

PILCHAK COHEN & TICE, P.C.

Attorneys Representing Management in Labor and Employment Law



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Michigan Affiliate

The Nationwide Network of Management Labor and Employment Law Firms. Worklaw Network Attorneys practice in 38 states and the District of Columbia.

Inside this issue:

Despite U.S. Supreme Court Ruling That Younger Employees Cannot Sue, in Michigan, Young Employees are Protected	...1
Recent Victories for Our Clients	...1
Neutrality Agreements - The Union's New Organizing Weapon! Add This To The List of What Not To Do When The Union Comes Knocking At Your Door	...2
Upcoming Seminars and Speaking Engagements	...4
Items from Worklaw Network's Mid-Winter Meeting	...4

Recent Victories for Our Clients

PCT recently settled a racial harassment case for a four figure amount, far less than the cost of a motion to dismiss, after discovery showed that other minority employees did not consider the acts of co-workers offensive, and where the employer took prompt, remedial efforts to assure that the acts were nonetheless never repeated.



DESPITE U.S. SUPREME COURT RULING THAT YOUNGER EMPLOYEES CANNOT SUE, IN MICHIGAN, YOUNG EMPLOYEES ARE PROTECTED

On February 24, 2004, the United States Supreme Court held that the federal Age Discrimination in Employment Act ("ADEA") does not forbid employers from preferring older employees over younger employees. *General Dynamics Land Systems, Inc. v Cline*. In *Cline*, General Dynamics negotiated a collective bargaining agreement that provided health benefits to subsequently retired employees who were at least fifty years old when the contract was signed. All other future retirees would get no health coverage. Employees over the age of 40 but younger than 50 claimed age discrimination. (Employees under the age of 40 are not protected by the ADEA at all.) The plaintiffs claimed that "age" was not defined to mean "older" and that "the word could be read to look two ways."

Reviewing an extensive legislative history which indicates that the ADEA was passed to prevent discrimination against older workers because of demeaning stereotypes and increased costs to employ older workers, the Court held "the statutory objects were to promote employment of older persons on the basis of their ability rather than age." "[P]rejudice suffered by a 40-year-old is not typically owing to youth, as 40-year-olds sadly tend to find out." The Court noted that if Congress had been worrying about protecting the younger against the older, it would not have ignored everyone under the age of 40.

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Whenever the U.S. Supreme Court speaks upon a point of employment law, the Michigan business community must consider the effect upon discrimination

law under Michigan's statutes. Unfortunately for employers, the Michigan Court of Appeals has already definitively ruled on this issue, holding that **younger employees are protected against discrimination on the basis of their age**. For this position to be reversed, an employer must be sued and obtain a contrary ruling from the Michigan Supreme Court.



continued on page 3 ...

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- I-9 Forms
- 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

**Neutrality Agreements -
The Union's New Organizing Weapon!
Add This To The List of What Not To Do
When The Union Comes Knocking At Your Door**

If employees at your company (or a unit of your company) are not currently unionized, you should know what not to do if the union ever calls or shows up on the scene. There are two ways for employees to get the union in the door: (1) an election conducted by the National Labor Relations Board (NLRB), or (2) the employer voluntarily recognizes the union. In almost every case, the NLRB election process is in an employers' best interest. It is a secret ballot election, and is typically set far enough in advance so that employees can be taught what unionization is all about. Often, employees sign union cards or petitions—because they feel coerced (e.g., a union business agent may visit employees at their homes) or because they do not know what they are signing (e.g., they think they are signing a card to get an election, but in reality they are signing a contract to make the union their representative). So, even if employees sign cards, they do not always vote for the union.



Before an NLRB election, there is generally a period (typically about 6 weeks) where both the union and the employer may "campaign" to employees on how they should vote. With the current laws, there are many things that unions *can* do in this process that employers *cannot*. For example, the NLRB says it's ok for unions to urge employees to vote for the union on the promise that they will get them more pay, but not ok for employers to promise employees a raise if they vote against the union. The rationale for this rule is that employers have the power to deliver on their promises but the unions do not. This is just one rule; many follow. The moral of the story is: while employers can still succeed in conducting successful campaigns, they must be extremely careful in sending their message to their employees, they are already facing an uphill battle.

In the old days, unions attempted to trick unwary employers into voluntarily recognizing the union. For example, if an employer agreed to meet with a union representative about whatever he/she wants to talk about, and then looked at cards signed by employees or a petition signed by employees that equals a majority, the employer could become legally bound to recognize the union without the benefit of the NLRB election process. **If you are not unionized, and confronted with a union request to meet and/or look at cards or petitions, you should refuse and call your attorney immediately!**

The union's newest tactic is Neutrality Agreements. They are typically requested of employers with some units organized. In other cases, governmental bodies have been known to pressure their vendors to adopt them at the urging of their own unions. Unions use this tactic to get the employers' agreement on one or more of the following: (1) remain neutral during any period preceding an election and not say anything bad (ie: the truth) about the union; (2) forego the secret ballot election process and instead use union authorization cards or petitions (inherently unreliable); (3) allow the union to access the premises and to talk to employees either individually or in captive audiences (a right unions do not typically have under current laws), and/or (4) agree to provide the union with your employees' personal information.

continued on page 3 ...

