

# PILCHAK COHEN & TICE, P.C.

*Attorneys Representing Management in Labor and Employment Law*

## WORKPLACE CHRONICLE

SUMMER  
2006



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### Recent Victories for Our Clients

PCT obtained the dismissal of two EEOC Charges alleging disability discrimination under the Americans with Disabilities Act and retaliation. The employee had alleged that her requests for "sit down" work as an accommodation were denied and that the employer subsequently laid her off in retaliation for asserting her ADA rights. While it was true that the employee's request for "sit down" work was denied and that the employee was subsequently laid off, PCT emphasized to the EEOC that any "sit down" work that had been available was no longer available because of the types of jobs that were being run and the size of the machines that were running those jobs. Significantly, the machines that could be run by a seated operator were no longer in use. As to the close proximity in time of the lay off, PCT pointed out that the lay off occurred when part of

### THE MICHIGAN LEGISLATURE APPEARS TO HAVE FIXED MICHIGAN'S OVERTIME DILEMMA

The eyes of the employer community have been on Lansing all summer long as the battle to preserve the federal overtime exemptions in Michigan raged on. After a summer of tense, and at times, arduous negotiations, the Michigan Legislature has now passed HB 6213, with some modifications. The Bill is intended to fix the unintended consequences of Public Act 81, which was signed into law by the Governor in March, 2006 and which increases Michigan's minimum wage to \$6.95 effective October 1, 2006.

The unintended consequences stem from a provision in the Michigan Minimum Wage Act which states that Michigan law does not apply to employers subject to the federal minimum wage law as long as the application of the federal minimum wage provisions do not result in a lower minimum wage than under the Michigan Act. Stated another way, as long as the State minimum wage remained the same as or lower than the federal minimum wage, Michigan law would not apply to employers who were covered by the FLSA. Come October 1, the Michigan minimum wage will eclipse the federal minimum wage, which will remain at \$5.15. This will mark the first time in over 40 years that the State minimum wage will exceed the federal rate.

Once the minimum wage increases above the federal rate, employers who are covered by the FLSA will have to comply with the

Michigan Minimum Wage Act, which does not contain many of the federal minimum wage or overtime exemptions. In other words, many employers who had traditionally relied upon exemptions for outside salespersons, drivers and computer professionals, for example, would be required to pay such employees overtime under State law.

It is against this backdrop that PCT and many others, who are part of a State-wide coalition, have worked so diligently. This coalition assisted with the drafting of corrective legislation which was passed by the House and Senate on June 27. House Bill 6213 restored the status quo concerning overtime while still allowing the minimum wage increase to take effect on October 1. Because 6213 did not pass with a two thirds majority, it lacked "immediate effect" and could not correct the problem until April 1, 2007, assuming that the Governor signed the bill into law.

Throughout July and August, dialogue continued between the Republicans and the Democrats as to how, if at all, the problem could be fixed. The Coalition continued to press the issue and the lawmakers continued their negotiations. The Senate democrats put forth SB 1388, a bill which purported to "fix" the unintended consequences. SB 1388 actually "cut and paste" federal overtime exemptions into the State Act. SB 1388, however, called for dual regulation by the

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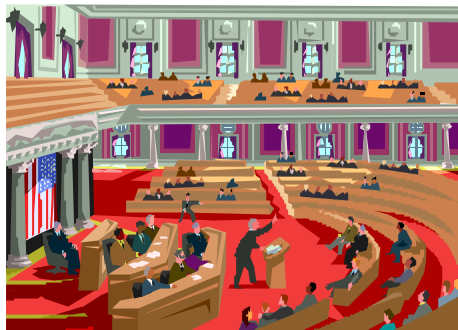
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- I-9 Forms
- Policy—Wage Deductions
- Relief of Charge
- Sample CCW Memo
- Sample Certification for Users of Consumer Report
- Severance Agreement and Release of Claims
- Severance Agreement and Release of Claims (In Compliance With Older Worker Benefit Protection Act)
- Social Security Privacy Policy

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Federal Department of Labor on the one hand and Michigan’s Wage and Hour Division (now referred to as the Department of Labor and Economic Growth) on the other hand. This raised concerns that there would be conflicts and “mixed signals,” which would invite litigation.

While SB 1388 was rejected by the Republicans, it led to a flurry of negotiations out of which came revisions to HB 6213. HB 6213, with its revisions, was voted on and passed unanimously in



the Senate and the House on August 30. As passed, HB 6213 retains the “status quo” for most. With two exceptions, employers who become subject to the Michigan Minimum Wage Act due to the increased minimum wage will not be obligated to pay the Michigan minimum wage or overtime. In other words, the federal minimum wage and overtime exemptions

will continue to apply to these employers in Michigan. Employees who had been eligible for minimum wage and/or overtime under the Michigan Act will continue to be eligible for their State minimum wage and/or overtime compensation, which existed on September 30, the day before the minimum wage increase takes effect.

