notice requirement, it must make paper

copies of the public notice for the emergency Meeting available to the public at that Meeting.

- The notice of the emergency public Meeting must include an explanation of the reasons why the Public Body cannot comply with the 18-hour posted notice requirement.
- The explanation must be specific to the circumstances that necessitated the emergency public Meeting and should not use generalized explanations like "an imminent threat to the health of the public" or "a danger to public welfare and safety."
- If the Public Body maintains an official internet presence that includes monthly or more frequent updates of public Meeting agendas or minutes, it must post the public notice of the emergency Meeting and its explanation on its website.
- Within 48 hours after the emergency public Meeting, the Public Body must send official correspondence to the Board of County Commissioners of the County in which the Public Body is located, informing the Board that an emergency public Meeting with less than 18 hours' public notice has taken place.
- The correspondence to the Board of County Commissioners must also include the public notice of the emergency public Meeting with explanation and must be sent by either U. S. Mail or electronic mail.

- If requested in writing by an individual, organization, firm, or corporation, and upon the requesting party's payment of a yearly fee of not more than the reasonable estimated cost for printing and postage of such notices, a Public Body must send to the requesting party a copy of any required notice of a public Meeting by first class mail.
- Upon written request, a Public Body must provide a copy of the public notice of a Meeting to any newspaper published in the state and to any radio and television station located in the state, free of charge, at the same time the public notice of that meeting is posted.

EMPLOYMENT PRACTICES GUIDELINE

Open Meetings Act (OMA) - Minutes (MCL 15.269)

Requirements:

- Each Public Body must keep minutes of each Meeting showing the date, time, place, members present, members absent, any Decisions made at a Meeting open to the public, and the purpose or purposes for which a closed session is held.
- The minutes must include all roll call votes taken at the Meeting.
- The Public Body must make any corrections in the minutes at the next Meeting after the Meeting to which the minutes refer. The Public Body must make corrected minutes available at or before the next subsequent meeting after correction. The corrected minutes must show both the original entry and the correction.
- The Public Body must make proposed minutes available for public inspection within 8 business days after the meeting to which the minutes refer.
- The Public Body must make approved minutes available for public inspection within 5 business days after the meeting at which the minutes are approved by the Public Body.
- Minutes are public records open to public inspection, and the Public Body must make the minutes available at the address designated on its posted public meeting notices.
- The Public Body shall make copies of the minutes available to the public at the reasonable estimated cost for printing and copying (without additional labor costs).
- Closed session minutes are addressed in the Fact Sheet on Closed Sessions.

_____ County Road Commission

Open Meetings Act Policy

This policy sets forth the procedures for the _____ County Road Commission (the "Road Commission") to comply with the Open Meetings Act, MCL 15.261, et. seq, as the same may be amended from time to time.

1. Open Meeting Requirement. The business of the Board of the Road Commission shall be conducted at public meetings held in compliance with the Open Meetings Act.
   (a) All meetings shall be open to the public and shall be held in a place available to the general public.
   (b) All decisions of the Board shall be made at a meeting open to the public.
   (c) All deliberations of the Board constituting a quorum of its members shall take place at a meeting open to the public, except as provided in paragraph 6 of this policy.
   (d) All persons shall be permitted to attend any meeting of the Board. The right of a person to attend a meeting of the Board includes the right to tape-record, to videotape, to broadcast live on radio, and telecast live on television the proceedings of the Board.
   (e) All persons attending Road Commission meetings will be expected to comply with the Code of Civility adopted by the Board.
   (f) No person shall be excluded from a meeting otherwise open to the public except for a breach of the peace actually committed at the meeting. A breach of the peace constitutes seriously disruptive conduct involving abusive, disorderly, dangerous, aggressive, or provocative behaviors tending to threaten or incite violence.

2. Adoption of Parliamentary Rules. Robert's Rules of Order Newly Revised 12th Ed. (or the current edition) are adopted as the parliamentary rules of procedure for all Road Commission meetings to the extent not inconsistent with the Open Meetings Act.

3. Public Comments. Road Commission policy regarding public comments is as follows:
   (a) Comments shall be limited to the "public comment" portion of the agenda at any Road Commission meeting.
   (b) A person shall be permitted to address a meeting of the Board so long as he or she identifies himself or herself by name for purposes of including it in the minutes of the meeting.
   (c) Any person wishing to address the meeting pursuant to these requirements shall wait until he or she is recognized by the Chair of the Board and limit his or her comments to the time determined by the Chair of the Board prior to the "public comment" portion of the meeting, but in any event no more than three (3) minutes at any meeting.
   (d) In the interest of time, and to permit the expression of the broadest range of viewpoints, the Chair of the Board may ask if one speaker may be designated to speak for any group that is present. If one speaker is designated to speak for a group, the Chair of the Board may allow for extensions of the time limit determined pursuant to subsection (c) above.
   (e) Public comments involving abusive, disorderly, dangerous, aggressive, or provocative speech and behaviors tending to threaten or incite violence will not be tolerated.

(f) Written remarks may be submitted to the Chair of the Board at any time and will be received in the record of the meeting as if read.

4. Notice of Meetings. Public notice of the date, time and place of each regular meeting of the Road Commission shall be posted at the Road Commission's principal office and other locations considered appropriate for the Road Commission throughout the area of the county.
   (a) Public notices of the Road Commission shall include the name of the Road Commission, a contact person and telephone number for the Road Commission, and the address of the Road Commission.
   (b) Within ten (10) days of the first meeting of the Road Commission in each fiscal year, a public notice stating the dates, times, and places of the Road Commission's regular meetings shall be posted at the Road Commission's principal office and other locations considered appropriate for the Road Commission throughout the area of the county.
   (c) If there is a change in the schedule of regular meetings of the Road Commission, a public notice stating the new dates, times, and places shall be posted within three (3) days after the meeting at which the change is made as provided in (b) of this Section 3.
   (d) For a rescheduled regular or special meeting, a public notice stating the date, time, and place of the meeting shall be posted at least eighteen (18) hours before the meeting in a prominent and conspicuous place at both the Road Commission's principal office and on a portion of the Road Commission's website that is fully accessible to the public. To meet the 18-hour posting requirement, the notice must be accessible to the public for the entire 18 hours.
   (e) In addition, the Road Commission's Board Secretary, or his or her designee, shall give or cause to be given notice either personally, by first class mail, facsimile communication or electronic communication to each member of the Board, not later than the time the public notice is given, but the failure to do so shall not invalidate any proceedings of the Road Commission.
   (f) All public notices of the Road Commission shall include the following statement, with an accessible contact person for each meeting, who shall be Board Secretary or the Board Secretary's designee: "If you require accommodation due to a disability, please contact _____ at (___) ____-_____ not less that 48 hours prior to the date of the meeting."

5. Emergency Meetings. In accordance with the Open Meetings Act, emergency meetings of the Board may be held in the event of a severe and imminent threat to the health, safety, or welfare of the public when a majority of the members of the Board decides that delay would be detrimental to efforts to lessen or respond to the threat. If the Road Commission holds an emergency meeting that does not comply with the 18-hour posted notice requirement, the Road Commission shall make paper copies of the notice available to the public at that meeting. The notice shall include an explanation of the reasons that the Road Commission cannot comply with the 18-hour posted notice requirement.

6. Meeting Minutes. The Board shall keep written or printed minutes of each meeting, which shall be made available to the public.

(a) The minutes shall include the date, time, place, members present, members absent, any decisions made at the meeting, all roll call votes taken at the meeting, and the purpose or purposes for which any closed session is held.
(b) The Road Commission shall make any corrections to the minutes at the next meeting after correction, and the corrected minutes shall show both the original entry and the correction.
(c) The Road Commission shall make proposed minutes available for public inspection within eight (8) business days after the meeting to which the minutes refer, and shall make approved minutes available for public inspection within five (5) business days after the meeting at which the minutes are approved by the Board.
(d) The Road Commission shall not include in or with its minutes any personally identifiable information.

7. Closed Sessions. The Board may meet in closed session only for the following purposes, as provided in the Open Meetings Act:
   (a) To consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, or to consider a periodic personnel evaluation of, an officer, employee, staff member, or individual agent of the Road Commission, if the named person requests a closed hearing.
   (b) If applicable, for strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement if either negotiating party requests a closed hearing.
   (c) To consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained.
   (d) To consult with legal counsel to the Road Commission regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the Road Commission.
   (e) To review and consider the contents of an application for employment or appointment if the candidate requests that the application remain confidential. However, all interviews by the Road Commission for employment or appointment to office shall be held in an open meeting.
   (f) To consider material exempt from discussion or disclosure by state or federal statute.
   (g) Any other exemptions that may be provided by the Open Meetings Act.

XXII. FREEDOM OF INFORMATION ACT

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Freedom of Information Act (FOIA) - Definitions and Requirements (MCL 15.231, et seq.)

Definitions:

FOIA Coordinator	The individual responsible for receiving and processing requests for a Public Body's Public Records and for approving denials as appropriate.
Public Body	A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
Public Record	A writing prepared, owned, used, in the possession of, or retained by a Public Body in the performance of an official function, from the time it is created.
Writing	Handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.

Requirements:

- A person has a right to inspect, copy, or receive copies of a Public Record, if he or she provides the Public Body's FOIA Coordinator with a written request that describes the Public Record sufficiently to enable the Public Body to find the Public Record.
- A request by an individual (other than someone who qualifies as indigent) must include the requesting person's name, address, and contact information (i.e., valid telephone number or electronic mail address). If the request is made by a person other than an individual, it must include the complete name, address, and contact information of the person's agent who is an individual.
- An employee of a Public Body who receives a written request for a Public Record is required to promptly forward the request to the FOIA Coordinator.
- A written request made by facsimile, e-mail, or other electronic transmission is considered received by a Public Body's FOIA Coordinator one business day after the electronic transmission is made. If a written request is sent by e-mail and delivered to the Public Body's spam or junk-mail folder, the request is considered

received one day after the Public Body first becomes aware of the written request. The Public Body must note in its records both the time a written request is delivered to it spam or junk-mail folder and the time the Public Body first becomes aware of that request.

- Unless otherwise agreed to in writing by the person making the request, the Public Body must respond to a written request for a Public Record within *five business days after receiving the request*, by doing one of the following:
    - Granting the request;
    - Issuing a written notice denying the request;
    - Issuing a written notice granting the request in part and denying the request in part; or,
    - Issuing a notice requesting an additional 10 business days in which to respond to the request. A Public Body shall not issue more than one notice of extension for a particular request.
- Before issuing a denial or partial denial, Members should consult with MCRCSIP and legal counsel. Additionally, if a FOIA request appears calculated to obtain information from a Member pertaining to actual or threatened potential litigation, MCRCSIP should be immediately notified and legal counsel consulted before responding.
- A failure to respond constitutes a denial.
- A written denial must contain an explanation of the basis for the exemption or, if applicable, a certification that the Public Record being requested does not exist within the Public Body under the name given by the requestor or by another name reasonably known to the Public Body. The denial must provide a description of the Public Record that is being withheld or the information on the Public Record that is redacted, if a redaction is made. The denial must also contain a full explanation of the requesting person's right to appeal the denial to the head of the Public Body or seek judicial review.
- If a Public Record contains both exempt and non-exempt material, the Public Body must separate them and make the non-exempt material available for examination and copying.
- The Public Body has a responsibility to provide reasonable facilities during normal business hours so that a requestor may inspect records and take notes. A Public Body may make reasonable rules necessary to prevent excessive and unreasonable interference with the discharge of its function. A Public Body must protect Public Records from loss, unauthorized alteration, mutilation, or destruction.
- The Public Body's response must be electronically mailed, delivered by facsimile, or delivered by first-class mail, as stipulated by the person making the request. This provision is not applicable if the Public Body lacks the technological capacity to provide an electronically mailed response.
- A Public Body is not required to make a compilation, summary, or report of information, or create a new public record.

- A Public Body must, upon written request, furnish a requesting person a certified copy of a Public Record.
- A FOIA Coordinator must keep a copy of all written requests for Public Records on file for no less than one year.
- Within 10 business days after receiving a written appeal concerning a disclosure denial, the head of a Public Body must do one of the following:
    - Reverse the disclosure denial;
    - Issue a written notice to the requester upholding the disclosure denial;
    - Reverse the disclosure denial in part and issue a written notice to the requester upholding the disclosure denial in part; or,
    - Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the Public Body shall respond to the written appeal. Only one notice of extension for a particular written appeal may be issued.
- A board that is the head of a Public Body is not considered to have received a written appeal until the first regularly scheduled meeting of that board following submission of the written appeal.
- A Public Body must establish procedures and guidelines to implement the FOIA and must create a written public summary of the specific procedures and guidelines relevant to the general public regarding how to submit written requests to the Public Body and explaining how to understand a Public Body's written responses, deposit requirements, fee calculations, and avenues for challenge and appeal.

EMPLOYMENT PRACTICES GUIDELINE

Freedom of Information Act (FOIA) – Exempt Records (MCL 15.243)

Numerous records are exempt from disclosure under the FOIA. The main categories of exemption are as follows:

Section of FOIA	Description of Exemption
Section 13(1)(a)	Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.
Section 13(1)(d)	Records or information specifically described and exempted from disclosure by statute.
Section 13(1)(f)	Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if: (i) The information is submitted upon a promise of confidentiality by the Public Body. (ii) The promise of confidentiality is authorized by the chief administrative officer of the Public Body or by an elected official at the time the promise is made. (iii) A description of the information is recorded by the Public Body within a reasonable time after it has been submitted, maintained in a central place within the Public Body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.
Section 13(1)(g)	Information or records subject to attorney-client privilege.
Section 13(1)(h)	Information or records subject to the physician-patient privilege, the psychologist-patient privilege, the minister, priest, or Christian Science practitioner privilege, or other privilege recognized by statute or court rule.
Section 13(1)(i)	A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the deadline for submission of bids or proposals has expired.
Section 13(1)(j)	Appraisals of real property to be acquired by the Public Body until either of the following occurs: (i) An agreement is entered into.

	(ii) Three years have elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated.
Section 13(1)(k)	Test questions and answers, scoring keys, and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under the FOIA outweighs the public interest in nondisclosure.
Section 13(1)(l)	Medical, counseling, or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation, including protected health information, as defined in 45 CFR 160.103.
Section 13(1)(m)	Communications and notes within a Public Body or between Public Bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the Public Body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of Public Bodies clearly outweighs the public interest in disclosure. "Determination of policy or action" includes a determination relating to collective bargaining, unless the Public Record is otherwise required to be made available under the Public Employment Relations Act, MCL 423.201 to 423.217.
Section 13(1)(p)	Testing data developed by a Public Body in determining whether bidders' products meet the specifications for purchase of those products by the Public Body, if disclosure of the data would reveal that only one bidder has met the specifications. This subdivision does not apply after one year has elapsed from the time the Public Body completes the testing.
Section 13(1)(u)	Records of a Public Body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the Public Body.
Section 13(1)(v)	Records or information relating to a civil action in which the requesting party and the Public Body are parties.
Section 13(1)(w)	Information or records that would disclose the Social Security number of an individual.
Section 13(1)(y)	Records or information of measures designed to protect the security or safety of persons or property, or the confidentiality, integrity, or availability of information systems, whether public or private, including, but not limited to, building, public works, and public water supply designs to the extent that those designs relate to the ongoing security measures of a Public Body, capabilities and plans for responding to a violation of the Michigan Anti-Terrorism Act, MCL 750.543a to MCL 750.543z, emergency response plans, risk planning documents, threat assessments, domestic preparedness

	strategies, and cybersecurity plans, assessments, or vulnerabilities, unless disclosure would not impair a Public Body's ability to protect the security or safety of persons or property or unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance.
Section 13(1)(z)	Information that would identify or provide a means of identifying a person that may, as a result of disclosure of the information, become a victim of a cybersecurity incident or that would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software.
Section 13(1)(aa)	Research data on road and attendant infrastructure collected, measured, recorded, processed, or disseminated by a public agency or private entity, or information about software or hardware created or used by the private entity for such purposes.

Other Important Points to Note:

- Home addresses and telephone numbers constitute private information for purposes of the FOIA's privacy exemption.
- A personal e-mail not transmitted in the performance of an official function is not a Public Record.
- Communications maintained on a personal device may constitute Public Records if they were transmitted in the performance of an official function.
- Personnel records possessed by Public Bodies that are subject to the FOIA generally are not exempt from disclosure unless the information falls within one of the FOIA exemptions. For instance, under the Michigan Bullard-Plawecki Employee Right to Know Act, specifically MCL 423.507, disciplinary reports, letters of reprimand, or other records of disciplinary action that are more than four years old are not to be released to third parties unless the release is ordered in a legal action or arbitration to a party in that legal action or arbitration. Therefore, such records would be exempt from disclosure under Section 13(1)(d) of FOIA.
- If a FOIA request appears calculated to obtain information from a Member pertaining to actual or threatened potential litigation, MCRCSIP should be immediately notified and legal counsel consulted before responding.
- MCL 124.12(1) provides that information regarding that portion of the funds or liability reserve of a municipal self-insurance pool established for purposes of satisfying a specific claim or cause of action are exempt from disclosure under the FOIA. Consequently, all such information available to Members through MCRCSIP is exempt from disclosure under MCL 15.243(1)(d).

