

PILCHAK COHEN & TICE, P.C.

Attorneys Representing Management in Labor and Employment Law



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HAPPY HOLIDAYS !!

Recent Victories for Our Clients

PC&T obtained summary dismissal of a Lapeer County case where an employee filed suit against an employer two days before the statute of limitations expired, but neglected to serve it until several months later. Recalling an obscure nuance of the 2003 court rules, PC&T moved to dismiss because the Plaintiff could only avoid dismissal by placing the summons in the hands of the sheriff before the three year anniversary. Other Defendants, who simply filed answers, were not excused from the case, and are incurring defense costs.



The Top Ten New Years Resolutions For Human Resource Professionals and Business Owners

Its time for New Years Resolutions. Here is a list for HR Professionals and Business Owners:

- 1. Update the Handbook once and for all**—As most of you already know, we believe that your handbook is probably the single most important document you can have. For this reason, it must be periodically updated to remain current. This is one project that tends to be put on the back burner more so than other projects. Before you know it, several years have gone by and the handbook has not been updated. Given our experience with changes in the laws and interpretations of existing laws by courts, handbooks should be reviewed and updated every two to three years.
- 2. Kick off your Management Training Program**—Management training in the area of employment law and personnel decisions is often one of the most neglected yet important projects. We recognize at PCT that most employment problems are either caused by or involve your supervisory personnel. This is not because your supervisors intend to create problems, but is more likely the product of their focus. Indeed, most supervisors are working toward the manufacture of your products. So, they are likely to focus more on avoiding an expedited shipping charge than sitting down with an employee who is seeking their assistance with a “people problem.” Under its recent trilogy of sexual harassment cases, the Supreme Court has made it exceedingly clear that training is required if you intend to defend on the ground that you took reasonable steps to prevent harassment.
- 3. Review Your Orientation Package**—We at PCT are firm believers that documentation is the key to protecting your businesses against employment related claims and litigation. An orientation package, which includes the application, Fair Credit Reporting disclosures, I-9 paperwork, tax forms, non-compete/confidentiality agreements, HIPAA authorizations, job descriptions, among other things, together with an orientation checklist, is a wise choice. This will protect against inadvertent omissions and, with respect to the orientation checklist (signed by the employee), you will have an inventory of items presented to and/or discussed with the new hire.
- 4. Review Your Job Descriptions**—These are all key documents for the defense of wrongful discharge, discrimination and retaliation cases. Job descriptions are also quite helpful in the administration of the FMLA as well as your efforts to provide reasonable accommodations under the ADA and the Michigan Persons With Disabilities Act. It is important that you include the mental features of the job and not just the physical features of the job. For example, you want job descriptions to address cooperation, teamwork and effective communication. And, all job descriptions should provide for “other duties as assigned.” Job descriptions should be discussed with employees, and they should be required to sign for the description.
- 5. Address Internet and Technology Usage and/or Abuse**—With such a large percentage of employees who use or have access to computers, consideration should be given to access controls as well as what information can and cannot be accessed. More and more lawsuits center around e-mail abuse, like sending harassing messages to co-workers. You must prohibit such uses and retain the right to monitor employee usage of your technology.

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

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Top Ten New Years Resolutions...

- 6. Get Your Personnel Files In Order**—If you do not have a simple and user friendly procedure for transferring everyday personnel records into the employee's personnel file, now is the time to act. The second most important thing about documentation (after the creation of it) is the storage of it. Your record-keeping should be centralized and access to the personnel files extremely limited. Personnel files must be separated from medical records and secured.
- 7. Tighten Up Your Attendance Policies**—Attendance problems continue to plague employers and place additional burdens on employees with good attendance. While attendance problems are common, good attendance policies and practices are not. Do not allow your employees to manipulate your managers when it comes to reporting and supporting their absences with untimely documentation. Require employees to provide advance notice of absenteeism and tardiness and require them to present contemporaneous documents. Moreover, do not maintain reporting systems that allow employees to avoid discussing their absences with you.
- 8. Evaluate and Address Employee Turnover**—Employee turnover is both costly and time consuming. If you have been experiencing turnover, we would suggest that you re-evaluate what you are doing to screen job applicants. The Hiring process tends to have a direct affect on longevity. How you recruit and attract qualified candidates and what you do with them once you have found them is extremely important for one reason: this is your best opportunity to find talented people with the character you need or, put another way, it is your chance to screen out problems from entering the workforce.
- 9. Scrap Inaccurate Evaluation Forms And Processes**—One of the most difficult scenarios PCT faces is when we defend litigation where an employee was terminated for substandard performance or a continuing trait that is not mentioned in the evaluations on file. All too often, we hear: "At our company, 3 out of 5 is a poor grade. Mediocre employees get "4's and good employees get 5's." This occurs because supervisors are not willing to give bad news, because they do not want to let on that anyone in their group is less than perfect or because they feel it reflects badly on them. However, to a jury, an employee earning '3 out of 5' is equal to a "C student," which any dunce knows is a passing grade. With training, supervisors can learn how to impart constructive criticism along with praise where warranted. If your "system" causes or facilitates inflated evaluations, it is time to adopt a new one.
- 10. Review Your Overtime Exempt Jobs**—This is often referred to as a wage-hour audit. These audits are timely now that the Department of Labor has just issued its long overdue revised overtime regulations. Many practitioners wrongly assume that employees who are paid a salary are automatically exempt from receiving overtime pay for all actual hours worked in excess of 40 in a work week. Another commonly held misperception is that managers are always exempt. In reality, managers are often mischaracterized as exempt because of their title and salary. Wage hour audits place the proper focus on the nature of the job (i.e. the amount of discretion and independent judgment) and can help reduce the exposure to unpaid overtime awards. ❖



PCT QUARTERLY SEMINARS
February, 2005—Wage Hour Traps for the Unwary

DATE & TIME—To Be Determined

Visit our web site to indicate your interest and to suggest other seminars and to indicate *your preference* for dates & times.

