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PILCHAK COHEN & TICE, P.C.  
THE EMPLOYERS LAWYERS

# WORKPLACE CHRONICLE

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**Recent Victories for Our Clients**

PC&T won a worker's compensation retaliation case before the Michigan Court of Appeals on behalf of an employer that dismissed a supervisor for violating a major safety rule after being warned by an hourly employee not to do so, and for then professing complete ignorance of the rules. The employee argued that notes in the file showed that a manager had told HR that he had opposed the employee's two prior workers compensation claims and were "direct evidence" of a retaliatory motive. Like the trial court, the Court of Appeals rejected that argument and held further that the employee's repeated admissions during the investigation and at his deposition that he did not know the safety rules meant that he was "not qualified" to work in the dangerous work environment, handling molten steel.



**OBTAINING A RELEASE OF EMPLOYMENT CLAIMS IN WORKER'S COMP SETTLEMENTS TO BECOME MORE DIFFICULT**

By William E. Pilchak

A number of insurance carriers writing workers disability compensation insurance policies have announced that they will no longer permit the attorneys and third party administrators representing their interests to negotiate resignations of employment and releases of claims when working out resolutions of workers' compensation claims. In the past, contentious claims were frequently resolved with a payment to the claimant, a waiver of seniority, a release of all statutory or common law claims and a "don't darken my doorstep" provision where the employee agreed that he/she would not ever apply to the employer for employment in the future. The new announcement threatens to bring an end to the practice, especially if other carriers follow suit.

Without the waiver of seniority and release, three problems arise: First, if the employee attempts to return to work and is not permitted, s/he can assert disability discrimination. Second, to the extent the employee does return to work, employers face retaliation or disability discrimination claims if and when the employee must be disciplined and/or discharged. Third, the returning employee can always claim an aggravation of the prior workers compensation claim.

Under the myriad of existing laws bearing upon an employee's medical condition, this scenario is possible: The employee claims he suffered a work-related disability in the form of a bad back and files a workers' compensation claim, which the employer disputes. The employee remains off work for

nine months as the claim winds its way through the system. The employer and carrier fear the possibility of the dreaded "open award" that could pay the claimant wage loss benefits into his 80's and 90's. Rather than face that prospect, the claim is settled for a substantial amount. Without a resignation of employment and release of liability, the employee could announce a "miraculous" cure shortly after the settlement and return to the employment office seeking the job he/she had performed and sue for disability discrimination or FMLA retaliation if not hired.

In the past, this scenario was avoided by the terms of the waiver of seniority and release. The announcement ending the carrier's participation in negotiating releases reflects concern that doing so could form the basis of claims of worker's compensation retaliation or disability discrimination. No such claims against carriers are known to have been filed.

Nevertheless, the carrier's mandate is that the attorneys representing their interests may not negotiate or resolve the litigation claims. Instead, the employer, acting through

separate counsel, must secure the release at their own expense. In addition, the carriers suggest that no payments made by the carriers can form the consideration under the agreement.

One wonders if any employer will have the motivation to push back on the new practice, or whether their only remedy will be to change carriers

*(See "Employment Claims" on page 2)*



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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)
- Social Security Privacy Policy
- WH Forms (under FMLA guidelines) 380-E, 380-F, 381, 382, 384, 385
- Workplace Violence—Risk Factor Checklist

**Employment Claims Cont.**

(unless this becomes a uniform practice). Indeed, it is doubtful that any legal tribunal would have jurisdiction to challenge this business decision. There is no remedy for an overly cautious practice. The only possible transgression may be by workers' compensation attorneys who are caught in the middle. The workers' compensation arena has always presented murky ethical issues as to which party does counsel represent: the employer or the carrier. If the attorney owes his/her duties to the employer, it could pose ethical or malpractice issues to leave this exposure intact upon the instruction of an outsider to the attorney-client relationship. However, a malpractice case is a poor substitute for avoiding litigation, and here is akin to shooting the messenger.