EMPLOYMENT PRACTICES GUIDELINE

Freedom of Information Act (FOIA) - Fees and Deposits (MCL 15.234)

Fees:

A Public Body may charge a fee under the FOIA, which total fee may not exceed the sum of the following components:

Nature of Cost	How Calculated
Labor costs directly associated with searching for, locating, and examining Public Records to fulfill a granted written request, when failure to charge a fee will result in unreasonably high costs to the Road Commission.	Not more than the hourly wage of the lowest-paid employee capable of searching for, locating, and examining the Public Records, regardless of whether that person actually performs the labor, charged in increments of 15 minutes or more, rounded down.
Labor costs, including necessary review, if any, directly associated with the separating and deleting of exempt information from nonexempt information, when failure to charge a fee will result in unreasonably high costs to the Road Commission.	For services performed by an employee of the Public Body, not more than the hourly wage of the lowest-paid employee capable of separating and deleting exempt information from nonexempt information, regardless of whether that person actually performs the labor, charged in increments of 15 minutes or more, rounded down. If there is no employee capable of separating and deleting exempt information from nonexempt information, as determined by the FOIA Coordinator, contracted labor costs, not exceeding an amount equal to 6 times the state minimum hourly wage rate under Michigan law, charged in increments of 15 minutes or more, rounded down. The name of the contracted person or firm must be provided to the requestor on the detailed itemization of fees.
Nonpaper physical media.	The actual and most reasonably economical cost of the nonpaper physical media.
Paper copies of Public Records.	The actual total incremental cost of necessary duplication or publication, not exceeding 10 cents per sheet of paper made on 8-1/2 by 11-inch paper or 8-1/2 by 14-inch paper, utilizing the most economical means available for making copies of Public Records, including double-sized printing, if cost saving and available.

Labor costs directly associated with duplication or publication, including making paper copies, making digital copies, or transferring digital Public Records to be given to the requestor on nonpaper physical media or through the internet or other electronic means as stipulated by the requestor.	Not more than the hourly wage of the lowest-paid employee capable of necessary duplication or publication, regardless of whether that person actually performs the labor, charged in time increments of the Public Body's choosing, rounded down.
Mailing.	The actual cost of mailing, if any, for sending the Public Records in a reasonably economical and justifiable manner. The Public Body may not charge more for expedited shipping or insurance unless specifically stipulated by the requestor but may otherwise charge for the least expensive form of postal delivery confirmation when mailing Public Records.

- The Public Body may add up to 50% to the applicable labor charge to cover the cost of fringe benefits, limited to the actual cost of fringe benefits, if it clearly notes the percentage multiplier used to account for benefits in the detailed itemization of fees.
- Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor.
- Copies of Public Records may be furnished without charge or at a reduced charge if the Public Body determines that a waiver or reduction of the fee is in the public interest.
- A copy of a Public Record shall be furnished without charge for the first $20.00 of the fee for each request made by an individual who submits an affidavit stating that the individual is indigent and receiving specific public assistance or, if not receiving public assistance, stating facts showing inability to pay the cost because of indigency. However, an individual is ineligible for this fee reduction if the individual has previously received discounted copies of Public Records from the same Public Body twice during that calendar year or if the individual requests the information in conjunction with outside parties who are offering or providing payment or other remuneration to the individual making the request.
- A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information unless failure to charge a fee would result in unreasonably high costs to the Public Body because of the nature of the request, and the Public Body specifically identifies the nature of these unreasonably high costs.
- Any Public Records available to the general public on the Public Body's internet site at the time the request is made are exempt from any charges. The Public Body

shall notify the requestor in its written response that all or a portion of the requested information is available on its website. The written response, to the degree practicable, must include a specific webpage address where the requested information is available.

- The Public Body must use a standard form for itemizing any estimated or charged fee amount in responding to a written request for a Public Record. The detailed itemization must clearly list and explain the allowable charges for each of the 6 fee components that compose the total fee used for estimating or charging purposes.
- If a Public Body does not respond to a written request in a timely manner as required under the FOIA, the Public Body must reduce the charges for labor costs otherwise permitted by 5% for each day the Public Body exceeds the time permitted for a response to the request, with a maximum 50% reduction, if either the late response was willful and intentional or the written request specifically referenced the FOIA within the first 250 words of the body of the request.
- Within 10 business days after receiving a written appeal concerning a fee request, the head of a Public Body shall do 1 of the following:
    - Waive the fee;
    - Reduce the fee and issue a written determination to the requestor indicating the specific basis that supports the remaining fee;
    - Uphold the fee and issue a written determination to the requestor indicating the specific basis that supports the required fee; or,
    - Issue a notice extending for not more than 10 business days the period during which the head of the Public Body must respond to the written appeal. The notice of extension shall include a detailed reason or reasons why the extension is necessary. The head of a Public Body shall not issue more than 1 notice of extension for a particular written appeal.
- A board that is the head of a Public Body is not considered to have received a written appeal until the first regularly scheduled meeting of that board following submission of the written appeal.

Deposits:

- In either the Public Body's initial response or subsequent response, the Public Body may require a good-faith deposit from the requestor before providing the Public Records to the requestor if the entire fee estimate or charge exceeds $50.00, based on a good-faith calculation of the total fee.
- The deposit must not exceed ½ of the total estimated fee, and a Public Body's request for a deposit must include a detailed itemization.
- The request must also contain a best-efforts estimate by the Public Body regarding the time frame it will take the Public Body to comply with the FOIA in providing the Public Records to the requestor. Please note that, as long as a formal response to the FOIA request was given within the required time under the FOIA, actual production of the requested Public Records can take place at a reasonably later date.

- After a Public Body has granted and fulfilled a written request under the FOIA, if the Public Body has not been paid in full the total amount due, the Public Body may require a deposit of up to 100% of the estimated fee before it begins a Public Record search for any subsequent written request from that same individual for the next 365 days if:
    - The final fee for the prior written request was not more than 105% of the estimated fee;
    - The Public Records made available were responsive to the written request and are still in the Public Body's possession;
    - The Public Records were made available, subject to payment, within the time frame estimated;
    - 90 days have passed since the Public Body notified the individual in writing that the Public Records were available for pickup or mailing;
    - The individual is unable to show proof of prior payment in full to the Public Body; and,
    - The Public Body calculates a detailed itemization that is the basis for the current written request's estimated fee deposit.
- If a deposit that is required is not received by the Public Body within 45 days from receipt by the requestor of the notice that a deposit is required, and if the requestor has not filed an appeal of the deposit amount, the request shall be considered abandoned. Notice of a deposit requirement is considered received 3 days after it is sent, regardless of the means of transmission.

_____ County Road Commission

FOIA Procedures and Guidelines

Preamble: Statement of Principles

Consistent with the Michigan Freedom of Information Act (FOIA), MCL 15.231, et seq, it is the policy of the _____ County Road Commission ("Road Commission") that all persons, except those who are incarcerated, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees. The people shall be informed so that they may fully participate in the democratic process.

The Road Commission's policy with respect to FOIA requests is to comply with state law in all respects and to respond to FOIA requests in a consistent, fair, and even-handed manner regardless of who makes such a request.

The Road Commission acknowledges that it has a legal obligation to disclose all nonexempt public records in its possession pursuant to a FOIA request. The Road Commission acknowledges that sometimes it is necessary to invoke the exemptions identified under FOIA in order to ensure the effective operation of government and to protect the privacy of individuals.

The Road Commission will protect the public's interest in disclosure, while balancing the requirement to withhold or redact portions of certain records. The Road Commission's policy is to disclose public records consistent with and in compliance with state law.

The Road Commission's Board has established the following written procedures and guidelines to implement the FOIA and will create a written public summary of the specific procedures and guidelines relevant to the general public regarding how to submit written requests to the public body and explaining how to understand a public body's written responses, deposit requirements, fee calculations, and avenues for challenge and appeal. The written public summary will be written in a manner so as to be easily understood by the general public.

Section 1: General Policies

The Road Commission's Board, acting pursuant to the authority at MCL 15.236, designates _____ as the FOIA Coordinator.

The FOIA Coordinator is responsible for accepting and processing requests for the Road Commission's public records and for approving denials of requests for public records. The FOIA Coordinator is authorized to designate other Road Commission staff to act on his or her behalf in accepting and processing requests for public records and in approving denials of requests for public records.

The FOIA Coordinator may, at his or her discretion, implement administrative rules, consistent with state law and the Procedures and Guidelines to administer the acceptance and processing of FOIA requests.

The Road Commission is not obligated to create a new public record or make a compilation or summary of information which does not already exist. Neither the FOIA Coordinator nor other Road Commission staff are obligated to provide answers to questions contained in requests for public records or regarding the content of the records themselves.

If a request for a public record is received by facsimile or e-mail, the request is deemed to have been received on the following business day. If a request is sent by e-mail and delivered to a Road Commission spam or junk-mail folder, the request is not deemed received until one day after the FOIA Coordinator first becomes aware of the request. The FOIA Coordinator shall note both the date and time the request was delivered to the spam or junk-mail folder and the date and time the FOIA Coordinator became aware of the request.

The FOIA Coordinator shall review Road Commission spam and junk-mail folders on a regular basis, which shall be no less than once a month. The FOIA Coordinator shall work with Road Commission Information Technology staff to develop administrative rules for handling spam and junk-mail so as to protect Road Commission systems from computer attacks which may be imbedded in an electronic FOIA request.

The FOIA Coordinator shall keep a copy of all written requests for public records received by the Road Commission on file for a period of at least one year.

The Road Commission will make this FOIA Procedures and Guidelines document and the Written Public Summary of FOIA Procedures and Guidelines publicly available without charge.

This FOIA Procedures and Guidelines document and the Written Public Summary of FOIA Procedures and Guidelines will be posted and maintained on the Road Commission's website at www._____.

The Road Commission will provide free copies of the FOIA Procedures and Guidelines document and the Written Public Summary of FOIA Procedures and Guidelines upon request by visitors at the Road Commission's office.

Section 2: Requesting a Public Record

A person requesting to inspect, copy, or obtain copies of a public record prepared, owned, used, possessed, or retained by the Road Commission must do so in writing. The request must sufficiently describe a public record so as to enable Road Commission personnel to identify and find the requested public record.

No specific form to submit a request for a public record is required. However, the FOIA Coordinator may make a FOIA Request Form available for use by the public.

Written requests for public records may be submitted in person or by mail to the FOIA Coordinator at the Road Commission office. Requests may also be submitted electronically by facsimile or e-mail. Upon their receipt, requests for public records shall be promptly forwarded to the FOIA Coordinator for processing.

A person may request that public records be provided on non-paper physical media, electronically mailed, or otherwise provided to him or her in digital form in lieu of paper copies. The Road Commission will comply with the request only if it possesses the necessary technological capability to provide records in the requested non-paper physical media format.

A person may subscribe to future issues of public records that are created, issued, or disseminated by the Road Commission on a regular basis. A subscription is valid for up to 6 months and may be renewed by the subscriber.

A person who makes a verbal, non-written request for information believed to be on the Road Commission's website shall be informed of the pertinent website address where practicable and to the best ability of the Road Commission employee receiving the request.

A person serving a sentence of imprisonment in a local, state or federal correctional facility is not entitled to submit a request for a public record. The FOIA Coordinator will deny all such requests.

Section 3: Processing a Request

Unless otherwise agreed to in writing by the person making the request, the Road Commission will issue a response within 5 business days of receipt of a FOIA request. If a request is received by facsimile, e-mail, or other electronic transmission, the request is deemed to have been received on the following business day.

The Road Commission will respond to a request in one of the following ways:

- Grant the request.
- Issue a written notice denying the request.
- Grant the request in part and issue a written notice denying part of the request.
- Issue a notice extending for not more than an additional 10 business days the period during which the Road Commission shall respond to the request. Only one such extension is permitted.
- Issue a written notice indicating that the public record requested is available at no charge on the Road Commission's website.

The FOIA Coordinator, or such other individuals as he or she may designate, shall have the exclusive authority to deny any FOIA request, either entirely or in part.

When a request is granted or granted in part:
If the request is granted, or granted in part, the FOIA Coordinator will require that payment be made in full for the allowable fees associated with responding to the request before the public record is made available.

The FOIA Coordinator shall provide a detailed itemization of the allowable costs incurred to process the request to the person making the request.

A copy of these FOIA Procedures and Guidelines and the Written Public Summary of FOIA Procedures and Guidelines will be provided to the requestor free of charge with the response to a written request for public records, provided however, that because the FOIA Procedures and Guidelines and the Written Public Summary of FOIA Procedures and Guidelines are on the Road Commission's website at www._____ , a website link to the documents will be provided in lieu of providing paper copies.

If the cost of processing a FOIA request is $50 or less, the requestor will be notified of the amount due and where the documents can be obtained.

If the cost of processing a FOIA request is expected to exceed $50 based on a good-faith calculation, or if the requestor has not paid in full for a previously granted request, the Road Commission will require a good-faith deposit pursuant to Section 4 of these Procedures and Guidelines before processing the request.

In making the request for a good-faith deposit, the FOIA Coordinator shall provide the requestor with a detailed itemization of the allowable costs estimated to be incurred by the Road Commission to process the request, as well as a best-efforts estimate of the time frame it will take the Road Commission to provide the records to the requestor. The best-efforts estimate shall be nonbinding on the Road Commission but will be made in good faith and will strive to be reasonably accurate, given the nature of the request in the particular

instance, so as to provide the requested records in a manner based on the public policy expressed by Section 1 of the FOIA.

When a request is denied or denied in part:
If the request is denied or denied in part, the FOIA Coordinator will issue a Notice of Denial which shall provide in the applicable circumstance:

- An explanation as to why a requested public record, or a portion of that public record, is exempt from disclosure; or
- A certificate that the public record does not exist under the name or description provided by the requestor, or another name reasonably known by the Road Commission; or
- An explanation or description of the public record or information within a public record that is separated or redacted from the public record; and
- An explanation of the requesting person's right to submit a written appeal of the denial to the Road Commission Board or seek judicial review in the _____ County Circuit Court; and
- An explanation of the right to receive reasonable attorneys' fees, costs, and disbursements, as well as actual or compensatory damages, and punitive damages of $1,000.00, should they prevail in Circuit Court.

The Notice of Denial shall be signed by the FOIA Coordinator or his or her designee.

If a request does not sufficiently describe a public record, the FOIA Coordinator may, in lieu of issuing a Notice of Denial indicating that the request is deficient, seek clarification or amendment of the request by the person making the request. Any clarification or amendment will be considered a new request subject to the timelines described in this Section.

Requests to inspect public records:
If there is a request to inspect public records, the Road Commission shall provide reasonable facilities and opportunities for persons to examine and inspect public records during normal business hours. The FOIA Coordinator is authorized to promulgate rules regulating the manner in which records may be viewed so as to protect Road Commission records from loss, alteration, mutilation, or destruction and to prevent excessive interference with normal Road Commission operations.

Requests for certified copies:
The FOIA Coordinator shall, upon written request, furnish a certified copy of a public record at no additional cost to the person requesting the public record.

Section 4: Fee Deposits

If the estimated fee is expected to exceed $50 based on a good-faith calculation, the requestor will be asked to provide a deposit not exceeding one-half of the total estimated fee.

If a written request for public records is from a person who has not fully paid the Road Commission for copies of public records that were made in fulfillment of the person's previously granted written request, the FOIA Coordinator will require a deposit of 100% of the estimated fee before beginning to search for a public record for any subsequent written request by that person, when all of the following conditions exist:

- The final fee for the prior written request is not more than 105% of the estimated fee;
- The public records made available contained the information sought in the prior written request and remain in the Road Commission's possession;
- The public records were made available to the individual, subject to payment, within the time frame estimated by the Road Commission to provide the records;
- Ninety (90) days have passed since the FOIA Coordinator notified the individual in writing that the public records were available for pickup or mailing;
- The individual is unable to show proof of prior payment to the Road Commission; and
- The FOIA Coordinator has calculated a detailed itemization that is the basis for the current written request's increased estimated fee deposit.

The FOIA Coordinator will not require an increased estimated fee deposit if any of the following apply:

- The person making the request is able to show proof of prior payment in full to the Road Commission;
- The Road Commission is subsequently paid in full for the applicable prior written request; or
- Three hundred sixty-five (365) days have passed since the person made the request for which full payment was not remitted to the Road Commission.

