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RECENT NEWS

PC&T won a jury trial in Wayne County Circuit Court, where the Plaintiff sued a V.P. of Human Resources. Plaintiff, who had retired from an hourly position at the Company in an unsuccessful attempt to become a highly-paid consultant, applied for a supervisory position with the backing of his former colleagues. He contended that the VP held a grudge and interfered with his expected employment because he had "gone over his head" years earlier, to win a maximum employee suggestion award. However, an anonymous letter received by the Company at the time of his retirement had raised questions about Plaintiff, his consulting program, and whether he could be expected to abide by the Company's no-vendor gift policy for supervisors. Defendant's highest settlement offer was \$0.

**IS YOUR HOUSE IN ORDER?**

By: Daniel G. Cohen

What if, tomorrow, you were served with a lawsuit claiming harassment or discrimination by an employee or ex-employee. Many small business owners have never faced this scenario. Indeed, if you are like most small business owners, you probably view employment litigation as something that will never happen to you. This is your first, your biggest and potentially most costly mistake. Even the most prudent of employers can be forced into expensive, time-consuming litigation on baseless discrimination, harassment or retaliation claims—perhaps by an employee making these allegations to avoid pending discharge, by an employee who feels wronged when discharge was really for legitimate, lawful reasons or by one who feels s/he must "save face" with family or friends. Until you have taken steps to minimize your exposure to such claims by your staff, your house is simply not in order.

Although you can drive yourself crazy worrying about all the possibilities or ignore the possibilities altogether, getting your house in order is neither difficult, time-consuming, nor costly. As the current year winds down and you look towards welcoming in a new year, here is what you have to do:

employment relationship may not be modified unless in writing and signed by you personally. While you have your application out, make sure it indicates that the applicant certifies the accuracy of the responses and that any falsification, misrepresentation or omission of information is grounds for rejecting the applicant and for dismissal if already hired. There are additional provisions that should be contained in your application. These can be found on our website at www.mi-employmentlaw.com.

- Update or adopt an Employee Handbook once and for all. The Handbook is probably the single most important document you can have. Updating and/or adopting a Handbook is the one project that tends to be put on the back burner more so than any other project. Before you know it, several years have gone by and the Handbook has not been updated or worse, never adopted. This is a cardinal sin, which will haunt you for the rest of your life if you wind up in employment litigation.
- Adopt a written policy covering all types of harassment from all sources with an adequate complaint procedure and anti-retaliation clause. The policy must encourage complaints. Ideally, the policy will be contained in an Employee Handbook, which sets forth your expectations for staff. Whether the policy is a stand alone
- Pull your employment application out and make sure it states that if hired, employment can be terminated at any time with or without cause and with or without notice and that this at-will em-

Seasons Greetings
From Pilchak Cohen
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**FORMS & POLICIES AVAILABLE
 ON THE PC&T WEBSITE:**

- Benefits and Detriments of Arbitration of Statutory Claims vs. Traditional Litigation
- Consent and Authorization to Release Employment Information
- Employment Application
- Fair Credit Reporting Act Forms
- Garnishee Disclosure Form
- HIPAA Authorization for Disclosure / Use of Personal Health Information
- I-9 Forms - **Rev 6/07**
- Policy—Wage Deductions
- Relief of Charge
- Sample CCW Memo
- Sample Certification for Users of Consumer Report
- Severance Agreement and Release of Claims
- Severance Agreement and Release of Claims (In Compliance With Older Worker Benefit Protection Act)
- Social Security Privacy Policy
- WH 380/381 Forms (under FMLA guidelines)
- Workplace Violence—Risk Factor Checklist

document or contained in an Employee Handbook, all employees must sign off on it, and signed receipts must be retained in *locked* personnel files.

- Review your overtime exempt jobs. Many small business owners wrongly assume that employees who are paid a salary are automatically exempt from receiving overtime pay for all actual hours worked in excess of 40 in a work week. Another commonly held misperception is that managers are exempt because of their title and salary. You must place the proper focus on the nature of the job, including the amount of discretion and independent judgment exercised.
- Get in the habit of documenting your personnel decisions. Jurors will almost universally conclude that if it isn't in writing it didn't happen, or worse, that the decision must have been illegal if it wasn't put in writing.
- Protect your trade secrets, other proprietary information and your customer relationships by controlling access to business re-

ords and your computer network, by retaining the right to monitor employee usage of your technology and by utilizing reasonable non-compete and confidentiality agreements.