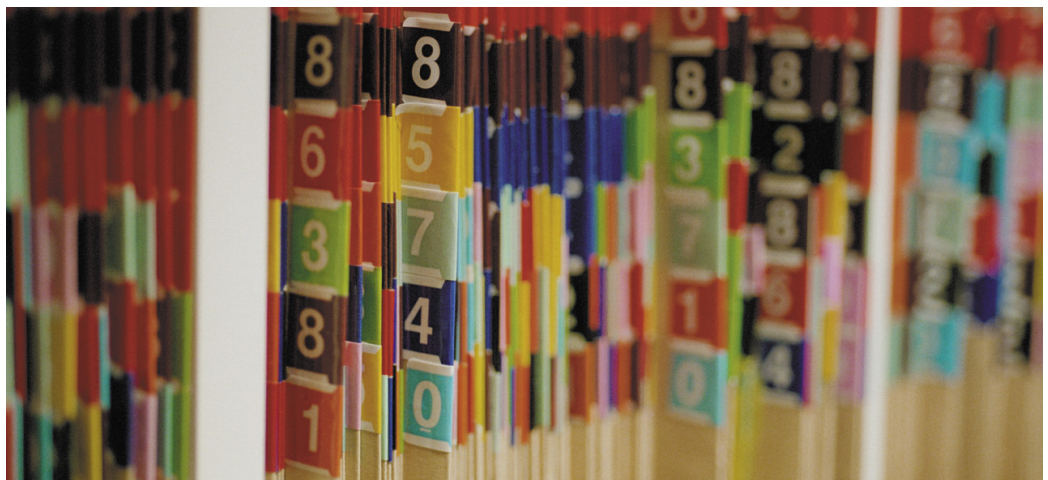
No employer can conduct business without workers compensation insurance or refuse to cooperate with the carrier in the handling of the claim. Accordingly, employers should be vigilant in which carrier they retain. However, inevitably, some employers will be faced with this situation because they are in a present term or will be unwilling to change carriers. Because few employers will want to fund a legal battle against a carrier over this issue, it might be better to recognize the best ways to live within the new system. Employers may be able to prepare for this scenario in the following manner:

1. Determine if your carrier has adopted the new practice, by calling your TPA;

2. If your carrier is one of those who will not participate in securing releases, determine if the employer has the right to approve a resolution of claims under the current workers compensation policy. (Sometimes the policy contains a "hammer" clause, giving the carrier the right to settle the claim over the insured's objection.) If the employer must approve the settlement, providing that approval alone can constitute the "consideration" for a release of claims, so that payment of additional monetary consideration might be avoided. If not, the employer loses significant leverage to obtain a release, and will likely have to devote significant additional funds (beyond the inevitable increase in premiums due to the claims experience) to secure a release;

3. Prepare the framework of a release agreement tailored to the company's above circumstances, for presentation to workers compensation claimants at the settlement stage. Consultation with counsel will likely be required in individual cases to finalize the agreement. Unavoidably, the appearance of separate counsel to secure the release will bring the ADA implications of these agreements into focus. As long as labor counsel is getting involved in these release agreements, some additional clauses and acknowledgements could be adopted to avoid future ADA problems, as follows:

*(See "Employment Claims" on page 3)*



## Employment Claims Cont.

- a. "The employee claims to have suffered an injury that renders him/her unable to perform the essential functions of any job available with the employer with or without accommodation since [insert last date worked], has been advised by his medical professionals and thus believes that the i) disabling injury will continue for the foreseeable future and ii) that performing any position available with the employer will aggravate the disabling injury;
- b. The employer, by approving the settlement and redemption of this matter [and by providing consideration recited] and employee by accepting the settlement or redemption [along with additional consideration] have effectively agreed that employee will be unable to perform the essential functions of any job available with the employer until at least \_\_\_\_\_, which is the period represented by the amount provided under the settlement divided by the employee's statutory average weekly wage;

- c. Accordingly, the parties agree that for the period stated in the previous subsection, it is conclusively presumed and agreed that the employee is unable to perform the essential functions of any job available at employer with or without accommodation and the employee thus resigns his employment and seniority status, if any, effective with his signature upon this agreement;
- d. Thus, in consideration of employer approving the settlement of this matter [or providing consideration recited], employee agrees and acknowledges that he will not apply for employment with employer, and that if employee shall unwittingly apply or otherwise apply to employer during said period, this agreement shall constitute a legitimate business reason for declining to hire the employee;
- e. In further consideration of the above, employee agrees that regardless of the period expressed in subparagraph (b), employer shall not have an obligation to re-employ plaintiff unless and until employee presents objective medical evidence

that the disabling condition has resolved;

- f. The employee releases the employer for any and all claims [using the usual broad language] that may have accrued until the date hereof, including any and all claims with regard to the terms of the settlement."