Section 5: Calculation of Fees

Consistent with the authority granted by the FOIA, it is the intent of the Road Commission to charge a fee for a public record search, for the necessary copying of a public record for inspection, and for providing a copy of a public record, so that its budget is not unduly burdened by the costs associated with processing FOIA requests.

A fee will not be charged for the labor cost of search, examination, review, and the deletion and separation of exempt from nonexempt information ***unless*** failure to charge a fee would result in unreasonably high costs to the Road Commission because of the nature of the request in the particular instance, and the Road Commission specifically identifies the nature of the unreasonably high costs.

The following factors shall be used to determine an unreasonably high cost to the Road Commission:

- Whether the costs for search, examination, review, and deletion and separation of exempt from non-exempt information are excessive and beyond the normal or usual amount for those services compared to the costs of the Road Commission's usual FOIA requests;
- Volume or size of the public record requested;
- Amount of time spent to search for, examine, review and separate exempt from non-exempt information in the record requested;
- Whether the public records are from more than one Road Commission department or whether various Road Commission offices are necessary to respond to the request;
- The available staffing to respond to the request; and
- Any other similar factors identified by the FOIA Coordinator in responding to the particular request.

The Road Commission may charge for the following costs associated with processing a FOIA request:

- Labor costs associated with copying or duplication, which include making paper copies, making digital copies, or transferring digital public records to non-paper physical media or through the internet when asked for by the requestor.
- Labor costs directly associated with searching for, locating, and examining a requested public record, when failure to charge a fee will result in unreasonably high costs to the Road Commission.
- Labor costs associated with a review of a record to separate and delete information that is exempt from disclosure, when failure to charge a fee will result in unreasonably high costs to the Road Commission.
- The cost of copying or duplication, not including labor, of paper copies of public records. This may include the cost for copies of records already on the Road Commission's website if the requestor asks the Road Commission to make copies.
- The actual cost of computer discs, computer tapes, or other digital or similar media when the requestor asks for records in non-paper physical media. This may include the cost for copies of records already on the Road Commission's website if the requestor asks the Road Commission to make copies.
- The actual cost to mail or send a public record to a requestor, including the least expensive form of a postal delivery confirmation, as well as the cost of expedited shipping or insurance when such is asked for by the requestor.

Labor costs will be calculated based on the following requirements:

- All labor costs will be estimated and charged in 15-minute increments, with all partial time increments rounded down.
- Labor costs will be charged at the hourly wage of the lowest-paid Road Commission employee capable of performing the work in the specific fee category, regardless of who actually performs the work.
- If necessary, the Road Commission may use contracted labor to separate and delete exempt information from nonexempt information. The Road Commission may treat necessary contracted labor cost used for the separating and deleting of exempt information from nonexempt information in the same manner as employee labor costs if it notes the name of the contracted person or firm on its Detailed Fee Itemization Form. The hourly rate charged by the contracted person or firm may not exceed 6 times the state minimum hourly wage rate.
- Labor costs will also include a charge to cover or partially cover the cost of fringe benefits. The Road Commission may add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits, but the Road Commission will not charge more than the actual cost of fringe benefits.
- Overtime wages will not be included in the calculation of labor costs unless specifically agreed to by the requestor. Overtime costs will not be used to calculate the fringe benefit cost.

The cost to provide records on non-paper physical media when so requested will be based on the following requirements:

- Computer discs, computer tapes, or other digital or similar media will be at the actual and most reasonably economical cost for the non-paper media.

- This cost will only be assessed if the Road Commission has the technological capability necessary to provide the public record in the requested non-paper physical media format.
- In order to ensure the integrity and security of the Road Commission's technological infrastructure, the Road Commission will procure any requested non-paper media and will not accept media from the requestor.

The cost to provide paper copies of records will be based on the following requirements:

- Paper copies of public records made on standard letter (8 ½ x 11) or legal (8 ½ x 14) sized paper will not exceed $.10 per sheet of paper. Copies for non-standard sized sheets of paper will reflect the actual cost of reproduction.
- The Road Commission will provide records using double-sided printing, if it is cost-saving and available.

The cost to mail records to a requestor will be based on the following requirements:

- The actual cost of mailing the public records using a reasonably economical and justifiable means.
- The Road Commission may charge for the least expensive form of postal delivery confirmation.
- No cost will be made for expedited shipping or insurance unless specified by the requestor.

If the FOIA Coordinator does not respond to a written request in a timely manner, the Road Commission must do the following:

1. Reduce the labor costs by 5% for each day the Road Commission exceeds the time permitted under the FOIA up to a 50% maximum reduction, if ***any*** of the following apply:
   a. The late response was willful and intentional; or
   b. The written request conveyed a request for information within the first 250 words of the body of a letter, facsimile, e-mail, or e-mail attachment; or
   c. The written request included the words, characters, or abbreviations for "freedom of information," "information," "FOIA," "copy," or a recognizable misspelling of such, or legal code reference to MCL 15.231, et seq, or 1976 Public Act 442 on the front of an envelope or in the subject line of an e-mail, letter, or facsimile cover page.

2. Fully note the charge reduction on the Detailed Fee Itemization Form.

Section 6: Waiver of Fees

Absent a waiver by the FOIA Coordinator in whole or in part, all charges associated with processing a FOIA request shall be paid in full before the release of any public records.

The costs of the search for and copying of a public record may be waived or reduced if the FOIA Coordinator determines that a waiver or reduction of the fee is in the public interest because searching for or furnishing copies of the public record can be considered as primarily benefitting the general public.

Section 7: Discounted Fees

Indigence
The FOIA Coordinator will waive the first $20.00 of the processing fee for a request if the person requesting a public record submits an affidavit stating that they are:

- Indigent and receiving specific public assistance; or
- If not receiving public assistance, stating facts demonstrating an inability to pay because of indigency.

An individual is not eligible to receive the waiver if:

- The individual has previously received discounted copies of public records from the Road Commission twice during the calendar year; or
- The individual requests information in conjunction with other persons who are offering or providing payment or other remuneration to the individual to make the request. The Road Commission may require a statement by the requestor in the affidavit that the request is not being made in conjunction with outside parties in exchange for payment or other remuneration.

The affidavit shall be a sworn statement made under penalty of perjury.

Nonprofit organization advocating for developmentally disabled or mentally ill individuals
The FOIA Coordinator will discount the first $20.00 of the processing fee for a request from a nonprofit organization formally designated by the state to carry out activities under subtitle C of the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000, Public Law 106-042, and the Protection and Advocacy for Individuals with Mental Illness Act, Public Law 99-319, or their successors, if the request meets all of the following requirements:

- It is made directly on behalf of the organization or its clients;
- It is made for a reason wholly consistent with the mission and provisions of those laws under section 931 of the Mental Health Code, 1974 PA 258, MCL 330.1931; and
- It is accompanied by documentation of the designation by the state.

Section 8. Appeal of a Denial of a Public Record

When a requestor believes that all or a portion of a public record has not been disclosed or has been improperly exempted from disclosure, he or she may appeal to the Road Commission Board by filing an appeal of the denial with the office of the Road Commission.

The appeal must be in writing, specifically state the word “appeal,” and identify the reason or reasons the requestor is seeking a reversal of the denial. The Road Commission FOIA Appeal Form (To Appeal a Denial of Records) may be used.

The Road Commission Board is not considered to have received a written appeal until the first regularly scheduled Road Commission Board meeting following submission of the written appeal.

Within 10 business days of receiving the appeal, the Road Commission Board will respond in writing by:

- Reversing the disclosure denial; or
- Upholding the disclosure denial; or
- Reversing the disclosure denial in part and upholding the disclosure denial in part; or
- Under unusual circumstances, such as the need to examine or review a voluminous amount of separate and distinct public records, the Board may issue a notice extending the period during which the Board will respond to the written appeal by not more than 10 business days. The Board shall not issue more than 1 notice of extension for a particular written appeal.

If the Road Commission Board fails to respond to a written appeal, or if the Road Commission Board upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action in Circuit Court.

Regardless of whether a requestor submits an appeal of a denial to the Road Commission Board, he or she may file a civil action in the _____ County Circuit Court within 180 days after the Road Commission's final determination to deny the request.

If the requestor is the prevailing party in the civil action, then he or she shall be awarded reasonable attorneys' fees, costs, and disbursements. If the person or the Road Commission prevails in part, the court may, at its discretion, award all or an appropriate portion of the reasonable attorneys' fees, costs, and disbursements to the party prevailing in part.

If the court determines that the Road Commission has arbitrarily and capriciously violated the FOIA by refusing or delaying in disclosing or providing copies of a public record, the court shall award the requestor punitive damages in the amount of $1,000.00. In addition, the court shall order the Road Commission to pay a civil fine of not less than $1,000.00 to the general fund of the state treasury.

Section 9. Appeal of an Excessive FOIA Processing Fee

If a requestor believes that the fee charged by the Road Commission to process a FOIA request exceeds the amount permitted by state law or under the Procedures and Guidelines, he or she must first appeal to the Road Commission Board by submitting a written appeal for a fee reduction to the Road Commission office. The appeal must be in writing, specifically state the word "appeal," and identify how the required fee exceeds the amount permitted by state law or under these Procedures and Guidelines. A Road Commission FOIA Appeal Form (To Appeal an Excess Fee) may be used.

The Road Commission Board is not considered to have received a written appeal until the first regularly scheduled Road Commission Board meeting following submission of the written appeal.

Within 10 business days after receiving the appeal, the Road Commission Board will respond in writing by:

- Waiving the fee; or
- Reducing the fee and issuing a written determination indicating the specific basis that supports the remaining fee; or

- Upholding the fee and issuing a written determination indicating the specific basis that supports the required fee; or
- Issuing a notice detailing the reason or reasons for extending the period during which the Road Commission Board will respond to the written appeal by not more than 10 business days. The Road Commission Board shall not issue more than 1 notice of extension for a particular written appeal.

Where the Road Commission Board reduces or upholds the fee, the determination must include a certification from the Road Commission Board that the statements in the determination are accurate and that the fee amount complies with its publicly available Procedures and Guidelines and Section 4 of the FOIA.

Within 45 days after receiving notice of the _____ County Road Commission Board's determination of an appeal, the requesting person may commence a civil action in _____ County Circuit Court for a fee reduction.

If a civil action is commenced against the Road Commission for an excessive fee, the Road Commission is not obligated to complete the processing of the written request for the public record at issue until the court resolves the fee dispute.

An action shall not be filed in Circuit Court unless ***one*** of the following applies:

- The Road Commission Board failed to respond to a written appeal as required, or
- The Road Commission Board issued a determination to a written appeal.

If a court determines that the Road Commission required a fee that exceeds the amount permitted under its publicly available Procedures and Guidelines or Section 4 of the FOIA, the court shall reduce the fee to a permissible amount.

If the requestor prevails in the civil action by receiving a reduction of 50% or more of the total fee, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements.

If the court determines that the Road Commission has arbitrarily and capriciously violated the FOIA by charging an excessive fee, the court shall order the Road Commission to pay a civil fine of $500.00 to the general fund of the state treasury. The court may also award the requestor punitive damages in the amount of $500.00.

Section 10: Conflict with Prior FOIA Policies and Procedures; Effective Date

To the extent that these Procedures and Guidelines conflict with previous FOIA policies promulgated by the Road Commission Board, these Procedures and Guidelines are controlling. To the extent that any administrative rule promulgated by the FOIA Coordinator subsequent to the adoption of this resolution is found to be in conflict with any previous policy promulgated by the Road Commission Board, the administrative rule promulgated by the FOIA Coordinator is controlling.

To the extent that any provision of these Procedures and Guidelines or any administrative rule promulgated by the FOIA Coordinator pertaining to the release of public records is found to be in conflict with any state

statute, the applicable statute shall control. The FOIA Coordinator is authorized to modify this policy and all previous policies adopted by the Road Commission Board, and to adopt such administrative rules as he or she may deem necessary, to facilitate the legal review and processing of requests for public records made pursuant to Michigan's FOIA statute, provided that such modifications and rules are consistent with state law. The FOIA Coordinator shall inform the Road Commission Board of any change to these FOIA Policies and Guidelines.

These FOIA Policies and Guidelines become effective _____, 20___.

Section 11: Appendix of Road Commission FOIA Forms

- FOIA Request for Public Records
- Notice to Extend Response Time for FOIA Request
- Notice of Response to FOIA Request
- FOIA Request Detailed Cost Itemization
- FOIA Appeal Form - To Appeal a Denial of Records
- FOIA Appeal Form - To Appeal an Excess Fee

_____ County Road Commission

Public Summary of FOIA Procedures and Guidelines

It is the public policy of the State of Michigan that all persons (except those persons incarcerated in state or local correctional facilities) are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees.

The people shall be so informed so that they may fully participate in the democratic process.

Consistent with the Michigan Freedom of Information Act (FOIA), Public Act 442 of 1976, the following is the Written Public Summary of the Road Commission's FOIA Procedures and Guidelines relevant to the general public.

This is only a summary of the Road Commission's FOIA Procedures and Guidelines. For more details and information, copies of the Road Commission's FOIA Procedures and Guidelines are available at no charge at the Road Commission office and on the Road Commission's website, www._____.

1. **How do I submit a FOIA request to the Road Commission?**

   - Requests to inspect or obtain copies of public records prepared, owned, used, possessed or retained by the Road Commission must be in writing. A request may be submitted on the Road Commission's FOIA Request Form or in any other form of writing (letter, fax, e-mail, etc.).
   - A request must sufficiently describe a public record so as to enable the Road Commission to find it.
   - Please include the words "FOIA" or "FOIA Request" in the request to assist the Road Commission in providing a prompt response.
   - No specific form to submit a written request is required. However, a FOIA Request Form and other FOIA-related forms are available for your use and convenience on the Road Commission's website at www._____, and at the Road Commission's office.
   - Written requests may be delivered to the Road Commission office in person or by mail: FOIA Coordinator, _____.
   - Requests may be faxed to: _____. To ensure a prompt response, faxed requests should contain the term "FOIA" or "FOIA Request" on the first/cover page.
   - Requests may be e-mailed to: _____@_____. To ensure a prompt response, e-mail requests should contain the term "FOIA" or "FOIA Request" in the subject line.
   - Please note that the Road Commission is not obligated to create a new public record or make a compilation or summary of information which does not already exist.

2. What kind of response can I expect to my request?

- Within 5 business days after receiving a FOIA request, the Road Commission will issue a response. If a FOIA request is received by fax or e-mail, the request is deemed to have been received on the following business day.
- The Road Commission will respond to your FOIA request in one of the following ways:
    - Grant the request; or
    - Issue a written notice denying the request; or
    - Grant the request in part and issue a written notice denying part of the request; or
    - Issue a notice indicating that the Road Commission needs an additional 10 business days to respond; or
    - Issue a written notice indicating that the public record requested is available at no charge on the Road Commission's website.
- If the FOIA request is granted, or granted in part, the Road Commission will ask you to pay all the allowable fees associated with responding to the request before the public record is made available to you.
- If the cost of processing the FOIA request is expected to exceed $50.00, or if you have not paid for a previously granted FOIA request, the Road Commission will require a deposit before processing your FOIA request.

3. What are the Road Commission's deposit requirements?

- If the Road Commission has made a good faith calculation that the total fee for processing the FOIA request will exceed $50.00, the Road Commission will require you to provide a deposit in the amount of 50% of the total estimated fee. When the Road Commission requests the deposit, it will provide you with a non-binding, best-efforts estimate of how long it will take to process the request after you have paid your deposit.
- If you have not fully paid the Road Commission for copies of public records that were made available to you in fulfillment of a previously granted FOIA request, the Road Commission will require you to pay a deposit of 100% of the estimated processing fee for any subsequent FOIA request before the Road Commission begins to search for a public record, if **all** the following conditions exist:
    - The final fee for the prior FOIA request is not more than 105% of the estimated fee; and
    - The public records made available contained the information sought in the prior FOIA request and remain in the Road Commission's possession; and
    - The public records were made available to you, subject to payment, within the best-efforts time frame estimated by the Road Commission to provide the records; and

    - Ninety (90) days have passed since the Road Commission notified you in writing that the public records were available for pickup or mailing; and
    - You are unable to show proof of prior payment to the Road Commission; and
    - The Road Commission has calculated an estimated detailed itemization that is the basis for the current FOIA request's increased fee deposit.
- The Road Commission will not require you to make the 100% estimated fee deposit if any of the following apply:
    - You can show proof of prior payment in full to the Road Commission; or
    - The Road Commission is subsequently paid in full for all applicable prior written requests; or
    - Three hundred sixty-five (365) days have passed since you made the request for which full payment was not remitted to the Road Commission.

