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PILCHAK COHEN &amp; TICE, P.C.

THE EMPLOYERS LAWYERS

# WORKPLACE CHRONICLE

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## Recent Victories for Our Clients

PCT helped a client defend two claims for unpaid wages, brought by a husband and wife couple - both who had worked for the client. After the husband was terminated for violating company policy, the husband and wife both filed claims asserting they should have earned more. The state agency found in favor of the employer on both cases, and upheld its decisions after requests for reconsideration.



## WHAT'S ON THE HORIZON FOR EMPLOYERS IN 2010?

By Rhonda H. Armstrong

The ringing in of 2010 marks the one-year anniversary of the Obama Administration. While *some* changes occurred in the last year that Democrats, employees, and unions alike can celebrate, the year ended on a sour note for them when the Supermajority the Democrats enjoyed throughout 2009 vanished with the election of Scott Brown in Massachusetts. This historic election has literally changed everything overnight. Now, health care reform, cap and trade and other legislation is in serious question. Even though this may have saved the economy, it may actually cause President Obama to refocus his attention on employers with a new found vigor. We heard some of this in his State of the Union address: "My administration has a Civil Rights Division that is once again prosecuting civil rights violations and employment discrimination...We're going to crack down on violation of equal pay laws." Of course, Secretary of Labor, Hilda Solis has already been quoted as saying, "we will not rest until the law is followed by every employer."

With expanded budgets and the addition of hundreds of investigators, the federal agencies are poised for an all out assault on employers. For many years, these agencies have been understaffed and underfunded. The investigators were, with some exceptions, experienced and up-to-speed on the law, but they were typically overwhelmed with files and could only devote so much time to a given investigation. This will not be the case going forward. There are two big problems with this for employers. First, like with any new employee, there will be a learning curve for the new generation of investigators. This will have the natural consequence of mistakes and inefficiencies,

which will only result in more time and energy spent by employers and their advocates demonstrating why the investigation should result in the dismissal of the charge. But, there is another natural consequence of expanded agency resources: the agencies will have more time and resources to nit-pick and to go out of their way to look for questionable practices and/or outright violations of the law.

Department of Labor investigations and audits will be particularly problematic simply because there are many nuances in the laws that the Agency oversees. Wage and hour, immigration, and FMLA

obligations, to name a few, are extremely technical and can be quite daunting. Some employers, particularly medium and small businesses, are or can be overwhelmed by all the rules they must follow. This is where the greatest danger exists. Even employers that are trying to comply with all the various laws, may be out of compliance simply because there are not enough hours in the day to keep up with it all. Of course, once an employer is out of compliance, it is often very difficult to fix the problem, particularly wage and hour issues.

The DOL will not excuse a violation because an employer did not know its obligations or because the employer "didn't mean it." For employers that do not know where they stand on some of their obligations: Time may be running out. Look for training opportunities now. There are plenty of seminars available where you can learn about your obligations. We, at PCT, have one that is on-going right now. In-house training is another option. The point is: you are better off being proactive and pre-



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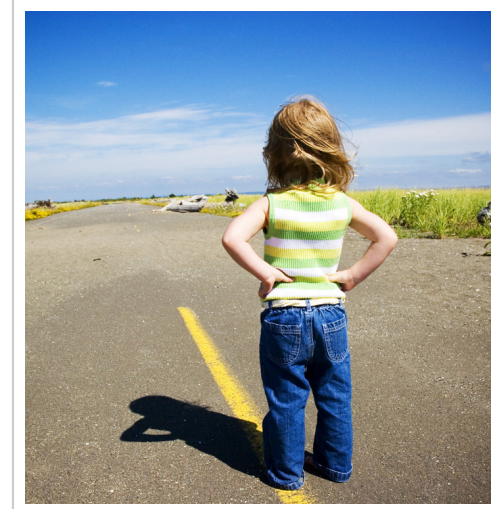
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## 2010 Cont.

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paring in advance than you are simply reacting to a notice of investigation or audit. By then, it might just be too late! It is certainly not time to panic. It is, however, time to take a deep breath and a step back and see where you stand. It might be time for a new or different approach.



