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PILCHAK COHEN & TICE, P.C.

THE EMPLOYERS LAWYERS

# WORKPLACE CHRONICLE

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**Recent Victories for Our Clients**

When subpoenas to third parties revealed that the plaintiff had been receiving payments from another business during his employment with PC&T's client, contrary to the plaintiff's interrogatory answers, PC&T not only obtained a complete dismissal of the commission and wrongful discharge claims in state and federal court, but obtained an injunction prohibiting the plaintiff from soliciting the employer's clients until 2013 – even though the underlying non-compete agreement had expired.



**MORE BAD NEWS FROM THE NLRB**

By Daniel G. Cohen

The National Labor Relations Board has continued its all out assault on employers. This time, the Obama Board has handed down two decisions that make it easier for unions to organize employees. The first decision, *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), reverses the Bush Board's decision in *Dana Corp.*, 351 NLRB 434 (2007). *Dana Corp* had held that employees who become represented by a union pursuant to a voluntary recognition agreement must be given an opportunity, after notice, to reject that representation through a government supervised secret ballot election. According to the NLRB in *Dana Corp.*, employees could file a decertification petition during the 45 day period following voluntary recognition. Now, the NLRB has reinstated the "recognition bar" that existed prior to *Dana Corp.*, meaning that a reasonable period of time must pass before the voluntary recognition can be challenged. The NLRB indicated that the recognition bar will apply for no less than 6 months after the parties' first bargaining session and no more than 1 year. Of course, this significantly reduces the prospect that employees will be able to decertify the union because most negotiations will conclude with the signing of a labor agreement within 6 to 12 months. A decertification petition will then be barred under the "contract bar" doctrine.

The second decision, *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), overturned a 20-year old precedent for determining what is an appropriate bargaining unit of employees

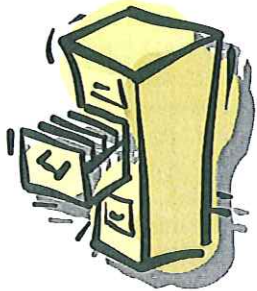
working at nursing homes, rehabilitation centers or other non acute care facilities. However, the NLRB did more than overturn a healthcare specific standard by addressing and altering the appropriate unit standard for *all* industries. According to the NLRB, when it is presented with an election petition that sets forth a readily identifiable group of employees as a bargaining unit, and the NLRB finds that those employees share a community of interests, the NLRB will find that unit appropriate even where the employer demonstrates that a larger unit would be appropriate or even more appropriate, unless the employer demonstrates that employees in the larger unit share an "overwhelming community of interest" with those in the petitioned-for unit. Member Hayes' dissenting opinion eliminates any doubt that this is a healthcare specific standard. According to Member Hayes, "Make no mistake. Today's decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in *any* industry subject to the Board's jurisdiction." Consequently, this decision makes it easier for unions to organize because they can now target smaller groups of employees and it will be more difficult for employers to seek to expand the unit to more employees who might not be as interested in the union's message.

We expect more mischief from the Obama Board in the coming months, and we will keep you informed of any further developments. Please don't shoot the messenger.



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- 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

**DOL AND IRS TEAM UP TO CRACK DOWN ON EMPLOYEE MISCLASSIFICATION ERRORS**

By Rhonda H. Armstrong

On September 19, 2011, the Department of Labor (DOL) and Internal Revenue Service (IRS) announced a collective effort to subject employers to greater scrutiny regarding their classifications of workers as independent contractors. This new initiative will make it easier for these federal agencies to crack down on employers for mistakes in classifying workers as independent contractors rather than employees. Specifically, the DOL and the IRS signed a memorandum of understanding to now share information between agencies. Similar agreements were signed between the DOL and several state labor agencies including Connecticut, Maryland, Minnesota, Missouri, Utah, and Washington, and the DOL announced similar agreements to soon take effect in the states of Hawaii, Illinois, Montana, and New York. It remains to be seen whether Michigan will follow suit. Prior to this initiative, each entity gathered information independently.

Independent contractor classifications are scrutinized by the IRS (for FICA, Social Security, and related payment claims), by the DOL or state labor offices (for minimum wage and overtime claims), workers' compensation units (for occupational injury claims), and by unemployment insurance units (for benefit claims). They can also be challenged in litigation by employees claiming rights under various employment statutes. Because there are so many different agencies involved, there is no single test employers must pass to properly classify a worker as an independent contractor. Nevertheless, the general focus is on the level of control the employer exercises over the worker. The less control by the employer over the individual, the more likely the worker can be properly classified as an independent contractor.

The IRS succinctly described this collaborative effort as "taking the partnership...to a new level." This sentiment was echoed by DOL Secretary Solis, who has vowed that the IRS and the DOL now are "standing united to end the practice of misclassifying employees." With this newly forged relationship, employers cannot afford to throw caution to the wind. Employers treating workers as independent contractors should be on high alert because worker misclassifications can be costly and result in significant penalties, fines and an increased tax burden.