4. How does the Road Commission calculate FOIA processing fees?

The Michigan FOIA statute permits the Road Commission to charge for the following costs associated with processing a FOIA request:

- Labor costs associated with copying or duplication, which includes making paper copies, making digital copies, or transferring digital public records to non-paper physical media or through the internet.
- Labor costs associated with searching for, locating, and examining a requested public record, when failure to charge a fee will result in unreasonably high costs to the Road Commission.
- Labor costs associated with a review of a record to separate and delete information that is exempt from disclosure, when failure to charge a fee will result in unreasonably high costs to the Road Commission.
- The cost of copying or duplication, not including labor, of paper copies of public records. This may include the cost for copies of records already on the Road Commission's website if you ask for the Road Commission to make copies.
- The cost of computer discs, computer tapes, or other digital or similar media when you request records on non-paper physical media. This may include the cost for copies of records already on the Road Commission's website if you ask for the Road Commission to make copies.
- The actual cost to mail or send a public record to you.

Labor costs

- All labor costs will be estimated and charged in 15-minute increments, with all partial time increments rounded down.
- Labor costs will be charged at the hourly wage of the lowest-paid Road Commission employee capable of doing the work in the specific fee category, regardless of who actually does the work.

- Labor costs will also include a charge to cover or partially cover the cost of fringe benefits. The Road Commission may add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits, but the Road Commission will not charge more than the actual cost of fringe benefits.
- Overtime wages will not be included in the calculation of labor costs unless agreed to by you. Overtime costs will not be used to calculate the fringe benefit cost.
- Contracted labor costs will be charged at an hourly rate not to exceed 6 times the state minimum hourly wage.

Copying and Duplication

Paper Copies

- Paper copies of public records made on standard letter (8 ½ x 11) or legal (8 ½ x 14) sized paper will not exceed $.10 per sheet of paper.
- Copies for non-standard sized sheets of paper will reflect the actual cost of reproduction.
- The Road Commission will provide records using double-sided printing, if it is cost-saving and available.

Non-paper Copies on Physical Media

- The cost for records provided on non-paper physical media, such as computer discs, computer tapes, or other digital or similar media, will be at the actual and most reasonably economical cost for the non-paper media.
- This cost will be charged only if the Road Commission has the technological capability necessary to provide the public record in the requested non-paper physical media format.

Mailing Costs

The Road Commission may charge you for the costs of mailing a public record to you. These costs will be based on the following:

- The actual cost of mailing the record(s), using a reasonably economical and justified means; and
- The least expensive form of postal delivery confirmation.
- No cost will be made for expedited shipping or insurance unless you request it.

Waiver of Fees

The cost of searching for and copying a public record may be waived or reduced if the FOIA Coordinator determines that a waiver or reduction of the fee is in the public interest. The Road Commission Board may identify specific records or types of records it deems should be made available for no charge or at a reduced cost.

5. **How do I qualify for an indigence discount on the fee?**

The Road Commission will waive the first $20.00 of the processing fees for a request if you submit an affidavit stating that you are:

- Indigent and receiving specific public assistance; or
- If not receiving public assistance, stating facts demonstrating an inability to pay because of indigence.

You are **not** eligible to receive the $20.00 discount if you:

- Have previously received discounted copies of public records from the Road Commission twice during the calendar year; or
- Are requesting information on behalf of other persons who are offering or providing payment to you to make the request.

An affidavit is a sworn statement made under penalty of perjury.

6. **Can a nonprofit organization receive a discount on the fee?**

The Road Commission will waive the first $20.00 of the processing fee for a request from a nonprofit organization formally designated by the State to carry out activities under subtitle C of the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000, Public Law 106-402, and the Protection and Advocacy for Individuals with Mental Illness Act, Public Law 99-319, if the request meets all of the following requirements:

- It is made directly on behalf of the organization or its clients; and
- It is made for a reason wholly consistent with the mission and provisions of those laws under section 931 of the Mental Health Code, 1974 PA 258, MCL 330.1931; and
- It is accompanied by documentation of the designation by the State.

7. **Can I challenge the denial of my request for a public record?**

If you believe that all or a portion of a public record has not been disclosed or has been improperly exempted from disclosure, you may appeal to the Road Commission Board by filing a written appeal of the denial with the Road Commission office.

The appeal must be in writing, specifically state the word "appeal," and identify the reason or reasons you are seeking a reversal of the denial. You may use the Road Commission's FOIA Appeal Form (To Appeal a Denial of Records), which is available at the Road Commission's office and on the Road Commission's website: www._____.

The Road Commission Board is not considered to have received written appeal until the first regularly scheduled Road Commission Board meeting following submission of the written appeal. Within 10 business days of receiving the appeal the Road Commission Board will respond in writing by:

- Reversing the disclosure denial;
- Upholding the disclosure denial;
- Reversing the disclosure denial in part and upholding the disclosure denial in part; or
- Under unusual circumstances, such as the need to examine or review a voluminous amount separate and distinct public records, issuing a notice detailing the reason or reasons for extending for not more than 10 business days the period during which the Road Commission Board will respond to the written appeal.

Whether or not you submitted an appeal of a denial to the Road Commission Board, you may file a civil action in the _____ County Circuit Court within 180 days after the Road Commission's final determination to deny your request. If you prevail in the civil action the court will award you reasonable attorneys' fees, costs, and disbursements. If the court determines that the Road Commission acted arbitrarily and capriciously in refusing to disclose or provide a public record, the court will award you punitive damages in the amount of $1,000.00.

8. Can I challenge an excessive FOIA processing fee?

If you believe that the fee or good faith deposit by the Road Commission to process your FOIA request exceeds the amount permitted by state law or under the Road Commission's FOIA Procedures and Guidelines, you must first appeal to the Road Commission Board by submitting a written appeal for a fee reduction to the Road Commission office.

The appeal must specifically state the word "appeal" and identify how the required fee exceeds the amount permitted by state law or under the Road Commission's FOIA Procedures and Guidelines. You may use the Road Commission's FOIA Appeal Form (To Appeal an Excess Fee), which is available at the Road Commission's office and on the Road Commission's website: www._____.

The Road Commission Board is not considered to have received a written appeal until the first regularly scheduled Road Commission Board meeting following submission of the written appeal. Within 10 business days after receiving the appeal, the Road Commission Board will respond in writing by:

- Waiving the fee;
- Reducing the fee and issuing a written determination indicating the specific basis that supports the remaining fee;
- Upholding the fee and issuing a written determination indicating the specific basis that supports the required fee; or
- Issuing a notice detailing the reason or reasons for extending the period during which the Road Commission Board will respond to the written appeal by not more than 10 business days.

Within 45 days after receiving notice of the Road Commission's Board's determination of the processing fee appeal, you may commence a civil action in the _____ County Circuit Court for a fee reduction. If you prevail in the civil action by receiving a reduction of 50% or more of the total fee, the court may award all of or an appropriate amount of your reasonable attorneys'

fees, costs, and disbursements. If the court determines that the Road Commission acted arbitrarily or capriciously by charging an excessive fee, the court may also award you punitive damages in the amount of $500.00.

If you have further questions regarding the Road Commission's FOIA policies, you are encouraged to review the Road Commission's FOIA Procedures and Guidelines, which are available at the Road Commission office and on the Road Commission's website: www._____.

Road Commission: Keep original and provide copy of both sides, along with Public Summary, to requestor at no charge.

_____ County Road Commission

_____

_____

Phone: _____

Request Form

Note: Requestors are not required to use this form. The Road Commission may complete one for recordkeeping if not used.

FOIA Request for Public Records

Michigan Freedom of Information Act, Public Act 442 of 1976, MCL 15.231, *et seq*.

Request No.: _____ Date Received: _____ Check if received via: ☐ Email ☐ Fax ☐ Other Electronic Method

Date delivered to junk/spam folder: _____

(Please Print or Type) Date discovered in junk/spam folder: _____

Name		Phone
Firm/Organization		Fax
Street		Email
City	State	Zip

Request for: ☐ Copy ☐ Certified copy ☐ Record inspection ☐ Subscription to record issued on regular basis

Delivery Method: ☐ Will pick up ☐ Will make own copies onsite ☐ Mail to address above ☐ Email to address above
☐ Deliver on digital media provided by the Road Commission: _____

Note: The Road Commission is not required to provide records in a digital format or on digital media if the Road Commission does not already have the technological capability to do so.

Describe the public record(s) as specifically as possible. You may use this form or attach additional sheets:

Consent to Non-Statutory Extension of Road Commission's Response Time

I have requested a copy of records or a subscription to records or the opportunity to inspect records, pursuant to the Michigan Freedom of Information Act, Public Act 442 of 1976, MCL 15.231, *et seq*. I understand that the Road Commission must respond to this request within five (5) business days after receiving it, and that response may include taking a 10-business day extension. However, I hereby agree and stipulate to extend the Road Commission's response time for this request until: _____ (*month, day, year*).

Requestor's Signature	Date

(Complete both sides)

Records Located on Website

If the Road Commission directly or indirectly administers or maintains an official internet presence, any public records available to the general public on that internet site at the time the request is made are exempt from any labor charges to redact (*separate exempt information from non-exempt information*).

If the FOIA coordinator knows or has reason to know that all or a portion of the requested information is available on its website, the Road Commission must notify the requestor in its written response that all or a portion of the requested information is available on its website. The written response, to the degree practicable in the specific instance, must include a specific webpage address where the requested information is available. On the detailed cost itemization form, the Road Commission must separate the requested public records that are available on its website from those that are not available on the website and must inform the requestor of the additional charge to receive copies of the public records that are available on its website.

If the Road Commission has included the website address for a record in its written response to the requestor and the requestor thereafter stipulates that the public record be provided to him or her in a paper format or other form, including digital media, the Road Commission must provide the public records in the specified format (if the Road Commission has the technological capability) but may use a fringe benefit multiplier greater than the 50%, not to exceed the actual costs of providing the information in the specified format.

Request for Copies/Duplication of Records on Road Commission Website

I hereby stipulate that, even if some or all of the records are located on the Road Commission website, I am requesting that the Road Commission make copies of those records on the website and deliver them to me in the format I have requested above. I understand that some FOIA fees may apply.

Requestor's Signature	Date

Overtime Labor Costs

Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted on the detailed cost itemization form.

Consent to Overtime Labor Costs

I hereby agree and stipulate to the Road Commission using overtime wages in calculating the following labor costs as itemized in the following categories:

1. ☐ Labor to copy/duplicate 2. ☐ Labor to locate 3a. ☐ Labor to redact 3b. ☐ Contract labor to redact
6b. ☐ Labor to copy/duplicate records already on Road Commission's website

Requestor's Signature	Date

Request for Discount: Indigence

A public record search **must** be made and a copy of a public record **must** be furnished **without charge for the first** $20.00 **of the fee** for each request by an individual who is entitled to information under this act and who:

1) Submits an affidavit stating that the individual is indigent and receiving specific public assistance, OR
2) If not receiving public assistance, states facts showing inability to pay the cost because of indigence.

If a requestor is ineligible for the discount, the public body shall inform the requestor specifically of the reason for ineligibility in the public body's written response. An individual is ineligible for this fee reduction if ANY of the following apply:

(i) The individual has previously received discounted copies of public records from the same public body twice during that calendar year,
(ii) The individual requests the information in conjunction with outside parties who are offering or providing payment or other remuneration to the individual to make the request. A public body may require a statement by the requestor in the affidavit that the request is not being made in conjunction with outside parties in exchange for payment or other remuneration.

Office Use: ☐ Affidavit Received ___ No. of Previous Discounted Requests During _____ Calendar Year
☐ Eligible for Discount ☐ Ineligible for Discount

I am submitting an affidavit and requesting that I receive the discount for indigence for this FOIA request: Requestor's Signature:	Date:

Request for Discount: Nonprofit Organization

A public record search **must** be made and a copy of a public record **must** be furnished **without charge for the first** $20.00 **of the fee** for each request by a nonprofit organization formally designated by the State to carry out activities under subtitle C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 and the Protection and Advocacy for Individuals with Mental Illness Act, if the request meets ALL of the following requirements:

(i) Is made directly on behalf of the organization or its clients.
(ii) Is made for a reason wholly consistent with the mission and provisions of those laws under section 931 of the Mental Health Code, 1974 PA 258, MCL 330.1931.
(iii) Is accompanied by documentation of its designation by the State, if requested by the Road Commission.

Office Use: ☐ Documentation of State Designation Received ☐ Eligible for Discount ☐ Ineligible for Discount

I stipulate that I am a designated agent for the nonprofit organization making this FOIA request and that this request is made directly on behalf of the organization or its clients and is made for a reason wholly consistent with the mission and provisions of those laws under section 931 of the Mental Health Code, 1974 PA 258, MCL 330.1931: Requestor's Signature:	Date:

Road Commission: Keep original and provide copy, along with Public Summary, to requestor at no charge.

_____ County Road Commission

_____

_____

Phone: _____

Extension Form

Notice to Extend Response Time for FOIA Request

Michigan Freedom of Information Act, Public Act 442 of 1976, MCL 15.231, *et seq*.

Request No.: _____ Date Received: _____ Check if received via: ☐ Email ☐ Fax ☐ Other Electronic Method

Date of This Notice: _____ Date delivered to junk/spam folder: _____

(Please Print or Type) Date discovered in junk/spam folder: _____

Name		Phone
Firm/Organization		Fax
Street		Email
City	State	Zip

Request for: ☐ Copy ☐ Certified copy ☐ Record inspection ☐ Subscription to record issued on regular basis

Delivery Method: ☐ Will pick up ☐ Will make own copies onsite ☐ Mail to address above ☐ Email to address above

☐ Deliver on digital media provided by the Road Commission:_____

Record(s) You Requested: (Listed here or see attached copy of original request) _____

_____

_____

_____

We are extending the date to respond to your FOIA request for an additional 10 business days, until _____ (*month, day, year*). Only one extension may be taken per FOIA request. If you have any questions regarding this extension, contact _____ at _____

Reason for Extension:

☐ 1. The Road Commission needs to search for, collect, or appropriately examine or review a voluminous amount of separate and distinct public records pursuant to your request. Specifically, the Road Commission must:

_____

_____

_____

☐ 2. The Road Commission needs to collect the requested public records from numerous field offices, facilities, or other establishments that are located apart from the Road Commission office. Specifically, the Road Commission must coordinate documents from the following locations:

_____

_____

_____

☐ 3. Other (describe):

_____

_____

_____

Signature of FOIA Coordinator:	Date:

[This page left blank on purpose for double-sided printing.]

Road Commission: Keep original and provide copy of both sides, along with Public Summary, to requestor at no charge.

_____ County Road Commission

_____

_____

Phone: _____

Denial Form

Notice of Denial of FOIA Request

Michigan Freedom of Information Act, Public Act 442 of 1976, MCL 15.231, *et seq*.

Request No.: _____ Date Received: _____ Check if received via: ☐ Email ☐ Fax ☐ Other Electronic Method

Date of This Notice: _____ Date delivered to junk/spam folder: _____

(Please Print or Type) Date discovered in junk/spam folder: _____

Name		Phone
Firm/Organization		Fax
Street		Email
City	State	Zip

Request for: ☐ Copy ☐ Certified copy ☐ Record inspection ☐ Subscription to record issued on regular basis

Delivery Method: ☐ Will pick up ☐ Will make own copies onsite ☐ Mail to address above ☐ Email to address above

☐ Deliver on digital media provided by the Road Commission:_____

Record(s) You Requested: *(Listed here or see attached copy of original request)* _____

_____

_____

_____

☐ All OR ☐ Part of your request for records has been denied. Please refer to this form for an explanation. If you have any questions regarding this denial, contact _____ at _____

Partial Denial: Estimated Time Frame to Respond: _____ (*days or date*).The time frame estimate is nonbinding upon the Road Commission, but the Road Commission is providing the estimate in good faith. Providing an estimated time frame does not relieve a public body from any of the other requirements of this act.

Reason for Denial:

☐ 1. Exempt from Disclosure: This item is exempt from disclosure under FOIA Section 13, Subsection _____*(insert number)*, because: _____

_____

☐ 2. Record Does Not Exist: This item does not exist under the name provided in your request or by another name reasonably known to the Road Commission. A certificate that the public record does not exist under the name given is attached. If you believe this record does exist, provide a description that will enable us to locate the record: _____

_____

☐ 3. Redaction: A portion of the requested record had to be separated or deleted (redacted) as it is exempt under FOIA Section 13, Subsection _____ *(insert number)*, because: _____

_____

A brief description of the information that had to be separated or deleted: _____

_____

_____

Notice of Requestor's Right to Seek Judicial Review

You are entitled under Section 10 of the Michigan Freedom of Information Act, MCL 15.240, to appeal this denial to the Road Commission Board or to commence an action in the Circuit Court to compel disclosure of the requested records if you believe they were wrongfully withheld from disclosure. If, after judicial review, the court determines that the Road Commission has not complied with MCL 15.235 in making this denial and orders disclosure of all or a portion of a public record, you have the right to receive attorneys' fees and damages as provided in MCL 15.240. (*See back of this form for additional information on your rights*.)