HIGHLIGHTS FROM THE 2004 ASSOCIATION OF CORPORATE COUNSEL MEETING

As Chairman of Worklaw Network's ACC Committee, Bill Pilchak attended the employment law continuing education sessions of this year's meetings. Here are some helpful highlights:

Losing Protection of Trade Secrets, Confidential Information and Non-Competes

Companies often lose protection for confidential information by knowingly or accidentally publishing or releasing the information. Though this obviously compromises "secret," or "confidential" status, this may also void non-compete agreements. Michigan's case law has not yet stated the point directly, but the common thread running through all decisions enforcing non-compete agreements is the departing employee's ability to unfairly compete using confidential information--about customers and prospects, pricing and margin, technologies, suppliers, business plans, etc. Here are some examples how information is released, thus eroding protection:

- A company touts its customers on a website that can be accessed by anyone. It can no longer claim that a sales rep should be bound by a non-compete because he knows the identity of its customers.
- A mortgage company provides its loan officers with a commission statement identifying each loan customer and the property address mortgaged without designating the information confidential. Sometimes "final" statements are mailed after termination.
- A company obtains a patent on key technology that competitors could not otherwise determine, thus disclosing the technology to the general public via the patent office.

A wiser strategy would be to "name drop" high profile customers in a less public manner, to code each commission statement by customer ID numbers that have little meaning out of the office, and to make intelligent decisions on when information should be protected by filing information in the public record.

Mandatory Sexual Harassment Training For Supervisors in California

More and more PC&T clients have California operations. One of the ACC presentations noted that under California state law, sexual harassment training for supervisors is mandatory. While employers in other states may think this is only one more peculiar California concept, in reality, federal law is not that far away from the idea. Under Title VII, employers with 20 or more employees must take affirmative steps to prevent sexual harassment from occurring in the first place, and prompt remedial efforts to address it when it does occur. Wise employers demonstrate that they have taken steps to prevent harassment by arranging for presentations by their attorneys or human resource consultants.

Wage Hour Practices

Most employers forget that commission and bonus payments, such as production bonuses, annual bonuses based upon company performance, and other payments based on specific criteria must be included in the employee's basic wage rate under the federal Fair Labor Standards Act, and included in the calculation of overtime for the week they are given. While truly discretionary bonuses (as to whether any bonus will be paid and as to amount) do not have to be included, the Department of Labor considers them rare. Nor may employers schedule bonus payments for weeks where employees will not normally work more than 40 hours, such as holiday weeks, to avoid overtime, because the regulations require that the bonus payments be apportioned over the weeks they were earned. However, the department will not find a violation, merely because the "bonus overtime" was paid when the bonus is paid, as long as it is allocated to the prior weeks.

Wage-Hour violations cannot be waived under the Fair Labor Standards Act, unless the Department of Labor oversees the settlement. When stuck in that difficult problem of trying to make payments rectifying past questionable wage practices without attracting the DOL's attention, one strategy to consider may be to pay the amount due and obtain an acknowledgement that the employee has received the back wages. While this payment does not "settle" the issue, and the employer is at risk for two years (three years if willful) that the DOL or a lawsuit would seek the liquidated damages available under the FLSA, at least the employer can show the wages were paid, and start the statute of limitations running.

Immigration Law Tips

The B-1 Visa (temporary visa for business) is widely abused by companies to escape the rigorous H-1B non-immigration visa requirements. Contrary to common belief:

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Highlights

- B-1 Visa status does allow the holder to engage in gainful employment while in the U.S. The holder may not be “employed” here.
- The holder may not be paid as an independent consultant while in the U.S.
- The B-1 Visa holder may:
 - Negotiate contracts
 - Engage in commercial transactions
 - Participate in litigation
 - Attend conventions, meetings, seminars.

One of the requirements for H-1B Visas is that the employer provide the employee with air transportation back to his/her native land when the assignment supporting the visa status ends. One large company, which utilizes many H-1B visa holders, typically provides the employee with a pre-purchased airline ticket, which meets the employer’s obligation under the regulations, rather than providing a check for airfare. That way, if the visa holder obtains an assignment through an other sponsor and stays in the U.S., the cost of the unused ticket returns to the company.

GOOD CHEER TO THE PLAINTIFFS’ BAR

Finally, we thought you would enjoy this tidbit. One Plaintiff-side firm won an astonishing \$90 Million class action award for an employee group—**and were sued by those same employees for malpractice** because they did not claim the non-payment of wages was “willful” so as to entitle the employees to another year of potential damages. Now you know why your mom always told you be careful about choosing who you associate with. ❖

You can find back issues of the *Workplace Chronicle* on the Web at
www.MI-EmploymentLaw.com/newsletter.htm

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