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PILCHAK COHEN & TICE, P.C.

Attorneys Representing Management in Labor and Employment Law

WORKPLACE CHRONICLE

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INCREASE IN MICHIGAN'S MINIMUM WAGE MAY HURT BUSINESS IN MORE WAYS THAN YOU MAY THINK

Recent Victories for Our Clients

PC&T received two favorable decisions from the Michigan Department of Civil Rights. The first charge was a claim of religious discrimination involving a Muslim employee, who claimed he was unlawfully prohibited from daily prayers and then terminated based on his religious practice. PC&T challenged the claim by demonstrating he was treated consistently and terminated for a reason unrelated to his religion. The second charge involved an auto dealer having terminated an employee for theft. The employee denied the theft and claimed he had permission to take abandoned property. PC&T demonstrated the employee took contradictory positions, no evidence demonstrated race discrimination and no evidence demonstrated the employer's reason was pretextual. PC&T obtained a preliminary injunction in Oakland County Circuit Court prohibiting a former employee of a client from soliciting customers and contacts of which she learned in the course of her employment.



On March 28, 2006, Governor Granholm signed a bill that increases the State's minimum wage. The first increase takes effect on October 1, 2006 when the rate goes from \$5.15 to \$6.95. On July 1, 2007, the rate increases to \$7.15 and on July 1, 2008, it goes to \$7.40. Come October 1, 2006, Michigan's minimum wage will eclipse the federal minimum wage for the first time since 1967. While there are a number of compelling arguments for and against increasing Michigan's minimum wage, these take a back seat to the unintended and costly consequence that the increase may have on Michigan's employers, i.e. loss of many miscellaneous overtime exemptions found in the Fair Labor Standards Act.

To understand the magnitude of the problem, a quick history lesson is in order. In 1964, the Michigan Minimum Wage Act ("MWL") was passed. In its original form, the Act did "not apply to any employer who [was] subject to the minimum wage provisions of the federal fair labor standards act." MCLA 408.394. This meant that only the smallest businesses with only Michigan operations were covered by the MWL. In 1966, the Leg-



islature added the following language to §394: "except in any case where application of such minimum wage provisions would result in a lower minimum wage than provided in this act..." Accordingly, provisions of the MWL would apply to larger employers covered by the FLSA, if Michigan's minimum wage exceeded the federal minimum wage.

Ironically, the "except for" language was not passed to eliminate the miscellaneous overtime exemptions once if Michigan raised its minimum wage. The "except" language was a legislative response to Congressional amendments bringing several new industries under the FLSA, when the MWL had no overtime provisions. These newly covered industries would be subject to a lower federal minimum wage than all other employers, which was also lower than Michigan's minimum wage. In response, the Legislature amended §408.394 to provide that those newly-covered employers would be subject to the State's higher minimum wage rate. Thus, the "except for" language was only intended to provide that Michigan employees in the newly covered industries were paid at least Michigan's

PILCHAK COHEN & TICE, P.C.

3062 East Walton Blvd.
Auburn Hills, MI 48326

Phone: 248.409.1900

Fax: 248.409.1999

Email: firm@mi-employmentlaw.com

FIND US ON THE WEB AT
www.mi-employmentlaw.com



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

minimum wage. As soon as the federal minimum wage rate for the newly-covered industries rose and caught up to the Michigan rate for all industries three years later, the reach of the MWL was returned to small, intrastate businesses.

Accordingly, when the State added an overtime provision to the MWL in 1974 (eight years after the "except for" amendment), it had



little impact on the larger businesses subject to the FLSA because the MWL did not apply to them. The new Michigan overtime provisions provided only a handful of overtime exemptions. But that did not matter, because larger employers subject to the FLSA simply applied the many overtime exemptions available under federal law. However, the "except for" language remains part of Michigan's statute, and once

the State's minimum wage exceeds the federal rate on October 1, 2006, employers who have been relying on the miscellaneous federal overtime exemptions will be at great risk if they continue to treat certain employees as exempt from overtime, unless the legislature acts. Michigan law does not recognize many of the federal overtime exemptions. Thus, the following employees will become entitled to overtime pay under Michigan on October 1, 2006:

1. Drivers subject to the regulation of the Department of Transportation;
2. Mechanics, drivers, driver helpers and loaders engaged in interstate commerce;
3. Outside sales employees;
4. Employees in certain computer related positions;
5. Salespersons, partsmen and mechanics employed by automobile dealers;
6. Salespersons employed by trailer, boat and aircraft dealers;
7. Movie theatre employees;
8. Taxicab drivers;
9. Domestic caregivers;
10. Announcers, editors and chief engineers of radio or television stations in small markets;
11. Employees in the fishing industry¹.

