PILCHAK COHEN & TICE, P.C.
3062 EAST WALTON BLVD.
AUBURN HILLS, MI 48326

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SIXTH CIRCUIT ARMS EMPLOYERS IN WAR ON ATTENDANCE VIOLATIONS

By William E. Pilchak

The Sixth Circuit Court of Appeals, which interprets federal law for Michigan employers, has ruled in favor of the employer in an important case under the Rehabilitation Act (RA), expressly relying upon the Americans with Disabilities Act (ADA). *Lee v City of Columbus,* Case No. 09-3899, (February 23, 2011) sustained an employer's directive that all employees returning from sick leave of more than three days submit a note from their physician to their direct supervisor, stating the "nature of the illness," and whether the employee is capable of returning to regular duty. The value of such a requirement should be obvious: It requires employees to visit a physician and obtain certification of a medical condition that kept them off work, cutting down on episodes where employees call in sick for ulterior motives and may provide a financial disincentive to feign illness if co-pays or other medical bills are involved.

En route to this important ruling, the Court: 1) Took pains to repeatedly illustrate that its' rationale applied to the ADA as well, with the only distinction being a RA plaintiff must prove that the employer is discriminating *solely* on the basis of a disability; 2) Held that requiring an employee to provide a general diagnosis or the nature of an illness is not tantamount to the forbidden inquiry under the ADA whether the employee has a disability or the nature of the disability; 3) Assuming arguendo that the inquiry can be characterized as disability-related, it is permissible because it applies to all employees, disabled or not; 4) Noting in the law prohibits an employer from designating an employee's supervisor as the initial contact for purposes of administering sick leave benefits; 5) The EEOC's own policy requires its employees to provide documentation to their direct supervisors.

By citing and thus endorsing pro-employer ADA cases from around the country, *Lee* is a treasure trove for employers. However, those seeking to implement its holdings above, should do so carefully, because a Second Circuit case, *Conroy,* holds contrary on nearly identical facts, and employers will want to orient to the Sixth Circuit's rationale.

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THE EMPLOYERS LAWYERS
WORKPLACE CHRONICLE

Inside this issue:

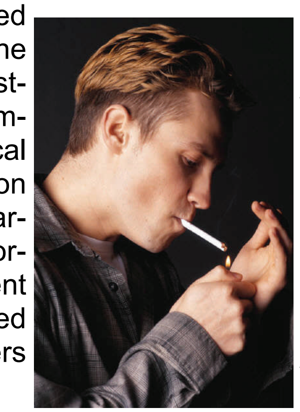
Recent Victories for Our Clients

Just twelve days after filing suit, PC&T obtained a permanent injunction against a departed sales employee prohibiting him and a competitor from contacting any customer contact or doing competitive business with any customer of PC&T's client for two years and three months. The order also requires the former salesperson to turn over the commission he earned on a prohibited deal and requires the client's competitor to turn over half of the profits.

MICHIGAN FEDERAL COURT RULES MEDICAL MARIJUANA ACT DOES NOT PROTECT EMPLOYEES FROM DISCHARGE

By: Rhonda H. Armstrong

On February 11, 2011, Judge Robert Jonker of the Western District of Michigan ruled in *Casias v. Wal-Mart Stores, Inc.*, 2011 U.S. Dist. LEXIS 15244 (WD MI, 2011), that Michigan's Medical Marijuana Act, MCLA 333.26421 et. seq. ("MMMA"), does not protect employees from adverse employment actions by their employers. The court was called upon to decide whether Wal-Mart violated the law by terminating an employee who tested positive for marijuana, detected when the Company required the employee to undergo a post-accident drug test. The employee possessed a medical marijuana card and relied upon the MMMA, enacted in 2008, arguing that it eliminates the normal rule of at-will employment and creates a new protected class for certain marijuana users in Michigan.