## AMENDMENT TO MICHIGAN'S CIVIL RIGHTS LAW BROADENS PROTECTION FOR PREGNANT EMPLOYEES

By Paul D. Kramer

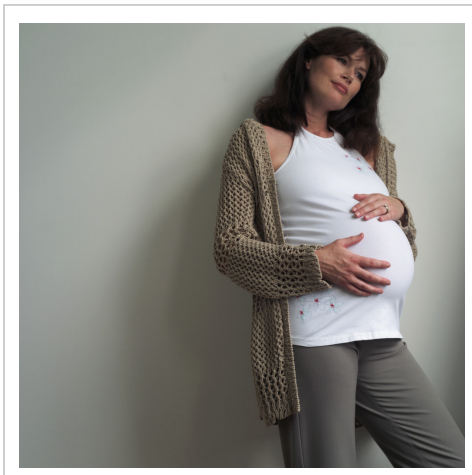
### FORMS & POLICIES AVAILABLE ON THE PC&T WEBSITE:

- 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
- 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 Forms (under FMLA guidelines) 380-E, 380-F, 381, 382, 384, 385
- Workplace Violence—Risk Factor Checklist

Michigan's Elliott-Larsen Civil Rights Act ("ELCRA") prohibits employers from discriminating against their employees based upon sex, religion, race, color, national origin, age, height, weight, family status, and marital status. Although the term "sex" has been defined in ELCRA and interpreted by Michigan courts to prohibit discrimination based on "pregnancy, childbirth, and a medical condition relating to pregnancy or childbirth," a loophole in the Court's interpretation of ELCRA has lawfully allowed employers to offer modified duties to employees injured on the job even though employees who are equally unable to work due to pregnancy are not offered. *Cunningham v. Dearborn Board of Education*, 246 Mich. App. 621 (2001). Well, that loophole may have just been closed by a recent amendment to ELCRA.

Effective December 22, 2009, ELCRA was amended to prohibit employers from treating "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 to work." The amendment excludes from protection an inability to work caused by a non-therapeutic abortion not intended to save the mother's life. *M.C.L. 37.2202 (1)(d)*.

Although this new amendment has not yet been interpreted by Michigan courts, it is now likely that, contrary to *Cunningham*, failing to provide a pregnant worker with favored work will violate ELCRA if a similarly situated employee who suffers an occupational injury is provided favored work. The amendment prohibits a pregnant employee from being treated differently from another employee with a similar ability or inability to work "without regard to the source" of the other employee's condition, and there is no reason to believe the "source" of the other employee's condition would not include workplace injuries. Thus, if your company offers favored or light duty work to employees injured on the job, be prepared to offer favored or light duty work to an employee who has a similar inability to work due to her pregnancy, childbirth, or medical condition relating to her pregnancy or childbirth. ❖



## EEOC ISSUES PROPOSED REGULATIONS ON ADA RESTORATION ACT

By Daniel Cohen

Effective January 2, 2009, the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”) made it dramatically easier for employees and applicants to assert a disability and claim a right to an accommodation. A little over a year ago, in our Oct/Nov 2008 edition of the Workplace Chronicle, we reported how the ADAAA reversed hard-fought court victories by employers over the past decade. The EEOC has now promulgated new interpretive regulations which will likely take effect early this year.

One thing that is made perfectly clear in the regulations: “the definition of disability is to be construed broadly.” In case anybody was not sure the first time they read this, the EEOC repeats this statement several more times.

**Major life activities** are stated as specific activities, including: caring for oneself; performing manual tasks; seeing; hearing; eating; sleeping; walking; standing; sitting; reaching; lifting; bending; speaking; breathing; learning; reading; concentrating; thinking; communicating; interacting with others; and working.

Also included in the EEOC’s definition of major life activities are the operation of major bodily functions, including: functions of the immune system; functions of special sense organs and the skin; normal cell growth; digestive functions; genitourinary functions; bowel functions; bladder functions; neurological functions; brain functions; respiratory functions; circulatory functions; cardiovascular functions; endocrine functions; hemic functions; lymphatic functions; musculoskeletal functions; and reproductive functions.