It is readily apparent that Governor Granholm did not sign the Minimum Wage Bill with a full understanding of what was at stake. At a time that Michigan is fighting to keep jobs and attract new business, it seems quite improbable that she would (1) place Michigan at a competitive disadvantage with states that recognize the miscellaneous federal overtime exemptions, (2) risk decreased tax revenues occasioned

¹There are other federal exemptions that are not recognized by State law.

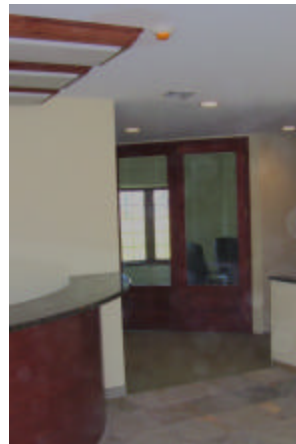
PC&T RELOCATES TO AUBURN HILLS

Joining other prominent Auburn Hills businesses, DaimlerChrysler, Borg Warner and Volkswagen-Audi North America, Pilchak Cohen & Tice will move into newly-purchased and renovated premises at 3062 Walton Blvd. The new location is one mile north of DaimlerChrysler, and ¼ mile west of Oakland University's campus.

New telephone numbers for the firm are: 248-409-1900 and 409-1999 (fax). PC&T's e-mail will remain the same.

The library in the new building includes facilities for training and seminars. Accordingly, clients and friends can look forward to on-site presentations and seminars, including a periodically scheduled "Supervisor's University," where management personnel can learn practical methods to comply with the myriad of employment-related laws while focusing on business.

Please feel free to drop in for a visit when you are calling upon DaimlerChrysler or one of the many other businesses in Auburn Hills, or before an event at the Palace, two miles north of us. ❖



DIRECTIONS: We are directly north of DaimlerChrysler World HQ: Exit I-75 at University Drive (exit 79), proceed east to Squirrel (at Oakland University campus) turn left/north to Walton (one mile). Turn left/west approx. 1/4 mile to 3062 E. Walton Blvd., at the corner of Snellbrook.

by business flight and an inability to attract new business; and (3) create a need for appropriations to the Michigan Wage and Hour Division, which is grossly understaffed to investigate complaints brought by the nearly 400,000 additional employees who will have overtime protections under the MWL come October 1. One would think that a legislative fix would be easy, but recent news indicates that a political battle is brewing. See: <http://www.npr.org/templates/story/story.php?storyId=5363503>. As employers and employer representatives, we cannot sit back and wait for the government to act. We all need to do our part. If your company is one that will be significantly affected, your best course of action is to alert your industry trade group, and have them contact Daniel G. Cohen at Daniel.Cohen@MI-employmentlaw.com, who is currently working with a number of business representatives and the State Chamber of Commerce in a coordinated effort to remedy this problem. Alternatively, you should contact your state legislators at www.legislature.MI.gov. ❖

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Pilchak Cohen & Tice, P.C. — *Workplace Chronicle* — May 2006

CRUDE EXPRESSION OF DESIRE PROVIDES NOTICE OF EMPLOYEE’S VIOLENT PROPENSITIES

A recent case expanded the violent propensities doctrine, again alerting employers of the need to react to complaints of sexual words in the workplace.

In *Brown v Samuel Whittar Steel*, a non-employee female security guard complained to the plant manager that a foreman told her of sexual acts he would like to perform upon her, using the crudest of terms. The plant manager did nothing, the woman was later raped, and the foreman convicted. The security guard sued the employer for negligence and assault and battery.

Normally, an employer is not liable for the unforeseen acts of an employee or acts outside the scope of an agent’s authority. And, prior law had indicated that criminal acts are generally unforeseeable. However, a number of prior cases have held that a business entity may be liable for criminal acts, if it knew or should have known of an employee’s or customer’s violent propensities:

- Knowledge of an employee’s criminal record and “past acts of impropriety, violence or disor-

der” is sufficient to put a business on notice;

- Knowledge that most of the individuals visiting a treatment center were mental patients including some with violent tendencies invoked the doctrine.

In *Whitmar Steel*, the court stated that the foreman’s expression of what sexual acts he would like to perform upon the plaintiff was sufficient notice of violent propensities to warrant a trial on the negligence and assault claims, despite the fact that no words indicated that he was inclined to force her into sexual acts and the plaintiff’s own testimony that the statements did not provoke fear of an assault on her part. In other words, the court ruled that the employer should have concluded that an assault was foreseeable, though the target who actually heard the words spoken did not.

Employers increasingly recognize that expressions of sexual desire have no place in the workplace. At the very least, the company must react to such complaints and insert themselves in the process. At-will employees may be removed for such acts, usually with no legal recourse, unless there has been a discriminatory application of termination. However, in a variety of scenarios, it is clear that doing nothing is the worst thing to do. ❖