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PILCHAK COHEN &amp; TICE, P.C.

THE EMPLOYERS LAWYERS

# WORKPLACE CHRONICLE

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## Recent Victories for Our Clients

PC&T recently obtained dismissal of a Charge of Retaliation filed with the EEOC, where an employee had previously filed a Charge of Discrimination, had returned to work as part of the settlement of that prior Charge and was discharged again soon thereafter. The EEOC generally protects individuals that file Charges and return to work. In this case, the key to preserving the employer's ability to discharge was including the right to rely upon the misconduct that gave rise to the first Charge and subjecting the returning employee to a new, and in fact, second probationary period in the settlement terms.



## SOCIAL MEDIA POLICIES UNDER ATTACK FROM THE NLRB

By Daniel G Cohen

Millions of employees are using social media such as Facebook, MySpace, Twitter and blogs to share personal information. And, more and more employers are adopting social media policies, which typically prohibit employees from disparaging the company and its employees. The natural tension between employee privacy rights and an employer's right to enforce social media policies, which reach off duty communications is about to be tested in a case pending before the National Labor Relations Board. In November, 2010, the NLRB issued an unfair labor practice complaint alleging that American Medical Response, Inc. unlawfully terminated a union-represented employee who posted negative remarks about her supervisor on her personal Facebook page.

The NLRB Complaint alleges that AMR's discharge of Dawnmarie Souza violated her right under Section 7 of the National Labor Relations Act to protest her working conditions. Souza made several inappropriate comments about her supervisor. One of her posts said her supervisor was being a "d\*\*\*\*" and a "scum\*\*\*\*." The NLRB is also alleging that AMR's blogging and internet posting policies are overly broad and illegally restrict employees from communicating complaints about their jobs. An excerpt from AMR's handbook states,

"Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superior, co-workers and/or competitors"

According to the Regional Director in the NLRB's Hartford, Connecticut office, the basic law is nothing new and whether on line or petitioning with leaflets, an employee has the right to criticize supervisors and talk with other employees. A hearing is scheduled for January 25, 2011 before an NLRB Administrative Law Judge. If the NLRB prevails, Ms. Souza could be reinstated with back pay, and AMR could be required to revise its blogging and internet posting policies.



The filing of this Complaint sends a clear message that the Board's new Acting General Counsel is departing from current Board law and asserting the pro-labor agenda of the Obama Administration, which is further evidenced by the Proposed NLRB Rule requiring employers to post notice advising employees of their unionization rights (*see e.g.* NLRB hands organized labor an early Christmas gift, *infra*). Significantly, in 2009, the NLRB General Counsel's Division of Advice issued an advisory memorandum concluding that a social media policy very much like the one under scrutiny at AMR was lawful where it was part of a broader policy which protected proprietary information, and prohibited sexual harassment, obscenity, profanity and the like. Indeed, the Division of Advice determined that such a social media policy would not "reasonably tend to chill employees in the exercise of their section 7 rights..."

The mere fact that the NLRB has gone to complaint in the case does not necessarily mean that social media policies must be scrapped and disparaging comments tolerated. AMR could win the case, and, more likely, a reviewing federal appellate court could reject this apparent shift in NLRB law. Close attention, however, is advisable as this is likely a foreshadowing of more mischief by the NLRB.



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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
- 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

## BREAK TIME FOR NURSING MOTHERS LAW

By Rhonda H. Armstrong

On December 21, 2010, the Department of Labor (DOL) announced that it is seeking public comments relative to the *Break Time for Nursing Mothers Law* that was enacted as a small part of the Affordable Care Act in March 2010. The Nursing Mothers' provision applies to employees deemed non-exempt from the overtime provisions of the Fair Labor Standards Act. The comments will be considered by the DOL in interpreting the new law.

Under the new statute, employers are required to provide non-exempt employees with "a reasonable break time...to express breast milk for [an employee's] nursing child for 1 year after the child's birth each time such employee has need to express the milk." No minimum or maximum duration or frequency is noted in the statute. Further, employers must provide a non-bathroom location that is "shielded from view and free from intrusion from coworkers and the public." Employers with less

than 50 employees may assert undue hardship defense in which case factors such as size, financial resources, nature, or business structure will be considered. If any state law provides greater rights, state law will control.



The new law does not require employers to pay employees for such time so long as they are completely relieved of their job duties. Surprisingly, this directive is contrary to the DOL's general rule that short break periods (30 minutes or less, 20 in unique circumstances) be treated as compensable time.

Employers wishing to comment can do so by responding via <http://www.regulations.gov> on or before February 22, 2011. If you would like further information about this law,

see the DOL's Fact Sheet: <http://www.dol.gov/whd/regs/compliance/whdfs73.htm>.



## PC&T AWARDS CRUISE TO N. OAKLAND EMPLOYEE OF THE YEAR

As a firm that deals with poor performers and those guilty of misconduct on behalf of clients, PC&T was pleased to conceive and co-sponsor the "North Oakland Employee of the Year" contest with the Auburn Hills Chamber of Commerce. The Grand Prize offered by PC&T, a six-day Caribbean cruise and airfare for two to Charleston, S.C., was won by **Cynthia McKenna, Manager of the Crittenton Wellness Center at the Older Persons Commission** in Rochester. In addition to managing the Center and acting as primary nurse, McKenna has developed programs

such as Diabetes self-management education, prostate/PSA screening, out-patient



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**EMPLOYEE OF THE YEAR**

physical therapy, fitness challenges, flu and pneumonia vaccination clinics, and other programs that have had an impact on the elder population in Rochester.