Just in case anyone was to get the wrong idea that the above lists were all-inclusive, the EEOC makes the point that the lists are not exhaustive as well as the point that there is to be no negative implication by omission of particular major life activities

The bar has been significantly lowered for determining whether an impairment *substantially limits* one of the above major life

activities. First and foremost, an impairment need not prevent, or significantly or severely restrict the individual to be a disability. Second, an individual need not demonstrate a limitation on activities of central importance to daily life. Finally, the EEOC states that an impairment may substantially limit a major life activity even if it lasts or is expected to last fewer than six months

The ameliorative effects of *mitigating measures* other than “ordinary eyeglasses or contact lenses” shall not be considered in determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses are those designed as “intended to fully correct visual acuity or to eliminate refractive error”

The EEOC has also indicated that an *impairment* that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Moreover, the EEOC will now consider some impairments to be disabling regardless of the circumstances. These impairments fall within the class of impairments that will consistently meet the definition of disability and include: deafness, blindness, intellectual disability (formerly retardation); partially or completely missing limbs; mobility impairments requiring the use of wheelchair; autism; cancer; cerebral palsy; diabetes; epilepsy; HIV or AIDS; MS or muscular dystrophy; major depression; bipolar disorder; post traumatic stress disorder; obsessive compulsive disorder; and schizophrenia. With these impairments, there is no room to argue that the individual functions fine. So, for example, Jay Cutler, the starting quarterback for the Chicago Bears this past season, is disabled because he is a diabetic.

Other impairments will fall within a second class which will be disabling to some but not for others. This list is comprised of: asthma; high blood pressure; learning disabilities (even if achieving a college degree); back or leg impairment which limits the dis-

tance one can walk, time one can stand or weight one can lift compared to most; psychiatric impairments like panic attacks, anxiety disorders, or some forms of depression other than major depression; carpal tunnel syndrome; and hyperthyroidism.

Neither list is all-inclusive, and we are cautioned again that there is to be no negative implication by omission of a particular impairment.

An individual has a *record of an impairment* if s/he has a history of or has been misclassified as having an impairment. This concept of “misclassification” has “employee abuse” written all over it. Could this mean that the employee’s own doctor could misclassify the employee as disabled and transform the employee into a qualified individual with a disability?



To be *regarded as disabled*, an individual no longer must be perceived as substantially limited in a major life activity. It is enough if the individual is subjected to an action prohibited by the ADA based on an impairment that is neither transitory (less than six months)

nor minor. About the only thing good for employers in the EEOC regulations is clarification that there is no duty to provide an accommodation to an individual who is only regarded as disabled.

If the starting quarterback for the Chicago Bears automatically has a disability under the EEOC’s regulations, is there any doubt that all the mere mortals in your workplaces will be disabled when push comes to shove. Employers should not be focusing their defense to ADA claims and requests for accommodations on the basis that the individual does not have a covered disability. The focus should be on providing effective accommodations rather than the accommodation of the employee’s choice. Be creative in the interactive accommodation process and accommodate individuals unless to do so would pose an undue hardship or safety threat. ♦

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## UNIVERSITY OF HARD KNOCKS, SCHOOL OF LABOR & EMPLOYMENT LAW KICK OFF IS WELL ATTENDED DESPITE FIRST AND HOPEFULLY ONLY SNOW STORM OF THE SEASON

On January 8th 2010, Pilchak Cohen & Tice, PC began its [The University of Hard Knocks](#), an 8 part breakfast seminar series for supervisors and managers. The seminars are being conducted at the law offices of Pilchak Cohen & Tice, PC on the 2nd and 4th Friday of every month and will run through April 23rd, 2010. The fee is \$50 per session, per person and includes a continental breakfast. The remaining sessions are:

- Discipline, Discharge, Documentation and Record-keeping (2/12)
- Layoffs, RIFS and Furloughs (2/26)
- Wage/Hour, Fringe Benefit and Commission Mistakes (3/12)
- Protecting Employer Property, Information and Competitive Posture (3/26)
- Leaves of Absence, Absenteeism, Disability and Accommodation (4/9)
- Union Avoidance and Dealing with Unions (4/23)

The course materials for all 8 sessions (including Effective Hiring Strategies and Equal Employment Opportunity Awareness) can be purchased for \$149. For more information or to register, please email us at [pct@mi-worklaw.com](mailto:pct@mi-worklaw.com), or call 248.409.1921.