

# PILCHAK COHEN & TICE, P.C.

Attorneys Representing Management in Labor and Employment Law



## WORKPLACE CHRONICLE

January  
2005

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### Recent Victories for Our Clients

In a union's common-law litigation against a service vendor that displaced the employer with whom it had a collective bargaining agreement at a major public facility, PC&T successfully removed the action from Wayne County Circuit Court to federal court, satisfying the federal court that the union's suit raised issues that should have been brought under federal labor law.



### It Pays to Know the Hidden Dangers of The Equal Pay Act

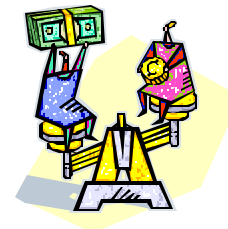
Every cloud has a silver lining: Sometimes Michigan's gold-plated civil rights act carries hidden benefits for PCT clients. One of those benefits is that plaintiffs often forego federal claims in order to avoid removal of lawsuits to federal court, preferring the more plaintiff-friendly Michigan courts. One of the federal statutes employers are happy to avoid is the Equal Pay Act.

The EPA provides for the laudable goal of assuring that men and women are paid equal money for equal work. However, several common scenarios thought to be non-discriminatory can run afoul of this law. And, there is a veritable thicket of problems for employers who litigate these claims.

First, jobs need not have identical titles or involve precisely identical tasks to come within the act. Rather, jobs are comparable if they involve equal skill, effort and responsibility. Accordingly, in one of the early cases, Shultz v. Wheaton Glass Co., 421 F.2d 259 (3<sup>rd</sup> Circ., 1970), under a union contract, male selector-packers were expected to perform 16 different duties, largely requiring heavy lifting, from which female selector-packers were exempt. The company contended that 18% of the males' time was spent on these 16 duties. However, these heavy lifting duties were also performed by other employees ("snap up boys") that were paid less than either male or female selector-packers. Accordingly, the lifting duties, which warranted less pay for snap-up boys, could not justify higher pay for male selector-packers. Finding an equal pay violation, the court noted equal work does not mean identical work.

Another problem is that the comparable male employees need not be employed at the same

time as the female plaintiff. A plaintiff can base her claim on the pay provided to males employed in the past. Surprisingly, several court decisions compare the pay offered to males after the plaintiff has left the job. This can put employers in difficult legal positions, even without discriminatory animus. Consider the employer who refuses to meet the salary demands of a female employee, thus triggering her resignation. If the employer finds it cannot fill the position at the salary previously paid (in other words, realizes the employee was right), hiring a male at an elevated salary will provide evidence of an EPA violation, though the prior salary may unquestionably have been set without discrimination.



Worse, when the plaintiff shows that males and females were paid differently for substantially the same work, the burden of proof shifts to the employer to justify the difference.

In all other discrimination cases, the employee always bears this burden of proving the employer's reason to be false, and ultimately of proving discriminatory intent.

Available statutory defenses are that the pay differences are attributable to a bona fide seniority system, a merit system or a system which measures earnings by quantity or quality of production. However, most employers resort to the catch-all defense: That the wage differential is based on a factor other than sex.

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- Consent and Authorization to Release Employment Information
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- 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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**... EQUAL PAY ACT**

The federal treatment of common business scenarios raising this catch-all defense is at times bizarre. Many employers have had defenses blow up in their faces. For example, if an employer were to cite the “market rate” for a position that was traditionally occupied by females as the reason for the present wage, some courts respond by indicating that such market rates are the product of past discriminatory influences. The employer may have to equalize the pay for traditionally female positions that are substantially the same as other jobs.

Similarly, most employers would think that paying the female applicant the salary requested at her interview would insulate them from a wage discrimination claim. However, some federal courts considering EPA claims indicate that female employees may have tolerated depressed wages in the past, and accordingly make lower demands than males. These courts hold that the employer has the obligation to hire at the salary level offered to males in comparable positions.

Interestingly, Title IX cases in the university sports realm have led to decisions explaining that while the gender of the employee must be a non-factor, the gender of those dealt with may have a legitimate bearing on income. For example, a university would not have to pay the male coach of its female basketball team the same as the coach of the men’s team.

Thankfully, the plaintiffs’ bar generally raises wage discrimination claims under Michigan law, which would treat most of the troubling issues differently. Under the Elliott Larsen Act:

- The plaintiff retains the burden of proving the employer’s non-discriminatory reason false;
- The employer’s discriminatory animus must be shown and paying prevailing market rates for a given occupation has not been labeled as perpetuating past discrimination;
- Changing the pay for a position because of the belated realization that the company’s pay scale has not kept

up with the job market will probably not be considered discriminatory if later incumbents are paid more.

Nevertheless, what should employers do to guard against the prospect of federal Equal Pay Act claims?