Signature of FOIA Coordinator: Date:

FREEDOM OF INFORMATION ACT (EXCERPT)
Act 442 of 1976

15.240 Options by requesting person; appeal; actions by public body; receipt of written appeal; judicial review; civil action; venue; de novo proceeding; burden of proof; private view of public record; contempt; assignment of action or appeal for hearing, trial, or argument; attorneys' fees, costs, and disbursements; assessment of award; damages.

Sec. 10.

(1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do one of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

(2) Within 10 business days after receiving a written appeal pursuant to subsection (1)(a), the head of a public body shall do one of the following:

(a) Reverse the disclosure denial.

(b) Issue a written notice to the requesting person upholding the disclosure denial.

(c) Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.

(d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than one notice of extension for a particular written appeal.

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a). If the head of the public body fails to respond to a written appeal pursuant to subsection (2), or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action under subsection (1)(b).

(4) In an action commenced under subsection (1)(b), a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located has venue over the action. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(6) If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

History: 1976, Act 442, Eff. Apr. 13, 1977 ;-- Am. 1978, Act 329, Imd. Eff. July 11, 1978 ;-- Am. 1996, Act 553, Eff. Mar. 31, 1997 ;-- Am. 2014, Act 563, Eff. July 1, 2015

Road Commission: Keep original and provide copy of both sides, along with Public Summary, to requestor at no charge.

_____ County Road Commission

_____

_____

Phone: _____

FOIA Appeal Form—To Appeal a Denial of Records

Michigan Freedom of Information Act, Public Act 442 of 1976, MCL 15.231, *et seq*.

Request No.: _____ Date Received: _____ Check if received via: ☐ Email ☐ Fax ☐ Other Electronic Method

Date of This Notice: _____ Date delivered to junk/spam folder: _____

(Please Print or Type) Date discovered in junk/spam folder: _____

Name		Phone
Firm/Organization		Fax
Street		Email
City	State	Zip

Request for: ☐ Copy ☐ Certified copy ☐ Record inspection ☐ Subscription to record issued on regular basis

Delivery Method: ☐ Will pick up ☐ Will make own copies onsite ☐ Mail to address above ☐ Email to address above

☐ Deliver on digital media provided by the Road Commission:_____

Record(s) You Requested: *(Listed here or see attached copy of original request)* _____

_____

_____

Reason(s) for Appeal:

The appeal must identify the reason(s) for reversing the denial. You may use this form or attach additional sheets:

_____

_____

_____

Requestor's Signature: _____Date: _____

Road Commission Response:

The Road Commission must provide a response within 10 business days after receiving this appeal, including a determination or taking one 10-business day extension.

Road Commission Extension: We are extending the date to respond to your FOIA denial appeal for no more than 10 business days, until _____ (*month, day, year*). Only one extension may be taken per FOIA appeal.

Unusual circumstances warranting extension: _____

_____

If you have any questions regarding this extension, contact: _____

Road Commission Determination:

☐ Denial Reversed ☐ Denial Upheld ☐ Denial Reversed in Part and Upheld in Part

The following previously denied records will be released: _____

_____

_____

_____

Notice of Requestor's Right to Seek Judicial Review

You are entitled under Section 10 of the Michigan Freedom of Information Act, MCL 15.240, to appeal this denial to the Road Commission Board or to commence an action in the Circuit Court to compel disclosure of the requested records if you believe they were wrongfully withheld from disclosure. If, after judicial review, the court determines that the Road Commission has not complied with MCL 15.235 in making this denial and orders disclosure of all or a portion of a public record, you have the right to receive attorneys' fees and damages as provided in MCL 15.240. (*See back of this form for additional information on your rights*.)

Signature of FOIA Coordinator: Date:

FREEDOM OF INFORMATION ACT (EXCERPT)
Act 442 of 1976

15.240 Options by requesting person; appeal; actions by public body; receipt of written appeal; judicial review; civil action; venue; de novo proceeding; burden of proof; private view of public record; contempt; assignment of action or appeal for hearing, trial, or argument; attorneys' fees, costs, and disbursements; assessment of award; damages.

Sec. 10.

(1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do one of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

(2) Within 10 business days after receiving a written appeal pursuant to subsection (1)(a), the head of a public body shall do one of the following:

(a) Reverse the disclosure denial.

(b) Issue a written notice to the requesting person upholding the disclosure denial.

(c) Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.

(d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than one notice of extension for a particular written appeal.

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a). If the head of the public body fails to respond to a written appeal pursuant to subsection (2), or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action under subsection (1)(b).

(4) In an action commenced under subsection (1)(b), a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located has venue over the action. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(6) If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

History: 1976, Act 442, Eff. Apr. 13, 1977 ;-- Am. 1978, Act 329, Imd. Eff. July 11, 1978 ;-- Am. 1996, Act 553, Eff. Mar. 31, 1997 ;-- Am. 2014, Act 563, Eff. July 1, 2015.

Road Commission:
Keep original and provide copy of both sides, along with Public Summary, to requestor at no charge.

_____ County Road Commission

_____

_____

Phone: _____

Fee Appeal Form

FOIA Appeal Form—To Appeal an Excess Fee

Michigan Freedom of Information Act, Public Act 442 of 1976, MCL 15.231, *et seq*.

Request No.: _____ Date Received: _____ Check if received via: ☐ Email ☐ Fax ☐ Other Electronic Method
Date of This Notice: _____ Date delivered to junk/spam folder: _____

Name		Phone
Firm/Organization		Fax
Street		Email
City	State	Zip

(Please Print or Type) Date discovered in junk/spam folder: _____

Request for: ☐ Copy ☐ Certified copy ☐ Record inspection ☐ Subscription to record issued on regular basis

Delivery Method: ☐ Will pick up ☐ Will make own copies onsite ☐ Mail to address above ☐ Email to address above
☐ Deliver on digital media provided by the Road Commission:_____

Record(s) You Requested: *(Listed here or see attached copy of original request)* _____
_____
_____

Reason(s) for Appeal:

The appeal must specifically identify how the required fee(s) exceed the amount permitted. You may use this form or attach additional sheets:

_____
_____
_____

Requestor's Signature: _____Date: _____

Road Commission Response:

The Road Commission must provide a response within 10 business days after receiving this appeal, including a determination or taking one 10-business day extension.

Road Commission Extension: We are extending the date to respond to your FOIA fee appeal for no more than 10 business days, until _____ (*month, day, year*). Only one extension may be taken per FOIA appeal.

Unusual circumstances warranting extension: _____
_____

If you have any questions regarding this extension, contact: _____

Road Commission Determination: ☐ Fee Waived ☐ Fee Reduced ☐ Fee Upheld

Written basis for Road Commission determination: _____
_____
_____

Notice of Requestor's Right to Seek Judicial Review

You are entitled under Section 10a of the Michigan Freedom of Information Act, MCL 15.240a, to appeal a FOIA fee that you believe exceeds the amount permitted under the Road Commission's written Procedures and Guidelines to the Road Commission Board or to commence an action in the Circuit Court for a fee reduction within 45 days after receiving the notice of the required fee or a determination of an appeal to the Road Commission Board. If a civil action is commenced in court, the Road Commission is not obligated to complete processing the request until the court resolves the fee dispute. If the court determines that the Road Commission required a fee that exceeded the permitted amount, the court shall reduce the fee to a permissible amount. (*See back of this form for additional information on your rights*.)

Signature of FOIA Coordinator: Date:

FREEDOM OF INFORMATION ACT (EXCERPT)
Act 442 of 1976

15.240a Fee in excess of amount permitted under procedures and guidelines or MCL 15.234.
Sec. 10a.

(1) If a public body requires a fee that exceeds the amount permitted under its publicly available procedures and guidelines or section 4, the requesting person may do any of the following:

(a) If the public body provides for fee appeals to the head of the public body in its publicly available procedures and guidelines, submit to the head of the public body a written appeal for a fee reduction that specifically states the word "appeal" and identifies how the required fee exceeds the amount permitted under the public body's available procedures and guidelines or section 4.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, in the court of claims, for a fee reduction. The action must be filed within 45 days after receiving the notice of the required fee or a determination of an appeal to the head of a public body. If a civil action is commenced against the public body under this subdivision, the public body is not obligated to complete the processing of the written request for the public record at issue until the court resolves the fee dispute. An action shall not be filed under this subdivision unless one of the following applies:

(i) The public body does not provide for appeals under subdivision (a).

(ii) The head of the public body failed to respond to a written appeal as required under subsection (2).

(iii) The head of the public body issued a determination to a written appeal as required under subsection (2).

(2) Within 10 business days after receiving a written appeal under subsection (1)(a), the head of a public body shall do 1 of the following:

(a) Waive the fee.

(b) Reduce the fee and issue a written determination to the requesting person indicating the specific basis under section 4 that supports the remaining fee. The determination shall include a certification from the head of the public body that the statements in the determination are accurate and that the reduced fee amount complies with its publicly available procedures and guidelines and section 4.

(c) Uphold the fee and issue a written determination to the requesting person indicating the specific basis under section 4 that supports the required fee. The determination shall include a certification from the head of the public body that the statements in the determination are accurate and that the fee amount complies with the public body's publicly available procedures and guidelines and section 4.

(d) Issue a notice extending for not more than 10 business days the period during which the head of the public body must respond to the written appeal. The notice of extension shall include a detailed reason or reasons why the extension is necessary. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a).

(4) In an action commenced under subsection (1)(b), a court that determines the public body required a fee that exceeds the amount permitted under its publicly available procedures and guidelines or section 4 shall reduce the fee to a permissible amount. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located. The court shall determine the matter de novo, and the burden is on the public body to establish that the required fee complies with its publicly available procedures and guidelines and section 4. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(6) If the requesting person prevails in an action commenced under this section by receiving a reduction of 50% or more of the total fee, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by charging an excessive fee, the court shall order the public body to pay a civil fine of $500.00, which shall be deposited in the general fund of the state treasury. The court may also award, in addition to any actual or compensatory damages, punitive damages in the amount of $500.00 to the person seeking the fee reduction. The fine and any damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

(8) As used in this section, "fee" means the total fee or any component of the total fee calculated under section 4, including any deposit.

History: Add. 2014, Act 563, Eff. July 1, 2015

Road Commission: Keep original and provide copies of both sides of each sheet, along with Public Summary, to requestor at no charge.

_____ County Road Commission

_____

_____

Phone: _____

Freedom of Information Act Request Detailed Cost Itemization

Date: _____ Prepared for Request No.: _____ Date Request Received: _____

The following costs are being charged in compliance with Section 4 of the Michigan Freedom of Information Act, MCL 15.234, according to the county's FOIA Policies and Guidelines.		
1. Labor Cost for Copying / Duplication This is the cost of labor directly associated with duplication of publication, including making paper copies, making digital copies, or transferring digital public records to be given to the requestor on non-paper physical media or through the Internet or other electronic means as stipulated by the requestor. This shall not be more than the hourly wage of the Road Commission's lowest-paid employee capable of necessary duplication or publication in this particular instance, regardless of whether that person is available or who actually performs the labor. These costs will be estimated and charged in ____-minute time increments as set by the Road Commission Board *(for example: 15-minutes or more)*; all partial time increments must be rounded down. *If the number of minutes is less than one increment, there is no charge.* Hourly Wage Charged: $_____ Charge per increment: $_____ OR Hourly Wage with Fringe Benefit Cost: $_____ OR Multiply the hourly wage by the percentage multiplier: _____% (*up to 50% of the hourly wage*) and add to the hourly wage for a total per hour rate. Charge per increment: $_____ ☐ Overtime rate charged as stipulated by Requestor *(overtime is not used to calculate the fringe benefit cost)*	To figure the number of increments, take the *number of minutes:* ____, *divide by* _____ *-minute increments, and round down. Enter below:* Number of increments x _____ =	1. Labor Cost $_____
2. Labor Cost to Locate: This is the cost of labor directly associated with the necessary searching for, locating, and examining public records in conjunction with receiving and fulfilling a granted written request. This fee is being charged because failure to do so will result in unreasonably high costs to the Road Commission that are excessive and beyond the normal or usual amount for those services compared to the Road Commission's usual FOIA requests, because of the nature of the request in this particular instance, specifically: _____ _____ The Road Commission will not charge more than the hourly wage of its lowest-paid employee capable of searching for, locating, and examining the public records in this particular instance, regardless of whether that person is available or who actually performs the labor. These costs will be estimated and charged in ____-minute time increments *(must be 15-minutes or more)*; all partial time increments must be rounded down. *If the number of minutes is less than 15, there is no charge.* Hourly Wage Charged: $_____ Charge per increment: $_____ OR Hourly Wage with Fringe Benefit Cost: $_____ OR Multiply the hourly wage by the percentage multiplier: _____% (*up to 50% of the hourly wage*) and add to the hourly wage for a total per hour rate. Charge per increment: $_____ ☐ Overtime rate charged as stipulated by Requestor *(overtime is not used to calculate the fringe benefit cost)*	To figure the number of increments, take the *number of minutes:* ____, *divide by* _____ *-minute increments, and round down. Enter below:* Number of increments x _____ =	2. Labor Cost $_____

3a. Employee Labor Cost for Separating Exempt from Non-Exempt (Redacting):

(Fill this out if using a Road Commission employee. If contracted, use No. 3b instead).

The Road Commission will not charge for labor directly associated with redaction if it knows or has reason to know that it previously redacted the record in question and still has the redacted version in its possession.

This fee is being charged because failure to do so will result in unreasonably high costs to the Road Commission that are excessive and beyond the normal or usual amount for those services compared to the Road Commission's usual FOIA requests, because of the nature of the request in this particular instance,
specifically:_____
_____
_____

This is the cost of labor of a Road Commission employee, including necessary review, directly associated with separating and deleting exempt from nonexempt information. This shall not be more than the hourly wage of the Road Commission's lowest-paid employee capable of separating and deleting exempt from nonexempt information in this particular instance, regardless of whether that person is available or who actually performs the labor.

These costs will be estimated and charged in ____-minute time increments *(must be 15-minutes or more)*; all partial time increments must be rounded down. *If the number of minutes is less than 15, there is no charge.*

Hourly Wage Charged: $_____ Charge per increment: $_____

OR

Hourly Wage with Fringe Benefit Cost: $_____ OR

Multiply the hourly wage by the percentage multiplier: ____%
(*up to 50% of the hourly wage*) and add to the
hourly wage for a total per hour rate. Charge per increment: $_____

☐ Overtime rate charged as stipulated by Requestor *(overtime is not used to calculate the fringe benefit cost)*

To figure the number of increments, take the *number of minutes:* ____, *divide by* _____ *-minute increments, and round down. Enter below:*

Number of increments

x _____ =

3a. Labor Cost

$_____

3b. Contracted Labor Cost for Separating Exempt from Non-Exempt (Redacting):

(Fill this out if using a contractor, such as an attorney. If using in-house employee, use No. 3a instead.)

The Road Commission will not charge for labor directly associated with redaction if it knows or has reason to know that it previously redacted the record in question and still has the redacted version in its possession.

This fee is being charged because failure to do so will result in unreasonably high costs to the Road Commission that are excessive and beyond the normal or usual amount for those services compared to the Road Commission's usual FOIA requests, because of the nature of the request in this particular instance, specifically:_____
_____
_____

As this Road Commission does not employ a person capable of separating exempt from non-exempt information in this particular instance, as determined by the FOIA Coordinator, this is the cost of labor of a contractor (i.e., outside attorney), including necessary review, directly associated with separating and deleting exempt information from nonexempt information. This shall not exceed an amount equal to 6 times the state minimum hourly wage rate of _____ (*currently $9.87*).

Name of contracted person or firm: _____

These costs will be estimated and charged in ____-minute time increments *(must be 15-minutes or more)*; all partial time increments must be rounded down. *If the number of minutes is less than 15, there is no charge.*

Hourly Cost Charged: $_____ Charge per increment: $_____

To figure the number of increments, take the *number of minutes:* ____, *divide by* _____ *-minute increments, and round down to:* ____ *increments. Enter below:*

Number of increments

x _____ =

3b. Labor Cost

$_____

4. Copying / Duplication Cost:

Copying costs may be charged if a copy of a public record is requested, or for the necessary copying of a record for inspection (*for example, to allow for blacking out exempt information, to protect old or delicate original records, or because the original record is a digital file or database not available for public inspection*).

No more than the actual cost of a sheet of paper, up to maximum 10 cents per sheet for:

- Letter (8 ½ x 11-inch, single and double-sided): _____ cents per sheet
- Legal (8 ½ x 14-inch, single and double-sided): _____ cents per sheet

No more than the actual cost of a sheet of paper for other paper sizes:

- Other paper sizes (single and double-sided): _____ cents / dollars per sheet

Actual and most reasonably economical cost of non-paper physical digital media:

- *Circle applicable:* Disc / Tape / Drive / Other Digital Medium Cost per Item: _____

The cost of paper copies must be calculated as a total cost per sheet of paper. The fee cannot exceed 10 cents per sheet of paper for copies of public records made on 8-1/2- by 11-inch paper or 8-1/2- by 14-inch paper. The Road Commission must utilize the most economical means available for making copies of public records, including using double-sided printing, if cost saving and available.

