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*Attorneys Representing Management in Labor and Employment Law*

## WORKPLACE CHRONICLE

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### Recent Victories for Our Clients

The Michigan Court of Appeals affirmed the dismissal of a sex, age, and height discrimination case obtained by PCT last year. PCT successfully argued to the Court of Appeals that there was no evidence of sex or age discrimination by distancing the few alleged sexist and ageist comments from the decision-making process, characterizing them as stray remarks, not attributable to the decision-maker. PCT was also able to overcome a comment by the decision-maker that plaintiff's "height was a problem" by arguing that it was made in the context of a valid safety concern. PCT provided the Court of Appeals with evidence that the plaintiff's co-workers had safety concerns resulting from the plaintiff's height. This evidence convinced the Court of Appeals that the decision was, therefore, performance-based, rather than discriminatory.



### EMPLOYERS DO THE SLOW BURN WHILE WORKERS SMOKE Two 10-Minute Breaks Per Day Equals 86 Fewer Work Hours

Okemos-based Weyco Inc. drew national attention recently, by stating it would fire employees that smoke-- at home on their own time. Though it does not discharge employees that smoke, Kalamazoo Valley Community College now refuses to hire smokers. So does CNN.

The popular press coverage of Weyco's decision told the world what employment attorneys know: No statute prohibits discrimination against Michigan tobacco smokers.<sup>1</sup> Sixteen other states have laws that prohibit discrimination on the basis of lifestyle discrimination. Typically, this would include smoking. Our clients with operations outside Michigan can survey the status of their other states at Worklaw Network's archived 2004 survey on this issue at:

<http://www.worklaw.com/question-nov2004.html>

However, the absence of a statute does not mean that firing smokers could not trigger other issues. Assuredly, an employer under a collective bargaining agreement could not release smokers. And if an employer has not taken steps to solidify at-will status for its employees, or if it consciously adopted a just-cause standard (like many public sector employers)

the employer would not have the requisite "cause" to discharge employees for smoking at home. Nor can smoking normally trigger dissatisfaction that permits termination under a satisfaction contract, unless it significantly interferes with the work.

In reality, most employers would not adopt the draconian measure of firing smokers for smoking at home, and for good reason. Is there any more tempting lure for union organizers than an employer who fires its employees for acting lawfully in the privacy of their own home? Corpulent employees, casino gamblers, scotch drinkers, philanderers might all ask: Am I next? Odds are that Weyco will be a union shop in the near future.



However, this is not to say that PC&T is not sympathetic to employers on smoking issues. The most common complaint we receive is the decreased production from smokers and the resulting morale problem. Employers and non-smokers do a slow burn (and work) while smokers are outside, laughing over a cigarette, and in warm weather, enjoying the fresh air.

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- 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)
- WH 380/381 Forms (under FMLA guidelines)
- Workplace Violence—Risk Factor Checklist

*Employers Do Slow Burn While Workers Smoke Continued...*

Isn't this the worst of all worlds? The productive employees are unhappy, and the lower producers are rewarded with more frequent breaks.

As usual, PC&T has a better solution to the problem.

Lets start with the basics: First, it is not illegal to refuse to hire smokers. By simply by-passing smokers, you avoid the problem. When you read the statistics below, you will see that CNN and Kazoo Community College have the right idea.

Second: An employer has no obligation to give smoking breaks. An employer could require all employees to remain at the work-station and light up only during the lunch break. While some smokers would volunteer for outdoor assignments or otherwise find ways to get a nicotine fix, others would quit the habit or seek another job.

An employer could address the problem by adopting a policy of paying non-smokers more than smokers. Certainly the statistics justify a pay enhancement for non-smokers. Quoting Bureau of Labor Statistics data, the Minnesota Department of Labor & Industry states that smokers miss an average of 18% more work-days than non-smokers.<sup>ii</sup> Another study (the "Halpern study") found smokers to lag behind non-smokers in 7 of 10 objective productivity measures, by a range of 65 to 19% .<sup>iii</sup> Spread across all 10 productivity standards, smokers trailed non-smokers in productivity by an average of 4.5%. Simple arithmetic tells us that if smokers take two fifteen-minute breaks per day, they work 6.3% less- 130 hours less. And if the break is ten minutes, they add up to 86.6 hours per year. That is a 4.2% difference.



Incidentally, there was no significant productivity difference between never-smokers and former smokers in the Halpern study. There was a difference as far as attendance was concerned, however. Former smokers missed 180% of the sick days missed by never-smokers, while current smokers missed three times the days of never-smokers. This equated to 2.66 days per year, or another 1% of work time.