Prior to the *Casias* case, there was no authority on what employers could do other than the statutory subsection MCLA § 333.26427(c)(2) which provides that nothing in the MMMA requires "[a]n employer to accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana." Based on this language, Pilchak Cohen & Tice, P.C. has been recommending that Employers include the following language in their substance abuse policies: "employees may not ingest marijuana at work or report to work while under the influence of marijuana even if prescribed by a licensed physician." However, there had not been a court decision addressing an Employer's right to discipline and/or discharge an employee authorized to use medical marijuana, who violated such a policy.

This new case, however, is broadly decided in favor of Michigan employers. Specifically, the Court found "[a]ll the MMMA does is give some people limited protection from prosecution *by the state*, or from other adverse *state action* in carefully limited medical marijuana situations….the MMMA says nothing about private employment rights. Nowhere does the MMMA state that the statute regulates private employment, that private employees are protected from disciplinary action should they use medical marijuana, or that private employers must accommodate the use of medical marijuana outside of the workplace." *Id.* at 22 (emphasis added). The Court further noted that "the MMMA does not indicate a general policy on behalf of the State of Michigan to create a special class of civil protections for medical marijuana users."

The American Civil Liberties Union reported on their website, that they intend to appeal the decision. It remains to be seen whether Judge Jonker's ruling will be upheld., but this is an important first step for employers.

Pilchak Cohen & Tice, P.C.
3062 E. Walton Blvd.
Auburn Hills, MI 48326
Phone: 248.409.1900
Fax: 248.409.1999
Email: pct@mi-worklaw.com

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www.mi-worklaw.com

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- 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

NEW LAW PERMITS EMPLOYERS TO REQUIRE THE PAYMENT OF WAGES BY DIRECT DEPOSIT OR PAYROLL DEBT CARD

By: Rhonda H. Armstrong

On December 21, 2010, Governor Granholm signed into law an amendment to the Payment of Wages and Fringe Benefits Act that previously prohibited employers from requiring direct deposit or paying wages via debit cards. Under the amendment, employers may now require direct deposit or pay wages through a payroll debit card, so long as the employer provides the employee with:

1. A written form that allows the employee the option to receive wages either by direct deposit to the employee's account at a financial institution or through a payroll debit card;

2. A statement indicating that, but for a couple exceptions, failure to return the form within 30 days with the account information needed for direct deposit will be presumed to indicate consent to receiving wages by payroll debit card; and Written disclosure of certain statutory-required information relating to use of the payroll debit card (much of which must be obtained from the providing entity).

In order to pay employees by payroll debit card, **ALL** of the following statutory requirements must be met:

1. The employee must be permitted to make at least one withdrawal/transfer without charge each pay period, but not more frequently than once/week, for any amount the employee elects up to the balance accessible through the card;

2. Changes in fees or terms of service are not permitted unless the employee has received a written notice at least 21 days in advance of the date the changes take effect;

3. A method must be provided for the employee to make an unlimited number of balance inquiries without charge, either electronically or by telephone; and The card may not be linked to any form of credit, including a loan against future pay or a cash advance on future pay.

Under the new law, employees may request a change in the methods of payment referenced above at any time and the employer should take no longer than one pay period to implement the change after the employer receives the request and necessary information. Employers wishing to pay employees by direct deposit or payroll debit card are not permitted to pass along to employees any connected fees or costs. Further, as with most other terms and conditions of employment, employers whose employees are represented by a union are prohibited from unilaterally implementing such changes, and must take steps to meet their statutory obligation to notify and/or bargain with the union (unless they have reserved the right to act in their agreement or otherwise have the union's agreement or consent). PCT has drafted a model form for employers who wish to take advantage of the new law. The form is available under the "forms" tab of our website.

OUR PREDICTIONS FOR SWEEPING REGULATORY INITIATIVES IN 2010 HAVE PROVED TO BE TRUE. BUT WAIT, THERE'S MORE!