Number of Sheets:

x _____ = Costs: $_____
x _____ = $_____

x _____ = $_____

No. of Items:

x _____ = $_____

4. Total Copy Cost

$_____

5. Mailing Cost:

The Road Commission will charge the actual cost of mailing, if any, for sending records in a reasonably economical and justifiable manner. Delivery confirmation is not required.

- The Road Commission *may* charge for the least expensive form of postal delivery confirmation.
- The Road Commission *cannot* charge more for expedited shipping or insurance unless specifically requested by the requestor.*

Number of Envelopes or Packages:

Actual Cost of Envelope or Packaging: $_____ x _____ = Costs: $_____

Actual Cost of Postage: $_____ per stamp x _____ = $_____
$_____ per pound x _____ = $_____
$_____ per package x _____ = $_____

Actual Cost (least expensive) Postal Delivery Confirmation: $_____ x _____ = $_____

*Expedited Shipping or Insurance as Requested: $_____ x _____ = $_____

5. Total Mailing Cost

$_____

☐ * Requestor has requested expedited shipping or insurance

6a. Copying/Duplicating Cost for Records Already on Road Commission's Website:

If the public body has included the website address for a record in its written response to the requestor, and the requestor thereafter stipulates that the public record be provided to him or her in a paper format or non-paper physical digital media, the Road Commission will provide the public records in the specified format and may charge copying costs to provide those copies.

No more than the actual cost of a sheet of paper, up to maximum 10 cents per sheet for:

- Letter (8 ½ x 11-inch, single and double-sided): _____ cents per sheet
- Legal (8 ½ x 14-inch, single and double-sided): _____ cents per sheet

No more than the actual cost of a sheet of paper for other paper sizes:

- Other paper sizes (single and double-sided): _____ cents / dollars per sheet

Actual and most reasonably economical cost of non-paper physical digital media:

- *Circle applicable:* Disc / Tape / Drive / Other Digital Medium Cost per Item: _____

☐ Requestor has stipulated that some / all of the requested records that are already available on the Road Commission's website be provided in a paper or non-paper physical digital medium.

Number of Sheets:

x _____ = $_____
x _____ = $_____

x _____ = $_____

No. of Items:

x _____ = $_____

Costs:

6a. Web Copy Cost

$_____

6b. Labor Cost for Copying/Duplicating Records Already on Road Commission's Website:

This shall not be more than the hourly wage of the Road Commission's lowest-paid employee capable of necessary duplication or publication in this particular instance, regardless of whether that person is available or who actually performs the labor. These costs will be estimated and charged in ____-minute time increments *(i.e., 15-minutes or more)*; all partial time increments must be rounded down. *If the number of minutes is less than 15, there is no charge.*

Hourly Wage Charged: $_____ Charge per increment: $_____

OR

Hourly Wage with Fringe Benefit Cost: $_____ OR

Multiply the hourly wage by the percentage multiplier: _____%
and add to the hourly wage for a total per hour rate. Charge per increment: $_____

The Road Commission may use a fringe benefit multiplier greater than the 50% limitation, not to exceed the actual costs of providing the information in the specified format.

☐ Overtime rate charged as stipulated by Requestor

To figure the number of increments, take the *number of minutes: ____, divide by _____ -minute increments, and round down. Enter below:*

Number of increments

x _____ = $_____

6b. Web Labor Cost

6c. Mailing Cost for Records Already on Road Commission's Website:

Actual Cost of Envelope or Packaging: $_____

Actual Cost of Postage: $_____ per stamp / per pound / per package

Actual Cost (least expensive) Postal Delivery Confirmation: $_____

*Expedited Shipping or Insurance as Requested: $_____

☐ * Requestor has requested expedited shipping or insurance

Number:

x _____ = $_____

x _____ = $_____

x _____ = $_____
x _____ = $_____

Costs:

6c. Web Mailing Cost

$_____

Subtotal Fees Before Waivers, Discounts or Deposits:

☐ Cost estimate
☐ Bill

Estimated Time Frame to Provide Records:

_____ (*days or date*)

The time frame estimate is nonbinding upon the Road Commission, but the Road Commission is providing the estimate in good faith. Providing an estimated time frame does not relieve the Road Commission from any of the other requirements of this act.

1. Labor Cost for Copying:	$_____
2. Labor Cost to Locate:	$_____
3a. Labor Cost to Redact:	$_____
3b. Contract Labor Cost to Redact:	$_____
4. Copying/Duplication Cost:	$_____
5. Mailing Cost:	$_____
6a. Copying/Duplication of Records on Website:	$_____
6b. Labor Cost for Copying Records on Website:	$_____
6c. Mailing Costs for Records on Website:	$_____
Subtotal Fees:	$_____

Waiver: Public Interest

A search for a public record may be conducted or copies of public records may be furnished without charge or at a reduced charge if the Road Commission determines that a waiver or reduction of the fee is in the public interest because searching for or furnishing copies of the public record can be considered as primarily benefiting the general public.

☐ All fees are waived OR ☐ All fees are reduced by: _____%

Subtotal Fees After Waiver: $_____

Discount: Indigence

A public record search **must** be made and a copy of a public record **must** be furnished **without charge for the first $20.00 of the fee** for each request by an individual who is entitled to information under this act and who:

1) Submits an affidavit stating that the individual is indigent and receiving specific public assistance, OR

2) If not receiving public assistance, stating facts showing inability to pay the cost because of indigence.

If a requestor is ineligible for the discount, the public body shall inform the requestor specifically of the reason for ineligibility in the public body's written response. An individual is ineligible for this fee reduction if ANY of the following apply:

(i) The individual has previously received discounted copies of public records from the same public body twice during that calendar year, OR

(ii) The individual requests the information in conjunction with outside parties who are offering or providing payment or other remuneration to the individual to make the request. A public body may require a statement by the requestor in the affidavit that the request is not being made in conjunction with outside parties in exchange for payment or other remuneration.

☐ Eligible for Indigence Discount

Subtotal Fees After Discount (subtract $20): $_____

Discount: Nonprofit Organization

A public record search **must** be made and a copy of a public record **must** be furnished **without charge for the first $20.00 of the fee** for each request by a nonprofit organization formally designated by the state to carry out activities under subtitle C of the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000 and the federal Protection and Advocacy for Individuals with Mental Illness Act, if the request meets ALL of the following requirements:

(i) Is made directly on behalf of the organization or its clients.

(ii) Is made for a reason wholly consistent with the mission and provisions of those laws under section 931 of the Michigan Mental Health Code, 1974 PA 258, MCL 330.1931.

(iii) Is accompanied by documentation of its designation by the state, if requested by the Road Commission.

☐ Eligible for Nonprofit Discount

Subtotal Fees After Discount (subtract $20): $_____

Deposit: Good Faith The Road Commission may require a good-faith deposit in either its initial response or a subsequent response before providing the public records to the requestor **if the entire fee estimate or charge authorized under this section exceeds** $50.00, based on a good-faith calculation of the total fee. The deposit cannot exceed 1/2 of the total estimated fee. **Percent of Deposit:** _____% **Date by Which Deposit Must be Received:** _____ (*48 days after this notice was sent*)	Date Paid: _____	Deposit Amount Required: $_____
Deposit: Increased Deposit Due to Previous FOIA Fees Not Paid In Full After the Road Commission has granted and fulfilled a written request from an individual under this act, if the Road Commission has not been paid in full the total amount of fees for the copies of public records that the Road Commission made available to the individual as a result of that written request, **the Road Commission may require an increased estimated fee deposit of up to 100% of the estimated fee before it begins a full public record search for any subsequent written request from that individual** if ALL of the following apply: (a) The final fee for the prior written request was not more than 105% of the estimated fee. (b) The public records made available contained the information being sought in the prior written request and are still in the Road Commission's possession. (c) The public records were made available to the individual, subject to payment, within the best effort estimated time frame given for the previous request. (d) Ninety (90) days have passed since the Road Commission notified the individual in writing that the public records were available for pickup or mailing. (e) The individual is unable to show proof of prior payment to the Road Commission. (f) The Road Commission calculates a detailed itemization, as required under MCL 15.234, that is the basis for the current written request's increased estimated fee deposit. The Road Commission **can no longer require an increased estimated fee deposit** from an individual if ANY of the following apply: (a) The individual is able to show proof of prior payment in full to the Road Commission, OR (b) The Road Commission is subsequently paid in full for the applicable prior written request, OR (c) Three hundred sixty-five (365) days have passed since the individual made the written request for which full payment was not remitted to the Road Commission. **Date by Which Deposit Must be Received:** _____ (*48 days after this notice is sent*)	Date Paid: _____	Percent Deposit Required: _____% Deposit Required: $_____
Late Response Labor Costs Reduction If the Road Commission does not respond to a written request in a timely manner as required under MCL 15.235(2), the Road Commission **must** do the following: (a) **Reduce the charges for labor costs** otherwise permitted by 5% for each day the Road Commission exceeds the time permitted for a response to the request, **with a maximum 50% reduction**, if EITHER of the following applies: (i) The late response was willful and intentional, OR (ii) The written request included language that conveyed a request for information within the first 250 words of the body of a letter, facsimile, electronic mail, or electronic mail attachment, or specifically included the words, characters, or abbreviations for "freedom of information," "information," "FOIA," "copy", or a recognizable misspelling of such, or appropriate legal code reference for this act, on the front of an envelope, or in the subject line of an electronic mail, letter, or facsimile cover page.	Number of Days Over Required Response Time: _____ Multiply by 5% = Total Percent Reduction: _____	Total Labor Costs $_____ Minus Reduction $_____ = Reduced Total Labor Costs $_____
The Public Summary of the Road Commission's FOIA Procedures and Guidelines is available free of charge from: Website: _____ Email: _____ Phone: _____ Address:_____ **Request Will Be Processed,** **But Balance Must Be Paid Before Copies May Be Picked Up, Delivered or Mailed**	Date Paid: _____	Total Balance Due: $_____

XXIII. RECORD RETENTION

Forms:

EMPLOYMENT PRACTICES GUIDELINE

Record Retention - General Considerations

Local governments are responsible for ensuring that the public records they create and receive while conducting public business are retained and destroyed in accordance with Michigan law. Two Michigan statutes indicate that such records belong to the State of Michigan:

- Section 491 of the Michigan Penal Code (MCL750.491) provides that all public records belong to the State of Michigan and that any person who willfully destroys them without complying with the State's procedures for disposal of records shall be guilty of a misdemeanor, punishable by imprisonment for not more than two (2) years or by a fine of not more than $1,000.00.
- Section 5 of the Michigan History Center Act (MCL 399.811) provides that all records required to be kept by local public officers in the discharge of their duties, records required to be filed in local public offices, and records which represent memorials of transactions of local public officers, are considered to be property of the State and shall not be disposed of, mutilated, or destroyed except as provided by law.

A "public record" is defined by Michigan's Freedom of Information Act as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." The Department of Technology, Management & Budget—Records Management Services, the State agency responsible for assisting local government agencies with addressing records management and preservation issues, utilizes this definition in interpreting the above-referenced statutes.

Not all records kept by a local government agency are considered "public records". The Department of Technology, Management & Budget—Records Management Services has adopted a General Schedule #1: Non-Record Materials (https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Services/Records-Management/RMS_GS1.pdf?rev=4226d45fc16d43528dd40d0465fb41d6&hash=FEE9933B3B12E445A9065369431C8B87), that defines non-record materials as recorded information that is in the possession of an agency, but is not needed to document the performance of an official function. Examples of non-records include:

- Draft documents that are replaced by new or final versions, drafts that are not needed to document the development of the final record, and drafts that are not required to be retained by an agency-specific schedule;
- Duplicate copies of a document that are retained for convenience of reference;
- Information that does not document official activities;
- Letters of transmittal (including routing slips) that do not add any information to the transmitted material;

- Notes and recordings that have been transcribed into another format for record retention;
- Publications that are received from outside sources and retained for reference purposes, such as newsletters, brochures, catalogs, books, professional development materials, etc.;
- Mass mailings, notices, flyers, etc., that are received for information purposes;
- Advertisements, spam, and junk mail;
- Tracking documents or tools that are used to ensure that all steps in a business process take place, but are not the official documentation of the action or activity; and,
- Research and reference materials that are collected from outside sources but are not needed to document how the final decision is made.

These types of materials can be disposed of when they have served their intended purpose.

All other records should be listed on an approved Retention and Disposal Schedule that identifies how long the records must be kept, when they may be destroyed, and when certain records can be sent to the Archives of Michigan for permanent preservation. All Retention and Disposal Schedules must be approved by the Records Management Services, the Archives of Michigan, and the State Administrative Board. Retention periods listed on approved Retention and Disposal Schedules have the force of law. There are two types of schedules that local government agencies may use:

- **General Schedules:** cover records that are common to a local government agency. General schedules may not address every single record that a particular agency may have in its possession. General schedules do not mandate that any of the records listed on the schedule be created. However, if they are created in the normal course of business, the schedule establishes a minimum retention period for them.
- **Agency-Specific Schedules:** cover records that are unique to a particular local government agency. Agency-specific schedules always override general schedules if a record is covered on both. Agency-specific schedules only address the records of the agency named on the schedule and may not be used by another agency. The retention periods are absolute minimums and maximums.

There is a General Schedule which has been approved and is applicable to county road commissions. It is General Schedule #9 (https://www.michigan.gov/-/media/Project/Websites/dtmb/Services/Records-Management/RMS_GS9.pdf?rev=d69b6121bd5945cda100d564ecaef093). All county road commissions must follow this General Schedule and the retention requirements it contains with regard to any records created which are listed on it.

There are also several other General Schedules which have some applicability to some of the records which county road commissions create. Specifically, General Schedule #26 – Local Government Human Resources (https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Services/Records-

Management/RMS_GS26.pdf?rev=0d8759d6d0b1477bb0a183a64ec144f6&hash=394C05AB86D975BDBAAF8C6DE27B7AAF) covers records that are commonly found in the Human Resources offices of counties, cities, townships, villages, public schools, local authorities, public colleges and public universities. General Schedule #30 – Local Government Information Technology (https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Services/Records-Management/rms_gs30.pdf?rev=0c27bf5c00524ea79e5e8dd04223b936&hash=28EBB9B080EE6650ED5D6E3175A04C32) covers records that are commonly found in the Information Technology offices of counties, cities, townships, villages, public schools, local authorities, public colleges and public universities. General Schedule #31 – Local Government Financial Records (https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Services/Records-Management/RMS_GS31.pdf?rev=eea401ed2ccc474cace9df16f8e1246a&hash=CB6F6428CDBC20DAA4DC22243563CAFF) covers financial records that are commonly maintained by counties, cities, townships, villages, public schools, local authorities, public colleges and public universities. General Schedule #32 – Local Government Parks and Recreation Departments (https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Services/Records-Management/rms_gs32.pdf?rev=e2d4e46c2fae4855841539121f778b40&hash=0DBEE5D40009B445C424B7945BF80BA3) covers records that are commonly found in the park and recreation departments within counties, cities, townships, villages, and local authorities. To the extent a county road commission maintains records which are contained on any of these schedules, it should adhere to the retention period contained therein.

Records cannot legally be destroyed without the authorization of a schedule. The default retention period for records that are not listed on a schedule is permanent, because there is no authorization to destroy them.

Agencies must immediately cease the destruction of all relevant records (even if destruction is authorized by an approved Retention and Disposal Schedule) if they receive a FOIA request, if they believe that an investigation or litigation is imminent, or if they are notified that an investigation or litigation has commenced. If relevant records exist in electronic formats (such as email, digital images, word processed documents, databases, backup tapes, etc.), the agency should notify its technology staff to make sure the records are properly preserved. FOIA requires a public body to protect public records from loss, unauthorized alteration, mutilation, or destruction. FOIA allows a civil action to be commenced in circuit court within 180 days after a public body's final determination to deny a request. Consequently, a public body should preserve any records requested under FOIA for at least 180 days after a final determination to deny a request under the Act and through the pendency of any lawsuit which might be filed during that period of time. Failure to cease the destruction of relevant records could result in sanctions and/or penalties.

EMPLOYMENT PRACTICES GUIDELINE

Record Retention - Electronic Records and Email

As with their paper records, it is essential that government agencies manage their electronic records appropriately. An "electronic record" is information recorded by a computer that is produced or received in the initiation, conduct or completion of an agency or individual activity. Examples of electronic records include e-mail messages, word-processed documents, electronic spreadsheets, digital images and databases. Many electronic records are maintained as part of an electronic recordkeeping system, such as geographic information systems (GIS), digital image storage systems, computer-aided design (CAD) systems, etc. Electronic records are public records if they are created or received as part of performing official duties.