**Christa James, Math Teacher at Auburn Hills Christian School**, a close second runner-up, won a Northern Michigan, Shanty Creek getaway. James, who struggled with math in her early years

and went on to earn Bachelors degrees in math and physics and a masters degree in education, elevates not only the best students by creating a dual enrollment program for calculus students, but those who might otherwise fall behind by finding games and websites that convey concepts, developing study guides, creating mentorships, and bringing structure to Parent-Teacher meetings.

**Don Grice, Deputy Director- Department of Public Services, City of**

**Auburn Hills**, won accommodations for two at the romantic Cobblestone Manor Bed and Breakfast and tickets to Meadowbrook Music Festival. Grice works “hundreds of hours” beyond what is required, continually broadens his knowledge of public works and has led construction projects in Auburn Hills, all while reducing the parks and grounds budget by 12.9% in 2010-2011, for a total savings of \$210,000.



**NLRB HANDS ORGANIZED LABOR AN EARLY CHRISTMAS GIFT**

By Daniel G. Cohen

On December 22, 2010, the National Labor Relations Board published a proposed rule in the Federal Register that would require all employers subject to the National Labor Relations Act to post notices informing their employees of their rights as employees under the NLRA. See e.g. 75 Fed. Reg. 80410. The new posting requirement will be similar to President Obama’s mandate in executive Order 13496, which require federal contractors and subcontractors to include in their Government contracts specific provisions requiring them to post notices of employees’ NLRA rights. Employers failing to post the appropriate notice under the proposed rule would be subject to penalties, including findings of unfair labor practices.

It should come as no surprise to employers that the proposed poster does not make mention of employees’ *Beck* rights, which were established by the Supreme Court in *Communication Workers v. Beck*, 487 US 735 (1988) and permit employees to refuse to pay union dues or fees for any purpose other than collective bargaining, contract administration, or grievance-related activities. In other words, any worker who objects to his/her union’s use of dues money for other purposes, like political campaigns, is entitled to a refund of that portion of his/her dues. Although the *Beck* rights of union workers are well established they go largely unrealized in practice for the simple reason that employees are not familiar with their rights. Including *Beck* rights in the notice only makes sense, but is obviously inconsistent with the interests of



organized labor and therefore, not on the Obama Administration’s agenda.

Those in favor of the posting requirement maintain that the overwhelming number of employees in the private sector are not represented by unions. And, therefore, there is a large gap in knowledge about the rights of these employees to unionize and otherwise engage in activity which is protected by Section 7 of the NLRA. Proponents also emphasize that immigrants are not aware of these rights and that most students, who are about to enter the workforce, are not aware of these rights either. Perhaps the government should mandate a high school course on the virtues of union representation as well. In fact, the course could be taught by the UAW or maybe even by the SEIU. Maybe the students could be required to take a field trip to the City of Flint to see how unionization has helped that community.

Comments regarding this proposed rule must be received by the NLRB on or before February 22, 2011. ♦

**EEOC ISSUES FINAL REGULATIONS INTERPRETING THE GENETIC INFORMATION NONDISCRIMINATION ACT**

By Rhonda H. Armstrong

Previously, PCT notified employers of impact of the Genetic Information Nondiscrimination Act (GINA) which took effect on November 21, 2009. (See: Nov/Dec 2009 Workplace Chronicle). GINA regulates the acquisition and use of genetic and related health information in employment. On November 9, 2010, the Equal Employment Opportunity Commission (EEOC) issued final regulations pertaining to GINA which took effect January 10, 2011.

*For the full article please go to our website: [www.mi-worklaw.com](http://www.mi-worklaw.com) and click on the Genetic Information Nondiscrimination Act ("GINA") E-Alert.*



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You can find back issues of the *Workplace Chronicle* on the Web at “[www.mi-worklaw.com](http://www.mi-worklaw.com)”

## UNIVERSITY OF HARD KNOCKS, SCHOOL OF LABOR AND EMPLOYMENT SET TO BEGIN JANUARY 28, 2011 VIA WEBINAR

The sessions are as follows:

- **The Hiring Process:** Picking plums and avoiding bad apples, in an environment ripe with candidates -1/28/11
- **Equal Employment Opportunity:** claim, avoidance and defense, and spreading affirmative action obligations - 2/11/11
- **Discipline, Discharge, Documentation, & Recordkeeping:** the keys to bullet proof defenses that avoid litigation - 2/25/11
- **Layoffs, RIFs, and Furloughs** what can be done to reduce employment costs to meet declining revenue - 3/11/10
- **Unemployment:** Reducing costs thru effective claims administration and understanding the unemployment tax system – 3/25/11
- **Wage/Hour, Fringe Benefit & Commission Mistakes** that cannot be undone but can be prevented – 4/8/11
- **Union Avoidance and Dealing with Unions** as organized labor flexes its muscle – 4/22/11
- **Leaves, Absenteeism, Disability & Accommodation**, navigating the frustrating statutes, regulations and common law – 5/6/11
- **Protecting Employee Property**, Information and Competitive Posture in a “download,” “what’s yours can be mine” society – 5/20/11

Each program has been approved for 1.5 hours of (General) recertification credit toward PHR, SHRM and GPHR recertification. Each attendee will receive written materials. Cost: \$349 for all sessions, or \$50.00 per session, per connection site, with no limit on the number of participating attendees at each site.

register online at [www.mi-worklaw.com](http://www.mi-worklaw.com) or contact Pilchak Cohen & Tice, P.C. 248.409.1900 or [pct@mi-worklaw.com](mailto:pct@mi-worklaw.com)

This is the second consecutive year PCT is presenting the School of Hard Knocks Seminar Series. This year the Seminar Series will be conducted as a webinar. Participants can view the webinars live or recorded. We are pleased to have FAR Management, Inc. participating this year. FAR Management, Inc. concentrates its practice on assisting employers with their unemployment tax and claims administration needs and will be presenting on March 25, 2011.