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... SUPREME COURT RULING ...

Michigan has gotten to this point in a series of cases brought by younger plaintiffs.



In the first case, *Cheeseman v American Multi-Cinema, Inc.* 108 Mich App 428 (1981), children denied entry to the movie, “Animal House,” sued under the discrimination statute’s “public accommodation” provisions. There, the court assumed, without discussion, that younger patrons were as protected as older patrons, but decided they could be excluded under other provisions of the law protecting children. Next, in *Zoppi v Chrysler Corporation*, 206 Mich App 172 (1994), the Court held that a 49 year-old plaintiff could not complain that a pension plan required retirees to be age 55 or older, because “the Civil Rights Act was conceived to deter discrimination against older workers who are still capable.” However, *Zoppi* was overruled in *Zanni v Medaphis Physician Services Corp.*, 240 Mich App 472 (2000), where the Michigan Court of Appeals convened a special panel to decide this issue. In *Zanni*, an account executive was terminated and replaced by an older worker because she lost two accounts, had violated an employee plan, and was told she sounded “too young” on the phone. Because Michigan’s Act defines “age” as “chronological age,” the *Zanni* court held that nothing in the act indicates that the statute was designed to protect only older workers, saying:

“If an employer disfavors an employee because the employer perceives the employee as being too young, the employer has plainly disfavored the employee on the basis of the employee’s chronological age just as much as if the employer disfavored the employee for being perceived as too old.”

The *Zanni* Court expressly declined to follow federal ADEA cases, noting that the ADEA limits its protections to those 40 years or older, and holding that the omission of a similar provision in the state statute raises a presumption that it was considered and declined. And, the rationale of *Cline*, quoted above, supports analysis of the *Zanni* Court.

Obviously, news that younger employees are protected from discrimination may raise questions about current employment practices in Michigan. Employers with pension qualification issues, such as in *Zoppi*, can rely upon an exemption provision for “bona fide retirement policies.” MCL 37.2202(2). Other disqualifications can be defended on bonafide occupational qualifications, such as liquor laws, child labor laws, etc. However, clearly, some employment practices that disqualify individuals for positions or benefits should be re-examined to avoid discrimination against younger employees under Michigan law. ❖

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Neutrality Agreements ...

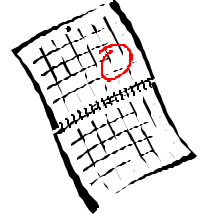
The answer on what to do if ever requested to sign a neutrality agreement should seem obvious: Don’t do it! However, employers often feel pressured. Frequently, the organizers imply that the employer’s relationship with existing unions will suffer unless the employer remains neutral in other organizing drives. Or, the union may threaten to take the case public, picket the jobsite, etc. Still: Don’t sign! Signing an agreement to this effect is almost certain to doom the results of the election (in favor of the union).



In dealing with unions in these types of situations, the rule “less is better” usually applies. Agreements to meet and discuss issues with a union that is not currently a representative of your employees, or chains of correspondence, could be used as evidence that the employer voluntarily recognized the union. If propositioned to sign one of these agreements, a simple “No thanks” would be the preferred response. Remember, there are many NLRB legal intricacies that govern what is lawful for an employer to say or do. By saying the wrong thing, the employer may jeopardize its position (e.g., be required to bargain with the union even though the employees didn’t vote the union in and the employer did not voluntarily recognize it). For this reason, it is important to immediately train supervisors on these intricacies whenever it is suspected that a union is knocking on the door.

As an employer, there are many reasons to say “no thanks.” Such agreements create a one-sided election environment--allowing the union to do what it wants yet permit the employer to do almost nothing. They could potentially interfere with the rights of employees who want to say “NO” to the union, for example being forced to attend captive audience speeches by the union. Most important, such agreements often divest employees of the secret ballot process, which a company can legitimately claim is sacred under the statutory scheme. While it is important to recognize these reasons, it is generally a good idea to follow the “less is more” approach in communicating with the union until speaking with your attorney. Strategies need to be developed depending on the individual facts of each circumstance, and employers need to make sure that their communications are carefully scripted so they don’t say or do the wrong thing. ❖

UPCOMING SEMINARS—MARK YOUR CALENDAR !!



May 19, 2004—Council on Education—Michigan FMLA Update 2004 in Novi, MI

July 15, 2004—Lorman Education Services—Family and Medical Leave Act in Michigan—
location TBD

ITEMS FROM WORKLAW NETWORK'S MID-WINTER MEETING:

According to Worklaw Network's new Toronto affiliate,
the largest sexual harassment award ever rendered in Canada is \$40,000—Canadian!!!

In contrast, Michigan's record verdict is \$20 Million, for an employee who was not sexually touched, and who remained employed with the employer at the time of the trial!

Worklaw Network Firms represent 110 of the Fortune 500 Companies.

Worklaw Network will be at the Association of Corporate Counsel's 2004 Annual Meeting (Chicago—October 25-27, 2004) and the Society for Human Resource Management's 56th Annual Conference and Expo (New Orleans—June 27-30, 2004)

You can find back issues of the *Workplace Chronicle* on the Web at
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4

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