- Make sure you have the required employment law postings in a conspicuous location within your office available for all staff to view.
 - And last, but certainly not least, kick off your management training program. Management training in the area of employment law and personnel decisions, with an emphasis on harassment avoidance and response, is one of the most neglected yet critical projects. The Supreme Court has made it exceedingly clear that training is required if you intend to defend against a harassment claim on the basis that you took reasonable steps to prevent it.
- Cutting corners to save a few bucks is one mistake that might just cost you your business. Do not let this happen. Be smart about your business. Take action now.





NEWS FROM THE ASSOCIATION OF CORPORATE COUNSEL ANNUAL MEETING

By: William Pilchak

As Worklaw® Network's liaison to the Association of Corporate Counsel, Pilchak Cohen & Tice attorneys attend the annual meeting every year. As one might suspect, some valuable information is disseminated. Here are some highlights:

EEOC Update

Due to a slimmed-down budget, the EEOC has been making a more efficient use of its resources by concentrating enforcement actions on widespread, class-based practices. This should translate into fewer individual charges being pursued by the EEOC in enforcement actions, unless the challenged practice has implications beyond the charging party. For example, a discharge for a unique set of facts is less likely to be subject to an enforcement action than disqualification of individuals from safety-sensitive positions with medical conditions that the company feels renders them unsafe.

Companies with more than 100 employees (or 50 employees and government contracts of \$50,000 or more) will find changes to the EEO-1 form they will be filing after September 30, 2007. Some of the more important are:

A new race or ethnic category was added: "Two or more races"

The "Asian or Pacific Islander" category was divided into two separate categories: "Asian" and "Native Hawaiian or other Pacific Islander"

The prior category of "Officials and Managers" has been divided into

two levels based on responsibility and influence within the organization:

Executive/Senior Level Officials and Managers (plan, direct and formulate policy, set strategy and provide overall direction; in larger organizations, within two reporting levels of CEO)

First/Mid-Level Officials and Managers (direct implementation or operations within specific parameters set by Executive/Senior Level Officials and Managers; oversee day-to-day operations)

The ACC members have noticed a trend in the EEOC toward enforcing "Family Responsibility Discrimination." "Family responsibility" is not a "protected classification" outside of the FMLA context, and the EEOC does not have responsibility for enforcing the FMLA. Rather, the Department of Labor enforces the FMLA. However, the EEOC will pursue sex discrimination charges where an employer presumes, for example, that one sex or the other should have the responsibility for staying home with sick children, or that a mother with young children would not be interested in a promotion that entails much job-related travel. As such, be vigilant how employment decisions may unwittingly run afoul of this concept.

Retaliation claims continue to be vexing, especially after the *Burlington v White* case held that a job action as mild as a transfer to a more physically demanding job can support a retaliation claim. (In contrast, for a discrimination action, a plaintiff must show a "tangible job detriment," in the nature of discharge, demotion, failure to promote, suspension or some other meaningful discipline or decision.) This persisting trend is one more reason why advice of counsel is needed when handling those who have filed complaints of discrimination either internally or with



a court or agency.

FMLA Update

PC&T has always taught that, when determining if a candidate has the one year of employment required to qualify for FMLA leave, employers must determine if there has been a prior period of employment, because the one year of employment need not be one consecutive year. The ACC presentation noted that in *Rucker v Lee Holdings*, 471 F.3d 6 (1st Cir. 2006), the Department of Labor filed an amicus brief in *Rucker*, stating that the five year gap in employment there should be "the outer bounds" of the time that can be bridged. PC&T will monitor this developing law, but until it resolves in favor of employers, keep counting all periods of prior employment.

There is hope that the regulations may soon be changed regarding releases of FMLA claims. Presently, FMLA claims cannot be released without Department of Labor approval or court supervision. However, literally nobody within the Department of Labor has "review and approval of FMLA settlements" in their job description. And, there is no way for employers to gain access to the federal courts contemplated by the "court supervision" option. As employers hope for the change in the regulation, this issue will be reviewed by the U.S. Supreme Court in 2008 in *Taylor v Progress Energy, Inc.*

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Pilchak Cohen & Tice, P.C.

PRESENTS...

Temporary Staffing Seminar

Topics include:

- » Avoiding liability for the acts of contract staff
- » Tempnapping & Workforce Transfers
- » Why customer demands for indemnity negate legal protections
- » Joint employment EEO issues
- » Critical FMLA obligations

Thursday, January 17, 2008
1:00 p.m. – 4:30 p.m.

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