All electronic records, including e-mail messages, that are created, received, or stored by a government agency are public property. They are not the property of employees, vendors, or members of the public. Electronic records might have to be released in accordance with the Freedom of Information Act (FOIA) or during discovery in litigation which is filed against the public agency. Employees must be prepared to provide access to their electronic records under such circumstances. Even electronic records that are created using home computers are subject to FOIA and possible discovery if they relate to official public business.

With regard to e-mail messages, employee responsibilities for managing them are the same as for other records. Specifically, employees should:

- Organize their e-mail messages so that they can be located and used.
- Use an approved Retention and Disposal Schedule to identify how long e-mail messages must be kept.
- Keep e-mail messages for their entire retention period.
- Delete e-mail messages in accordance with an approved Retention and Disposal Schedule.

There is not a single retention period for all e-mail. The retention period depends upon the content of the message and the business process it supports. A few examples:

- Junk mail and mass mailings should be deleted right away (according to the General Schedule for Non-records).
- General correspondence needs to be kept for 3 years (according to General Schedule #9).
- If an e-mail message is related to a contract, it needs to be kept as long as all other contract records.

- If an e-mail message is about a personnel issue, it needs to be kept as long as all other personnel records.

A decision tree for e-mail records, developed by DTMB Record Management Services, can be found at the following link: https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Services/Records-Management/rms_email_decision.pdf?rev=4fe4ae58f44c430dbe6a19a81975ff34&hash=6BE58ABE207ABACD773B43BB63E3C50D.

Many electronic records need to be kept longer than the original technology that was used to create them. New technology is not always compatible with older technology that agencies may have used. Agencies are responsible for ensuring that older electronic records remain accessible as technology is upgraded or changed. Each time technological upgrades and changes take place, agencies should inform their information technology staff about the existence and location of older electronic records so they can be migrated to the new technology.

EMPLOYMENT PRACTICES GUIDELINE

Record Retention - Federal Retention Requirements

In addition to the State of Michigan's record retention requirements, there are numerous federal statutes and regulations which govern how long certain employment records must be kept. The following retention periods are specified:

General Employment Records

Type of Document	Retention Period	Law
Employee name, address, social security number, gender, date of birth	3 years from last entry	FLSA, FMLA, ADEA
Biographical/demographic data	3 years	FLSA
Employment contracts	3 years	FLSA
Discrimination-related records	Until final disposition	Title VII, ADEA

Employee Recruitment and Hiring Records

Type of Document	Retention Period	Law
Job posting and advertisement	1 year	FLSA, ADA, ADEA
Position, job category	3 years from last entry	ADEA
Job applications, resumes, interview and hiring records, employment tests	3 years	FLSA
Job offerings and other related hiring records	2 years	Title VII, ADA
I-9 form	3 years after hire or 1 year after termination, whichever is later	IRCA
Date of hire	1 year after created	Title VII, ADA
Job descriptions	2 years after created	FLSA, EPA

Employment Action Records

Type of Document	Retention Period	Law
Dates and reasons for employee promotion, demotions, transfers, rehire, and termination	1 year after personnel action	ADEA, Title VII, ADA
Performance evaluations	2 years after created	FLSA, EPA
Training opportunities or agreements	Duration of training or 1 year after personnel action, whichever is later	FLSA, EPA, ADEA, Title VII, ADA
Layoffs	1 year after created	ADEA, Title VII, ADA
Terminations	1 year after termination	ADEA, Title VII, ADA

Compensation

Type of Document	Retention Period	Law
Daily and weekly work hours	3 years from last entry	FLSA, EPA, FMLA
Regular pay rate and exclusions	3 years from last entry	FLSA, EPA, FMLA, ADEA
Performance evaluations as related to pay changes	3 years	FLSA
Dates, amounts of total compensation, wages paid per pay period	3 years after payment	FLSA, EPA, FMLA, ADEA
Straight-time and overtime earnings per day/week	3 years after payment	FLSA, EPA, FMLA, ADEA
Deductions and additions to or from pay	3 years after payment	FMLA
Pension, annuity payments	3 years after payment	FLSA, EPA, FMLA
Accident and health plan payments	3 years after payment	FLSA, EPA, FMLA
Work schedules, timecards	3 years from last entry	FMLA
Fringe benefit payments	3 years after payment	FLSA, EPA, FMLA
Wage rate tables	2 years from last entry	FLSA, EPA
Merit/seniority systems	2 years after created or 1 year after system discontinued	FLSA, EPA, ADEA
Contracts, collective bargaining agreements	3 years from last entry	FLSA, EPA
Withholding agreements, dates and amounts of withholdings for specific taxes	3 years after created	FLSA, EPA, FMLA
Tax and withholding records	4 years after created	FICA, FUTA

Health and Medical Records

Type of Document	Retention Period	Law
Exposure and monitoring records such as for blood-borne pathogen or toxic substance exposure	30 years after termination	MIOSHA
OSHA forms 300, 301, and 300A	5 years after relevant year	MIOSHA
Records of driver alcohol test results indicating an alcohol concentration of 0.02 or greater	5 years	FMCSRs
Records of driver verified positive controlled substances test results	5 years	FMCSRs
Documentation of refusals to take required alcohol and/or controlled substances tests	5 years	FMCSRs
Driver SAP evaluation and referrals	5 years	FMCSRs
Calibration documentation for breath alcohol testing equipment	5 years	FMCSRs
Records related to the administration of the alcohol and controlled substances testing programs	5 years	FMCSRs
Annual summary of the results of the alcohol and controlled substances testing programs	5 years	FMCSRs
Records related to the alcohol and controlled substances collection process (except calibration documentation)	2 years	FMCSRs
Records of negative and cancelled controlled substances test results and alcohol test results with a concentration of less than 0.02	1 year	FMCSRs

Records related to the education and training of supervisors and drivers	Until 2 years after individual ceases performing functions for employer	FMCSRs
Employment physicals, medical exams, or records	30 years after termination	MIOSHA
Physician certification for FMLA leave	3 years from leave dates	FMLA

Benefit and Leave Records

Type of Document	Retention Period	Law
Benefit determination	3 years from leave dates or 1 year after plan termination, whichever applies	FMLA, ADEA
Benefit plan descriptions, reports, supporting documents	3 years from leave dates or 1 year after plan termination, whichever applies	FMLA, ADEA
Dates/hours of FMLA leave	3 years from leave dates	FMLA
FMLA notices (employee and employer-generated)	3 years after issued	FMLA
Records of FMLA disputes	3 years after dispute	FMLA
Employer paid/unpaid leave policies	3 years from last policy change	FMLA

To the extent any of these retention periods are shorter than or exceed those contained in the General Schedules, a county road commission must maintain the record in question for the longer period of time.

EMPLOYMENT PRACTICES GUIDELINE

Record Retention - Litigation Holds and Discovery

When the prospect of litigation is present, parties are required to preserve documents that may be relevant to the issues to be raised, and their failure to do so may result in a finding of spoliation of evidence. The most common penalty for spoliation of evidence is an adverse inference charge. This basically means that a finder of fact, like a jury, is entitled to take a negative inference against a party because that party destroyed evidence. The obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation. At a minimum, a party must ensure that documents are preserved, not deleted from an electronically stored information system or otherwise destroyed or made unavailable.

The scope of a litigation hold will be driven by the documents and electronically stored information which are relevant to the facts and circumstances likely to be at issue in the litigation. The type of evidence which will be deemed relevant will, of course, depend on the specific facts. Rule 401 of the Federal Rules of Evidence defines relevance as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The benchmark of discovery in civil cases is whether the information sought is "reasonably calculated to lead to the discovery of admissible evidence." The courts have recognized that the duty to preserve is not unlimited and does not require litigants to preserve every shred of paper, every email, or electronic document, and every backup tape. Nonetheless, discovery sanctions for failing to preserve relevant evidence can be quite severe and may include orders which direct that certain facts be taken as established, prohibit the disobedient party from supporting or opposing certain claims or from introducing certain matters into evidence, rendering a default judgment against the disobedient party, imposing monetary fines, or excluding evidence if the court later concludes relevant evidence was destroyed in bad faith. A county road commission which is involved in litigation would be well-advised to work closely with its legal counsel in preserving any and all records which are arguably relevant to the litigation.

One of the main areas of contention in producing records in litigation discovery is with regard to electronically stored information. Information is considered "electronic" if it exists in a medium that can only be read by a computer, including email, web pages, word processing files, audio and video files, images, computer databases, spreadsheets and virtually anything else that is stored on a computing device. These media include, but are not limited to, servers, desktops, laptops, cell phones, hard drives, flash drives, PDAs and MP3 players. Electronic discovery can also include a file's metadata (electronically stored data about the characteristics of the data), which can include information about the file's origin or validity. The media that is used to store this information includes cache memory, magnetic disks (such as computer hard drives or floppy disks), optical disks (such as DVDs

or CDs), magnetic tapes and flash memory (such as “thumb” or “flash drives”). All such “documents” need to be considered, retained, and retrieved in the event of litigation if they contain any relevant information.

EMPLOYMENT PRACTICES GUIDELINE

Record Retention - Creating Agency-Specific Schedules

If a local government needs a different retention period than the one listed on a general schedule, they can submit a specific schedule for approval. The specific schedule will override the general schedule. Below are the Michigan Department of Technology, Management & Budget's (DTMB's) instructions for creating specific schedules:

1. Conduct an inventory of all records or record series (both paper and electronic) that are created or maintained by the agency.
    - It helps to select a room or cubicle, and then survey each drawer of each file cabinet or shelving unit to determine its contents.
    - While conducting the inventory, it would be a good idea to ensure that all drawers, shelves, file folders, boxes, etc. are properly labeled.
    - Identify any databases, spreadsheets, etc. that are used to support business processes or to help access paper files (such as indexes).
2. Create a list of the record series identified as a result of the inventory and include a brief description of the function and content of each series. Try to answer the following questions:
    - Why is the record series created?
    - Does a law mandate the creation of the record series? If so, which law?
    - How are the records organized (alphabetically, chronologically, etc.)?
    - What format(s) does the record series exist in (paper, photographs, maps, drawings, microfilm, digital images, e-mail, database, etc.)?
    - What information can be found on a particular record (names, dates, social security numbers, addresses, etc.)?
    - Does the record series contain confidential information?
    - When did the agency first start to create/receive this record series? Is the record series still created?
    - Do other agencies maintain the same exact record series? If so, who? Why?
3. Establish retention periods for each record series based upon the following:
    - Statutorily required retention period, if any
    - Statute of limitations requirements
    - Audit requirements
    - Administrative need
    - Potential historical value
4. Fill out the DTMB's Record Inventory form. A copy, along with instructions and example, is included in this chapter.

5. Fill out the Local Government Contact Information form. A copy is included in this chapter. Send both the completed Record Inventory and Local Government Contact Information forms to DTMB Records Management Services via email at recordscenter@michigan.gov for review.
6. When the draft is ready for approval, DTMB Records Management Services will use the State of Michigan eSignature tool to send the schedule to the agency representative for signing. The agency contact person will be notified when the schedule is approved.
7. Distribute the newly approved schedule to affected employees and establish a routine for disposing of the records according to the provisions of the schedule.

A "record series" is a logical grouping of related records normally filed together to support a specific business process. A "record" is an individual piece of recorded information. For example, the January 2022 minutes of a Board of County Road Commissioners is an individual record. However, all minutes of a Board of County Road Commissioners, organized chronologically with meeting notices, agendas and supporting documentation, constitute a record series.

EMPLOYMENT PRACTICES GUIDELINE

Record Retention - Document Imaging and Microfilming

The Records Reproduction Act (MCL 24.401-406) authorizes the reproduction of public records by Michigan government agencies. Agencies that want to destroy original documents and use their digital images or microfilm as their official record must create their images according to the State of Michigan's standards. A copy of those Technical Standards can be found at the following links:

- https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Services/Records-Management/rms_st_digitizing.pdf?rev=6e94675353fc4ac0b3292999c4656869&hash=AD4C96F72CC3450E7EAFECD6F58A0F2A (Technical Standards for Capturing Digital Images from Paper or Microfilm)
- https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Services/Records-Management/rms_st_film_from_paper.pdf?rev=1c73fc8c6bc34a1a9b79c172a59196c1&hash=DB662EC2DEB4216117170114CEE616FD (Technical Standards for Capturing Microfilm Images from Paper)
- https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Services/Records-Management/rms_st_film_from_digital.pdf?rev=427f745773bf4c0ab1cd8f0c8f3e8cf2&hash=2ADC9C698E3ACCA34101882BFBEF8131 (Technical Standards for Microfilming Digital Records)

When processed and stored correctly, digital imaging and microfilm are acceptable alternatives to original paper documents for the long-term storage of information. DTMB Records Management Services administers the State of Michigan's master contracts for digital imaging and microfilming services. Both state and local government agencies can use these services. DTMB Records Management Services works with the vendor to ensure that agencies receive a quality product at a fair price. Agencies that use these contracts receive free consulting services from DTMB Records Management Services to ensure that a quality product is created. These consulting services include:

- Analyzing the records to determine if digital imaging and/or microfilming meets the agency's needs.
- Analyzing the business process to determine when in the record lifecycle digital imaging and/or microfilming should take place.
- Assisting the agency with cost-justifying the need for the imaging and/or microfilming application.

- Developing a Statement of Work that is signed by the agency and the vendor to ensure that a quality product is created.

For more information, agencies may contact Records Management Services at 517-335-9132.

EMPLOYMENT PRACTICES GUIDELINE

Record Retention - Disposal of Public Records

When public records are ready to be disposed of pursuant to a Retention and Disposal Schedule, there are two types of record disposition, i.e., destruction or permanent preservation with public access through a transfer to the Archives of Michigan.

Confidential Records Destruction

Some public records contain sensitive or confidential information. These records should not be placed in a regular trash or recycle bin when they are eligible to be destroyed. It is important that government agencies ensure that these records are destroyed in a manner that prevents the inappropriate release of information.

The State of Michigan administers a master contract with a vendor that complies with the State's requirements for confidential destruction of records. The State of Michigan's contract requirements are:

- **Paper**: 1mm x 5mm particle size (can be accomplished with pulverization or grinding, and all material is recycled)
- **Film and computer disks**: 1/35-inch particle size (can be accomplished with grinding)

The rates and terms for this contract apply to State government agencies only, but local governments may contact this vendor for a price quote and information. The contracted vendor is Rapid Shred. For further information, local governments can contact Scott Dennis at 616-735-2900.

Suspending Destruction

Agencies and their employees must immediately cease the destruction of all relevant records (even if destruction is authorized by an approved Retention and Disposal Schedule) if they receive a FOIA request, if they believe that an investigation, audit, or litigation is likely to happen, or if they are notified that an investigation, audit, or litigation has started. If relevant records exist in electronic formats (such as email, digital images, word processed documents, databases, etc.), the agency must notify their information technology staff for assistance. Failure to cease the destruction of relevant records could result in penalties.

Transferring Records to the Archives of Michigan

Local government agencies can only relinquish legal custody of their public records to the Archives of Michigan. Local governments that are ready to transfer records (including electronic records) to the Archives of Michigan need to complete an "Archives Transfer Form," providing a complete description of the records, the inclusive dates for the records, and the record series number from the Retention and Disposal Schedule on the form.

The Archives Transfer Form may be obtained by contacting the Archives of Michigan at 517-335-2576 or govarchives@michigan.gov. The completed form must be approved by the Archives of Michigan before the records are transferred. To arrange approval of the transfer, local governments should email the Archives at govarchives@michigan.gov. An archivist will review the form and work with the agency on transfer logistics after it is approved.

The agency should maintain the order of the original filing system when packing records for transfer to the Archives. The records should only be packed in boxes with the dimensions 15" x 12" x 9.75", because other boxes will not fit on the shelves. The box should be sealed as follows:

1. Fold the back flap first, then fold the side flaps, and fold the front flap on top.
2. Place the tape across the front flap to seal the box.
3. The top and sides of the box should not bulge.

Records Retention and Disposal Schedule – Local Government
Record Inventory
Michigan Department of Technology, Management and Budget
Records Management Services

Agency Name:

Item #	Record Series Title	Record Series Description	Retention Period
			RETAIN UNTIL: PLUS: THEN:
			RETAIN UNTIL: PLUS: THEN:
			RETAIN UNTIL: PLUS: THEN:
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State of Michigan

Records Management Services

Records Retention and Disposal Schedule
Local Government Record Inventory Form
Instructions and Example

Local governments must prepare and submit a Record Inventory form for the Retention and Disposal Schedule (instructions below, example on page #2).