By Daniel G. Cohen

At the beginning of 2010, PCT warned that with expanding budgets and the addition of hundreds of investigators, federal agencies were "poised for an all out assault on employers." (Jan/Feb 2010 Workplace Chronicle, What's On the Horizon For Employers in 2010?) Unfortunately, all indications suggest that even more innovative and far-reaching initiatives are on the horizon. Here are a few that are worthy of note:

Department of Labor (DOL) Connects Employees With Plaintiffs' Attorneys. In November 2010, Vice-President Biden announced that effective December 13, 2010, complainants whose cases could not be resolved with the DOL would be provided a toll-free number to be connected with a plaintiff's attorney, approved by the American Bar Association, who could take their case. This program will apply to wage claims under the Fair Labor Standards Act (FLSA), leave claims under the Family Medical Leave Act (FMLA), and other similar matters handled by the DOL. This program also contains an information sharing component whereby the DOL simply transfers its information regarding findings, violations, and back wages due directly to the attorney. Obviously, attorneys will be more inclined to take on cases that have already been investigated and worked up by the DOL. Moreover, this initiative will connect employees with attorneys when they otherwise may not have sought out counsel. While it remains to be seen how this program will impact case filings, we predict that it will not be good for employers.

DOL Pursues Innovative Remedy To Force FLSA Compliance. While testifying before the Committee on Education and the Workforce on February 16, 2011, Secretary of Labor Hilda L. Solis reported invoking a "long-ignored" hot-cargo remedy provision of the FLSA to force compliance with wage payment laws. In short, this provision prohibits the movement of goods in commerce that have been manufactured in violation of the law. Solis believes "[t]his pressure on manufacturers and retailers encourages them to create compliance programs for their contractors and subcontractors," (which incidentally are NOT required by any law, at present). Solis cited a recent application of the hot-cargo provision to a case where a contractor (Angel's Finishing) of a high-end clothing manufacturer (Joe's Jeans – sold at places such as Macy's, Nordstroms, etc.) allegedly failed to pay mandated wages. The DOL pursued an action prohibiting the shipment of goods until all back wages had been paid. When the contractor refused to make good, Joe's was forced to pay the full amount of back wages, and was required to conduct periodic monitoring of its contractor for wage and overtime law compliance, among other things. This is unprecedented territory, and indicative that Solis is committed to her pledge, made the same date as her pledge, to "hold accountable *anyone* who treats workers unfairly."

National Labor Relations Board (NLRB) Announces Intent to Step Up Injunction Cases and Use Unprecedented Remedies. The now Democratic-majority NLRB has issued several memoranda designed to step up efforts to pursue injunctions in cases where employers discipline union sympathizers and to start utilizing remedies that we have never seen the NLRB order. A few examples include a requirement that employers read aloud notices to employees in cases of violations (previously, employers were simply ordered to post a notice in the workplace) and the granting of union access to bulletin boards and employee address information.

Immigration and Customs Enforcement (CE) Audits As many as 1,000 companies for I-9 Compliance in February, 2011. In the past, immigration audits consist of an investigator asking to come onsite and reviewing our I-9 records. On February 17, 2001, several sources, including Worklaw® Network firms from across the Country, reported that as many as 1,000 employers were selected for audit. We are aware of several cases where the ICE inspector showed up, delivered a subpoena, and the employer was ordered to provide a laundry-list of documents to the investigator. We have heard that ICE plans another round of "random" audits of 1,200 additional businesses in the coming months.

Mounting Assault on Credit Checks and Criminal Background Checks. In the face of a daunting information request received by a client from the EEOC, PCT began coordinating with Worklaw® Network attorneys around the country, learning that a little-publicized but mounting effort is underway at the EEOC to preclude employers from relying upon Credit scores or criminal background checks to exclude applicants, because they allegedly exclude minorities to a greater extent.

The above are just a few unprecedented moves that regulatory agencies have taken. Amy other regulatory initiatives are expected in the coming months. Some of the more onerous include a proposal to require high alert and be ready to meet the ever-increasing regulatory burdens composed by Washington, requiring a formal, written classification analysis for all employees treated as exempt under the FLSA or as independent contractors, etc..