- Pay attention to job classifications that are inherently gender-related, and critically examine if pay differentials are justified. For example, paying guards in male prisons more than guards in female prisons might be justified because male prisoners pose a greater threat. But a differential in pay for males and female guards in the same prison requires careful analysis.
- Be mindful of jobs that have different titles but may involve substantially the same duties. For example, the duties of nurse practitioners may be nearly identical to those of physician’s assistants, but nurse practitioners are traditionally female and paid less.
- If you recognize a pay differential, develop a strategy for justifying the differential and consider having an analysis done by legal counsel or occupational experts to bolster the file in case the EEOC or an employee raises a claim. Failing justification, pay rates may have to be readjusted. (A footnote- the EPA prohibits reducing the salaries of males to achieve equality.)
- If a female employee complains that her salary is too low, do not brush off the complaint. At a minimum, consider (as suggested above) whether higher paid males are or were essentially doing jobs that require equal skill, effort and responsibility. To prevent underpaid females from vacating positions that cannot be filled at the current income-level, consider researching the market. PC&T can help with strategies or point employers to resources in this regard. To disarm complaining employees, consider inviting them to assemble comparable market data, critically examine their perspective and then respond with rationale that will pass muster if reviewed by a court. ❖

## BAD EMPLOYMENT AGREEMENTS— DO YOU HAVE ONE?

As attorneys who have been representing businesses in employment matters for over 20 years, we have had occasion to draft, review and defend hundreds of employment agreements. We know a good employment agreement when we see one and we know a bad employment agreement when we see one. Bad employment agreements exist for a variety of reasons, but one reason that sticks out above all others is the desire to strike a quick deal with that immensely talented candidate who only comes along “once in a lifetime.” Accordingly, some of the worst agreements are for the highest ranking executives. While passion of the moment might motivate many business owners to be overly generous, it is no reason to throw caution to the wind and, in essence, give away the farm, much in the same way the aging Hollywood superstar, in the heat of passion, marries the young beauty without a prenuptial agreement.

But, what makes an employment agreement a truly bad one? The most basic mistake that can be, and actually is made, is not establishing “at will” employment. In Michigan and most other places, an “airtight” at-will statement with a provision prohibiting its modification will foreclose trial by jury in a breach of employment agreement case. So, the starting point is to make certain that the employee “may be terminated at any time with or without cause” and that the at-will nature of the employment relationship “may only be modified by the President of the Company and any modification must be in writing.”



We have seen language over the years, which attempts to accomplish this, but simply falls short. For example, a provision stating that “employment may be terminated without notice” is insufficient. This only means that there is no requirement for notice. It does not answer the question whether the termination must be for cause or can be at the will of the company. And, the courts have refused to dismiss suits on the basis of “without notice” language. Another failed attempt to create at-will employment is a provision stating that “the agreement may be terminated at any time for improper conduct, nonperformance or incompetent performance.” This only establishes

that improper conduct, nonperformance or incompetent performance are “cause” for discharge. And, this is a jury question.

Of course, if the employment agreement is going to identify particular circumstances that can result in discharge, poor performance must be listed. We have seen employment agreements, which define cause as willful failure to follow directions, the conviction of a crime and bad faith breach of duty. This means the employee could unintentionally run the business into the ground, oversleep and miss the meeting with the biggest customer (which motivates the customer to pull all its business) or otherwise just be the worst performer there ever was and s/he could not be properly terminated under the terms of the employment agreement.

Other employment agreements provide for severance pay in the event the agreement is terminated for “other than cause.” Many agreements require substantial payouts of severance pay, despite horrific performance. Worse still, we have seen employment agreements, which provide for severance where the employee leaves for a “good reason.” Of course, as it turns out, one such employment agreement was drafted by the employee’s attorney, and the company did not have its attorneys review it first. Another employment agreement contained a provision, which gave the non-breaching party 30 days to cure before it could be considered good cause. In theory, such a provision would give the employee the right to reimburse monies stolen from the company and the employee would avoid the “for cause” provision.

We have also seen employment agreements inadvertently eliminate important obligations that employees once had. This can be accomplished through the following provision: “This agreement supercedes all prior verbal or written agreements.” While we almost always recommend language similar to this, companies can in one fell swoop cancel out a non-compete or confidentiality agreement previously signed by the employee. An easy way to avoid this dilemma is to use language, which makes it clear that the employment agreement “supercedes any prior contrary verbal or written agreements.”

So, the next time you plan to execute an employment agreement, be certain that it affords you with the protection and flexibility it should. Have it reviewed by counsel, and we mean your counsel not the employee’s counsel. Make sure it makes sense for the business and provides value. Finally, if you are going to give away the farm, make sure it is by design and not by accident. ❖



### **PCT QUARTERLY SEMINARS**

*1<sup>st</sup> Quarter 2005*

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**FRIDAY, FEBRUARY 25, 2005**

**8:30 am - 1:00 pm**

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