This agreement effectively holds the claimant to his current contentions: He is only getting paid a settlement on the representation that he will be disabled for the foreseeable future. Unfortunately, the new announcement raises novel legal issues, and accordingly, the advice of counsel is recommended until we all become comfortable with the process.



## CRIMINAL CASE COULD AFFECT EMPLOYERS' RIGHTS TO ENFORCE SUBSTANCE ABUSE POLICIES

By Rhonda H. Armstrong

Two recent developments require Michigan employers to examine their drug and alcohol testing policies to ensure they retain appropriate discretion to test or discipline employees under desired circumstances.

Unlike other states, Michigan has resisted the temptation to regulate the circumstances in which private sector employers may test employees for drugs or alcohol, the facilities they use for testing, notice requirements, etc. (Michigan public sector employers are subject to stricter scrutiny and some federal testing procedures may apply, due to Constitutional protections). To date, most employee chal-

lenges have been via common law claims in tort (e.g., invasion of privacy based upon lack of sufficient notice of testing requirements) or contract (e.g., employers testing contrary to circumstances communicated in their written policies).

In June 2010, however, the Michigan Supreme Court decided a criminal case, *Michigan v. Feezel*, 486 Mich. 184 (2010), which could affect how employers conduct substance abuse testing. Specifically, the Court found 11-carboxy-THC (a metabolite of marijuana) was not a "controlled substance" pursuant to Michigan law. Nor was

11-carboxy-THC a "derivative" of marijuana, under strict statutory terms. (Feezel was charged with the operation of a motor vehicle after the consumption of a schedule 1 controlled substance.) Although no case has yet relied on *Feezel* in the context of substance abuse testing in the workplace, wise employers will draft their policies to ensure that testing will include screening for metabolites as well as controlled substances, and that the presence of metabolites is included in the definition of "positive results" and subject the employee. Absent such language, an astute employee-side attorney could extend the

(See "Abuse Policies" on page 4)

## Abuse Policies Cont.

Feezel rationale to substance abuse testing in the workplace.

Further, as a result of a referendum vote on November 8, 2008, Michigan has passed a medical marijuana statute that permits certain individuals to possess and/or use marijuana. Mich. Comp. Laws § 333.26421 et seq. As many know, the ACLU has sued Wal-Mart for firing an employee with a brain tumor with a prescription for marijuana and who tested positive in a drug test. Accordingly, a test case is on the horizon as to whether employers may rely upon federal law in their substance abuse policies. Federal law provides that any possession of marijuana is illegal.

Notwithstanding passage of the Medical Marijuana Act, however, nothing within the statute shall be construed to require “[a]n employer to accommo-

date the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana.” Mich. Comp. Laws § 333.262427 (c)(2). How does one effectively utilize these provisions? Many substance abuse policies contain language authorizing use of otherwise controlled substances prescribed by a medical practitioner so long as the employee’s usage is at the prescribed or authorized dosage. Employer substance abuse policies should appropriately notify employees that usage at work or being under the influence at work, will not be tolerated (e.g., “Employees may not, however, ingest cannabis (marijuana) at work or report to work while under the influence of cannabis even if prescribed by a licensed physician”).

If you would like assistance making sure your substance abuse testing policies are appropriately drafted, PCT can assist you.



## Pilchak Cohen & Tice News

Pilchak Cohen & Tice, PC is pleased to announce that Zack Learman has become an associate in the firm. Mr. Learman, a graduate of Case Western Reserve University School of Law, has been practicing since 2007. He has conducted dozens of labor arbitrations and trial board hearings for the City of Detroit, and most recently managed operations in Eastern Michigan for a multi-state law firm.

Monzell Towners has joined the firm as a file clerk.

Rhonda Armstrong and her husband Michael welcome Landon Michael Armstrong to their family which includes Zack and Payton. Landon was born on October 7, 2010.