Put into the context of \$40,000 per year employees: Statistically, based on the Halpern study, a never-smoker is worth \$2200 more to an employer than the smoker (4.5% less efficient and 2.66 more missed days— another 1%). The smoker should be paid \$37,800. The interesting question is: How do you implement the concept. One might offer Non-smoking new hires higher pay. Wages of smokers could be frozen under a company policy until non-smokers advanced \$2200 ahead. However, Pavlov would argue that an employer would get most

bang for the buck by paying a 5.5% year-end bonus to the non-smokers who remained at their desks, churning out work or better get an extra week of vacation.

<sup>i</sup>When the Americans with Disabilities Act was first passed, the act's specification of alcoholism as a disability caused speculation that tobacco addiction would likewise be a protected classification. However, after Toyota v Williams, where the Supreme Court stated that a disability must substantially limit a major life activity so as to have an effect on the employee's day to day activities, this is no longer a concern.

<sup>ii</sup>(Warning: This Product May Increase Your Risk of Workplace Injury; <http://www.doli.state.mn.us/rrif02sept1.htm>)

<sup>iii</sup>Halpern, *Impact of Smoking Status on Workplace Absenteeism and Productivity*, [http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list\\_uids=11544387&dopt=Abstract](http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=11544387&dopt=Abstract)



## Employee Whose Doctor Failed to Submit Medical Certification Loses Protection of FMLA

The Fifth Circuit Court of Appeals has ruled that an employee, whose doctor fails to turn in a completed medical certification form, loses her job protection under the FMLA. In Urban v. Dolgencorp of Texas, Inc., 393 F.3d 572 (5<sup>th</sup> Cir 2004), the plaintiff requested FMLA leave to have bilateral carpal tunnel surgery. Dollar General tentatively designated Urban's leave as FMLA-qualifying and requested that medical certification from her physician. Dollar General did not receive Urban's medical certification. According to Urban, her doctor's office misplaced the form and consequently never sent Dollar General a copy of Urban's medical certification. Dollar General subsequently terminated Urban because her 30 days of non-FMLA medical leave provided by company policy had already expired, and the company considered her absences unauthorized.

In the ensuing litigation, Dollar General argued that it was Urban's responsibility, as an employee seeking the protections of the FMLA, to ensure that her medical certification was timely filed. The Fifth Circuit agreed and rejected Urban's argument that she should be given a reasonable opportunity to cure this deficiency in accordance

with 29 CFR §825.305(d). According to the Fifth Circuit, accepting Urban's argument would mean that an employer could never set a real deadline for the return of a medical certification. In effect, the employer would be required to provide the employee with an opportunity to submit the certification within a new, extended deadline - a scenario that could, in theory, repeat itself ad infinitum.

We at PCT find the Urban case significant because it is one of the first cases to address whether an employee can lose the protection of the FMLA based upon the conduct of her employee's doctor. Ordinarily, it is not difficult for an employee to gain the protection of the FMLA because doctors can usually certify that the employee must miss work under the FMLA, whether it is true or not. A certification only has to be completed and returned to the Company within 15 days. The Urban case, however, serves notice that an employee suffers the consequences of her doctor's carelessness in providing the documentation.



Moreover, the Urban case holds the line on the distinction between an incomplete medical certification as contemplated by 29 CFR §825.305(d) and the non-existent medical certification under 29 CFR §825.311(b), which states that "if the employee never produces the certification, the leave is not FMLA leave." *Accord: Baldwin-Love v. EDS Corp.*, 307 F. Supp. 2d 1222 (MD AL 2004) (An incomplete certification is the not same as a certification that is non-existent or that has not been provided to the employer). It is only where the medical certification has been timely returned (albeit incomplete) that an employee must be given a reasonable opportunity to cure the deficiency under the Department of Labor's regulations. Examples of deficiencies include an unsigned medical certification or a certification, which answers some but not all of the relevant questions. No such automatic right to cure exists when the employee simply fails to meet the 15 day

*Employee Whose Doctor Failed to Submit Medical Certification Loses Protection of FMLA Continued...*

deadline for returning the certification. Because the FMLA can be so easily abused and FMLA claims are so easily fabricated, the unsuspecting employer can be aced out of a valid disciplinary decision by not knowing what its rights are or what its employee's obligations are. A comprehensive policy is a must, and it must be published where all other benefit information is published (i.e. the employee manual). The few employee obligations under the FMLA, like timely submission of medical certification, must be spelled out clearly in the policy. And, you must enforce those employee obligations consistently. For comprehensive FMLA policies and procedures, visit [info@FMLAFlowchart.com](mailto:info@FMLAFlowchart.com). ❖



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