Despite the heightened scrutiny, there may still be an opportunity to avoid some of the penalties for misclassifying workers. Indeed, just days after announcing this joint effort to crack down on employers, the IRS announced a Voluntary Classification Settlement Program (VCSP) which allows employers to reclassify their independent contractors to employees prospectively and avoid certain interest and penalties. To qualify, however, the employer must meet certain conditions. For example, the employer cannot be subject to a current audit by the IRS, DOL, or similar state agency and the employer must have treated workers consistently in prior years. If you believe your workers may be misclassified, PCT can review your independent contractor determinations, offer suggestions for solidifying those determinations and/or advise you whether the VCSP is an option you might explore.

**NLRB DELAYS DEADLINE FOR POSTING NEW EMPLOYEE RIGHTS**

On October 5, 2011, the National Labor Relations Board announced that it will delay the requirement that most private U.S. employers post a new notice informing employees of their rights under the National Labor Relations Act. The Board had issued a Final Rule in August, requiring all employers covered by the

National Labor Relations Act to post a "Notification of Employee Rights under the National Labor Relations Act." The posting requirement was to become effective on November 14, 2011. The deadline for posting the notice is now January 31, 2012.



## SIXTH CIRCUIT REJECTS ADA ASSOCIATION DISCRIMINATION CLAIM

By: Zachary H. Learman

The United States Court of Appeals for the Sixth Circuit has issued its first Americans with Disabilities Act (ADA) association discrimination claim. The case is *Stansberry v Air Wis Airlines Corp*, 2011 US App LEXIS 13659 (6<sup>th</sup> Cir, Mich. 2011). The Plaintiff, Eugene Stansberry (“Stansberry”) managed Air Wisconsin’s Kalamazoo, Michigan airport operations. Stansberry’s wife suffered from a rare and debilitating auto-immune disorder. Her condition began to worsen, and her physicians recommended a litany of expensive medication which was not covered by Air Wisconsin’s health plan.

In the summer of 2007, the U.S. Transportation Security Administration (“TSA”) informed Air Wisconsin of security violations at the Kalamazoo Airport Air Wisconsin stemming from poor training of Air Wisconsin employees. Stansberry failed to notify his supervisor of these violations, and Air Wisconsin informed the TSA that it would take “severe disciplinary action” against Stansberry. Air Wisconsin officials ultimately terminated Stansberry based on his failure to report the security violations, and improper supervision of his employees. Stansberry filed a lawsuit claiming association discrimination in violation of the ADA. His lawsuit was based on the theory that Air Wisconsin terminated him because of its unfounded fears that he would be “distracted” at work due to his wife’s disability. The United States District Court for the Western District of Michigan granted Air Wisconsin’s motion for summary judgment, finding that Stansberry’s poor performance was a legitimate reason for his termination and that he had not shown Air Wisconsin’s actions were pretextual.

On appeal, the Sixth Circuit noted that ADA association discrimination liability revolves around three theories, 1) “expense”; 2) “disability by association”; and 3) “distraction.” The “expense” theory involves situations where an employee suffers an adverse employment action because of their association with a disabled individual covered under the employer’s health plan, which is costly to the employer. The “disability by association” theory encompasses two related situations: either the employer fears that the employee may contract the disability (a communicable

disease, for instance) of the person with whom the employee is associated, or that the employee is genetically predisposed to develop a relative’s disability. The ‘distraction’ theory is based on the employer’s unreasonable suspicion that the employee will be inattentive at work due to the associational disability.

Stansberry’s distraction-based theory failed because the record was replete with evidence that he was not satisfactorily performing his job, and simultaneously, the record was devoid of evidence that his discharge was based on the employer’s fears that his wife’s illness might cause him to be inattentive or distracted. According to the Court, Air Wisconsin had been aware of Stansberry’s wife’s medical condition for a long period of time, which weakened the inference that his termination was based on his wife’s disability. The Court explained that even if Stansberry’s poor performance was due to his wife’s illness, this was not a factor in assessing an association disability claim because under the ADA, employers are not required to provide reasonable accommodations to non-disabled employees.



The ADA’s prohibition of discrimination-by-association provides yet another basis for disability discrimination lawsuits that employers must understand. Luckily, such claims are rare. In fact, in nearly 20 years of ADA litigation, the Sixth Circuit has never published a decision concerning association discrimination until *Stansberry*. To avoid and defend associational disability discrimination claims, employers with knowledge of an employee’s relative’s disability must focus on the employee’s performance and ensure the employment actions are not based on the “unfounded fear” that the relative’s condition will have a negative impact on the employee’s performance. Moreover, although there is no duty to accommodate an employee who has a disabled family member, employers covered by the FMLA will likely be required to grant family and medical leave so the employee can care for their family member.