1. Double-click on the page header, where the *agency name* field is located. Provide the name of the agency submitting the schedule. For example, **Agency Name:** Michigan County - Clerk's Office.
2. Double-click on the table in the page body to enter the record inventory data, per the instructions below. List all records maintained by the agency that are not currently included on an applicable general schedule or agency-specific schedule. *Delete unnecessary rows. Please do not use colored fonts.*
3. Fill out the Local Government Contact Information form.
4. Send the Record Inventory and Local Government Contact Information forms to DTMB Records Management Services via email at recordscenter@michigan.gov for review.
5. When the draft is ready for approval, DTMB Records Management Services will use the State of Michigan eSignature tool to send the schedule to the agency representative for signing. The agency contact person will be notified when the schedule is approved.

Item #	Record Series Title	Record Series Description	Retention Period
Agency should assign a unique number to each record series listed on the schedule for reference purposes.	A record series is a group of records that are maintained together to document a business process or activity. Provide a title for the record series.	Describe why these records are created and what activity they support. List the types of documents typically found in the files, or the major data fields in the database.	Identify how long the records need to be kept. Format the retention period as follows: **RETAIN UNTIL:** [*What event or activity triggers the clock on the retention period?*] **PLUS:** [*How long are the records needed after the trigger? Days, months years?*] **THEN:** [*Are the records destroyed or transferred to the Archives of Michigan at the end of the retention period?*]

EXAMPLE

The following records are listed below as an example of how the schedule should look.

Agency Name: Michigan County - Clerk's Office

Item #	Record Series Title	Record Series Description	Retention Period
103	Freedom of Information Act (FOIA) Requests	These records document any requests for information or public records. They may include, but may not be limited to, requests for information, correspondence, a copy of the information released, and billing information.	RETAIN UNTIL: Request is closed PLUS: 1 year THEN: Destroy
105	Planners/Calendars	These records document an individual employee's work-related meetings, assignments, and tasks. They may be electronic or physical planners and calendars. Individual employees are responsible for retaining their planners/calendars for the duration of this retention period.	RETAIN UNTIL: Event takes place PLUS: 2 years THEN: Destroy
111	Policies, Procedures and Directives	These records document the policies procedures of the department. They also include administrative manuals.	RETAIN UNTIL: Replaced by a new version PLUS: 5 years THEN: Destroy
121	Visitor Logs/Registers	These records document who visited a particular office. They may be used for security purposes or to track visitor statistics. They may include, but may not be limited to, the visitor's name, and the date and time of the visit.	RETAIN UNTIL: Date created PLUS: 2 years THEN: Destroy

RECORDS RETENTION AND DISPOSAL SCHEDULE - LOCAL GOVERNMENT
CONTACT INFORMATION SHEET

Michigan Department of Technology, Management and Budget
Records Management Services

SECTION 1. LOCAL GOVERNMENT CONTACT INFORMATION

Provide *contact information* for the local government agency that is submitting the Retention and Disposal Schedule for review and approval, so DTMB-Records Management Services knows who to contact about questions or concerns.

1. Date

2. **Local Government Type** *(Click on "Choose an item." And select from the drop-down list):*

   Choose an item.

3. Agency Name:

4. Contact Person Name:

5. Contact Person Phone Number:

6. Contact Person Email:

SECTION 2. AGENCY REPRESENTATIVE

Provide the name and email address of the *agency representative* who will be signing the schedule, so the schedule can be sent to them using the State of Michigan's eSignature tool.

1. Agency Representative Name:

2. Agency Representative Job Title:

3. Agency Representative Email:

SECTION 3. COMMENTS

4. Comments (optional):

SUBMIT TO: DTMB Records Management Services via email at recordscenter@michigan.gov for review (include Local Government Record Inventory form).

Note: This model policy was developed for use by local governments in Michigan. Local governments may edit this document and adopt it. If you are interested in referring to them, the records management policy and procedures for the Executive Branch are published in the Administrative Guide to State Government, chapter 900, which is available online at http://www.michigan.gov/dtmb/0,1607,7-150-9131_9347---,00.html#900PRESERVATION.

[AGENCY NAME]
RECORDS MANAGEMENT POLICY

The [agency name], recognizing that good records management is vital to the effective and efficient operation of government operations, enacts the following records management policy:

Applicability

This records management policy shall apply to all employees, agents, independent contractors, and volunteers of the [agency name].

Definitions

Agency-specific schedule: covers records that are unique to a particular government agency. Agency-specific schedules only address the records of the agency named on the schedule, and may not be used by another agency. Any record that is not covered by a general schedule must be listed on an agency-specific schedule. Agency-specific schedules always supersede general schedules.

General schedule: covers records that are common to a particular type of government agency. General schedules may not address every single record that a particular office may have in its possession. *General schedules do not mandate that any of the records listed on the schedule be created.* However, if they are created in the normal course of business, the schedule establishes a minimum retention period for them. Retention for longer periods is authorized if the individual has reason to believe that a record may be required beyond the minimum retention period for the efficient operation of the agency.

Non-record Materials: include, but are not limited to, extra copies of documents retained only for convenience of reference, and letters of transmittal/routine correspondence that do not document significant activities of the agency. A more comprehensive description may be found within General Schedule #1 which is available from the State of Michigan, Records Management Services' website (see below).

Public Records: recorded information "prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." Michigan Freedom of Information Act (FOIA) (M.C.L. 15.231 - 15.232)

Retention and Disposal Schedule: define how long each record, regardless of its physical format, should be retained. Retention and Disposal Schedules also indicate which records have archival value, and when those records should be transferred to the Archives of Michigan. According to Michigan law, no public records may be destroyed without the authorization of an approved Retention and Disposal Schedule. All schedules are approved by the Records Management Services, the Archives of Michigan and the State Administrative Board.

Records

Each individual who creates, sends or receives official records is responsible for retaining these records in accordance with this records management policy.

Non-Records

Employees are not required to retain non-record materials once their reference value to the individual has expired. However, if a FOIA request is received, or if the agency becomes involved in litigation, non-records may be requested and may be released, if they have not already been destroyed.

Record Retention

All public records shall be retained in accordance with an approved Retention and Disposal Schedule. Records not listed on an approved Retention and Disposal Schedule may not be disposed of until a schedule is approved. Michigan Penal Code (MCL 750.491)

Record Maintenance

Individuals and offices shall organize their records to promote fast and efficient retrieval of information. Appropriate and cost-effective office equipment, indexes and tools shall be used to maintain records.

Records that will be retained for more than 10 years shall be stored in an environment that facilitates the security and stability of the storage media. Recommended

environmental conditions are available online at http://www.michigan.gov/documents/hal_mhc_rms_storage_conditions_125646_7.pdf.

The [agency director] shall work in conjunction with the [information technology personnel/department] to determine the most cost effective and reliable method of maintaining electronic records for their full retention period, so technology changes do not render them in accessible and unusable. The [agency director] shall publish that method to all affected individuals.

The [agency name] shall comply with the State of Michigan's standards for record reproduction, as authorized by the Records Reproduction Act (MCL 24.401-24.406). These standards are available online at http://www.michigan.gov/dtmb/0,5552,7-150-9141_21738-362754--,00.html.

Records containing sensitive or confidential information shall be protected against unauthorized access, especially records that are protected by state or federal laws, records containing private information, financial information, background checks, medical information, and social security numbers. Individuals and offices shall employ appropriate locks, passwords and other devices to protect the privacy of this information.

Separation from Employment

Employees shall not take public records with them when they terminate employment with the [agency name], and they shall not destroy records that have not yet fulfilled their approved retention period. Supervisors are responsible for ensuring that the records (including e-mail and other electronic records) of employees who are separating from employment with the [agency name] continue to be retained in accordance with this policy.

Disposal

Public records which have reached their minimum retention period, and which are no longer required for the efficient operation of the agency, may be disposed of. Disposal shall be made by a method which is guaranteed to ensure the privacy of sensitive or confidential information.

The [agency name] shall destroy sensitive or confidential information by [describe method, vendor, internal procedures, etc.]. The [agency name] shall destroy open records by recycling or regular trash disposal.

Some records possess permanent or historical value. These records may be designated for eventual transfer to the Archives of Michigan for permanent preservation. The [agency name] shall follow the Archives' procedures for transferring records, which are available online at http://www.michigan.gov/mhc/0,4726,7-282-61083-332203--,00.html.

Litigation, Investigations, and Freedom of Information Act Requests

No records that are the subject of litigation, a pending investigation request, or a pending Freedom of Information Act (FOIA) request shall be destroyed until the legal action or activity has ended, even if the records are otherwise scheduled for destruction pursuant to this policy. Any individual with knowledge of pending litigation, a pending investigation, or a FOIA request shall immediately inform the [agency director or legal counsel]. The [agency director or legal counsel] shall direct all relevant individuals to immediately cease disposal of all records relevant to the pending litigation, pending investigation, or FOIA request. If the relevant records are in electronic form (including e-mail) the [agency director or legal counsel] shall notify [information technology personnel/department] so they can protect the records from destruction (which may include stopping the rotation of backup tapes). Should questions arise as to what records are relevant to the pending litigation, pending investigation, or FOIA request, the [agency director or legal counsel] shall direct the immediate cessation of the disposal of all records. The moratorium on the disposal of all records relevant to the pending litigation, pending investigation, or FOIA request shall remain in effect for the duration of the litigation, investigation, or until the FOIA request had been fully processed.

Failure to Adhere to this Records Management Policy

Failure to adhere to this records management policy may result in applicable discipline, up to and including discharge from employment, termination of the contractor status, termination of the volunteer relationship, or expulsion.

Further, the removal, mutilation, or destruction of public records may result in civil and criminal liability, up to and including a penalty of not more than two years in state prison or a fine of not more than $1,000.

References

Laws

M.C.L. 15.231 - 15.232 (Freedom of Information Act, Definitions)
M.C.L. 18.1284 - 1292 (Management and Budget Act, Records Management)
M.C.L. 399.1 - 10 (Historical Commission Act)
M.C.L. 750.491 (Penal Code, Public Records)
Note: The Michigan Complied Laws are available online at http://www.legislature.mi.gov/

General Schedules for Local Governments

A current list of the general schedules that are approved for use by local governments is available online at http://www.michigan.gov/dtmb/0,5552,7-150-9141_21738_31548-56101--,00.html.

Additional Information

Agencies may contact the State of Michigan, Records Management Services at (517) 335-9132. Additional information is also available from the Records Management Services' website http://www.michigan.gov/recordsmanagement/, including records management manuals, general schedules, e-mail retention guidelines, microfilming standards and digital imaging standards, etc.

[AGENCY NAME]

POLICY FOR ELECTRONIC MAIL RETENTION

SECTION 1. INTRODUCTION

Electronic mail (e-mail) is a means of exchanging messages and documents using telecommunications equipment and computers. A complete e-mail message not only includes the contents of the communication, but also the transactional information (dates and times that messages were sent, received, opened, deleted, etc.; as well as aliases and names of members of groups), and any attachments.

SECTION 2. PUBLIC RECORDS

In accordance with the Michigan Freedom of Information Act (FOIA) (Public Act 442 of 1976, as amended), e-mail messages are public records if they are created or received as part of performing a public employee's official duties. All e-mail messages that are created, received or stored by a government agency are the property of the [agency name]. They are not the property of its employees, vendors or customers. E-mail accounts are provided to employees for conducting public business. Employees should have no expectation of privacy when using the agency's computer resources.

SECTION 3. RETENTION AND DISPOSAL SCHEDULES

Michigan law requires that all public records be listed on an approved Retention and Disposal Schedule that identifies how long the records must be kept, when they may be destroyed and when certain records can be sent to the Archives of Michigan for permanent preservation. Retention and Disposal Schedules for local government agencies are approved by the Records Management Services, Archives of Michigan and the State Administrative Board. Records cannot be destroyed unless their disposal is authorized by an approved Retention and Disposal Schedule. The State of Michigan Records Management Services is available to advise local government agencies about a variety of records management issues.

SECTION 4. RETENTION POLICY

Just like paper records, e-mail messages are used to support a variety of business processes. Just like paper records, senders and recipients of e-mail messages must evaluate each message to determine if they need to keep it as documentation of their role in a business process. Just like paper records, the retention period for an e-mail message is based upon its content and purpose, and it must be retained in accordance with the appropriate Retention and Disposal Schedule.

SECTION 5. E-MAIL STORAGE AND MAINTENANCE

The [agency name] will retain its e-mail by [Agency administrators and information technology staff must agree upon and choose one of the five options listed below. Each option has its pros and cons, and other options may be available as well.]

- Filing the e-mail in a Document Management System repository where it will be organized and automatically disposed of at the end of its retention period.
- Storing e-mail online in the active e-mail system for its entire retention period. Employees are encouraged to establish folders for arranging e-mail according to their content, and they are responsible for disposing of e-mail that has met all of its retention requirements.
- Creating online e-mail archives for storing messages that are accessible by the active e-mail system, but are not stored on the active e-mail server. Employees are encouraged to establish folders for arranging e-mail according to their content, and they are responsible for disposing of e-mail that has met all of its retention requirements.
- Storing e-mail on hard drives or peripheral drives [information technology staff must specify which drive to use; shared servers are recommended]. Employees are encouraged to establish folders for arranging e-mail according to their content, and they are responsible for disposing of e-mail that has met all of its retention requirements.
- Printing e-mail and related transactional information, and filing the paper in a manual filing system.

SECTION 6. EMPLOYEE RESPONSIBILITIES

Employees are responsible for organizing their e-mail messages so they can be located and used. They are responsible for keeping e-mail messages for their entire retention period, and for disposing of e-mail messages in accordance with an approved Retention and Disposal Schedule.

Many agencies have established automatic purge routines for e-mail messages that are 30 or 60 days old. However, these purge routines are technology-driven and are not based upon Retention and Disposal Schedules. Many e-mail messages need to be retained longer than these periods of time. Employees are responsible for ensuring that e-mail messages with longer retention periods remain accessible until the appropriate Retention and Disposal Schedule authorizes their destruction. Note: Records, including e-mail, cannot be destroyed if they have been requested under FOIA, or if they are part of on-going litigation, even if their retention period has expired.

Employees who use a home computer and a personal e-mail account to conduct government business must manage their work-related e-mail the same way as those messages that are created and received using government computer resources.

Just like paper records, e-mail messages might be subject to disclosure in accordance with FOIA. They can also be subject to discovery once litigation begins. Employees should be prepared to provide access to their e-mail to their FOIA Coordinator or an attorney for the [agency] under these circumstances.

SECTION 7. INFORMATION TECHNOLOGY STAFF RESPONSIBILITIES

Individual employees are responsible for deleting messages in accordance with the appropriate Retention and Disposal Schedule. However, deleted messages may be stored on servers and backup tapes for several days, weeks or months after they are deleted. Information technology staff will ensure that deleted messages are rendered unrecoverable within [insert timeframe; 1 week is the suggested maximum] of employee deletion. Note: The destruction of e-mail messages on servers and backup tapes must cease when an agency becomes involved in litigation or when it receives a FOIA request.

Many e-mail messages need to be kept longer than the original technology that was used to send and receive them. New technology is not always compatible with older technology that agencies may have used. Information technology staff will ensure that older e-mail messages remain accessible as technology is upgraded or changed. Each time technology upgrades and changes take place information technology staff will ask agency administrators for information about the existence and location of older messages so they can be migrated to the new technology.

SECTION 8. ADMINISTRATOR RESPONSIBILITIES

Agency administrators are responsible for ensuring that their employees are aware of and implement this policy. They are also responsible for ensuring that their agency has an approved Retention and Disposal Schedule that covers all records (regardless of form or format) that are created and used by their employees.

Agency administrators are responsible for ensuring that the e-mail (and other records) of former employees are retained in accordance with approved Retention and Disposal Schedules.

Agency administrators are responsible for notifying information technology staff when the agency becomes involved in litigation or when a FOIA request that involves e-mail is received.

SECTION 9. FOIA COORDINATOR RESPONSIBILITIES

Just like paper records, e-mail messages might be subject to disclosure in accordance with FOIA. FOIA coordinators are responsible for identifying if the records that are requested by the public are stored in e-mail, even if the public does not specifically request e-mail. They are also responsible for ensuring that information technology staff is notified that a FOIA requesting involving e-mail was received to prevent the destruction of relevant messages.

SECTION 10. ATTORNEY RESPONSIBILITIES

Just like paper records, e-mail messages might be subject to disclosure during the discovery phase of litigation. Attorneys representing Michigan government agencies are responsible for identifying if the records that are requested during the discovery process are stored in e-mail, even if the discovery order does not specifically request e-mail. They are also responsible for ensuring that information technology staff is notified that a discovery order involving e-mail was received to prevent the destruction of relevant messages.

QUESTIONS?

State of Michigan
Records Management Services
(517) 335-9132
http://www.michigan.gov/recordsmanagement/