The two exceptions are casual babysitters over the age of 18 and companionship employees employed to provide companionship services to individuals who, because of their age or infirmity, are unable to care for themselves, provided they do not live in the homes of the individuals for whom they care. These two classes of employees are exempt from minimum wage and overtime under federal law. They will not be exempt from the State law.

HB 6213 is linked to two other bills, SB 453, which creates an earned income credit for low income individuals, and SB 1364, which allows employers to pay employees under 18 85% of the State minimum wage and new hires under 20 \$4.25 an hour for their first 90 days of employment. Both bills have passed in the Senate and are expected to be voted on in the House sometime next week. HB 6213 is “tie barred” to these two bills. This means that if they do not pass in the House, HB 6213 will not pass. The two bills are expected to pass though, and the Governor is expected to sign these bills into law. Since HB 6213 was passed by the House and Senate with the necessary two thirds majority, it will have immediate effect upon the Governor’s signature.

So, while most of us are sorry to see summer winding down, it appears that one reason will not be because the unintended consequences of Michigan’s minimum wage increase was not corrected. Its time to close the book on a problem that could have been disastrous for Michigan. For more information about HB 6213 and what it means, you should contact Daniel Cohen at PCT.

## SUPREME COURT ADOPTS REASONABLE PERSON AND MATERIALITY STANDARDS IN TITLE VII RETALIATION CASES

Earlier this summer, in the case of Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. 2405 (2006), the Supreme Court addressed the requirements for retaliation claims brought under Title VII. In *White*, the plaintiff, the only woman working in the maintenance department of a railroad yard, complained to railroad officials that her supervisor had repeatedly made insulting and inappropriate remarks to her in front of her male colleagues. As a result, the railroad suspended the supervisor and reassigned White from operating a forklift to standard laborer tasks within the yard. White then filed a complaint with the Equal Opportunity Commission claiming that the reassignment amounted to unlawful gender-based discrimination and retaliation for filing her complaint. Subsequently, she was suspended without pay for insubordination. Burlington later found that she had not been insubordinate, reinstated her, and awarded her backpay for the 37 days she was on disciplinary suspension. The suspension led to another EEOC retaliation charge. Thereafter, White filed suit in federal district court claiming that her reassignment and disciplinary suspension amounted to unlawful retaliation under Title VII. A jury awarded her compensatory damages.

The Sixth Circuit Court of Appeals affirmed the Verdict. The Sixth Circuit applied the same standard for retaliation that it applies to a substantive discrimination offense, holding that a retaliation plaintiff must show an "adverse employment action," defined as a "materially adverse change in the terms and conditions" of employment. The Supreme Court granted certiorari to resolve, among other things, whether the challenged action has to be employment or workplace related and how harmful an act of retaliatory discrimination must be in order to fall within the prohibition of Title VII.

While answering these questions, the Court held the anti-retaliation provision of Title VII does not confine the actions and harms it forbids to those that are related to employment or that occur in the workplace. *Id.* at 2414. This determination was based upon the differing language between the substantive and anti-retaliation provisions of Title VII. Indeed, the former, explicitly limits the scope to actions that affect employment or alter workplace conditions, while the latter has no such limiting words.

The Court also determined that "[A] plaintiff must show that a reasonable employee would have

found the challenged action materially adverse." *Id.* at 2415. The Court emphasized that such adversity must be material as the statute does not protect employees from "those petty slights or minor annoyances that often take place at work." *Id.* The Court also stressed the objective nature of this standard and the necessity of applying its general terms in the context of each case. *Id.* Moreover, the Court noted that the standard is tied to the challenged retaliatory act and not the underlying discrimination. *Id.* at 2416.

Accordingly, the Court found that there was considerable evidence that the standard laborer tasks assigned to white were more arduous and dirtier than the forklift duties and that male employees resented her for being in the forklift position, which they considered a better job. The Court also rejected Burlington's argument that the 37 day unpaid suspension was not material because it reinstated her with full backpay. The Court concluded that a reasonable employee would find a month without pay a serious hardship.

In today's ever-more-polarized political climate, left-leaning commentators might suggest that the "conservative"

U.S. Supreme Court and the similarly "conservative" Michigan Supreme Court simply hand over victories to businesses or God-forbid, the insurance industry. However, the Burlington Northern case shows that instead of being driven by a conservative agenda, these courts are driven by a legal principle agenda. These courts believe that the Congress and legislatures we elect make the law, and they interpret it. If the plaintiff's argument is supported by the legislative intent found in the statute, like in Burlington Northern, the plaintiff wins.

Burlington Northern makes it clear that the discrimination provisions of Title VII protect employees for who they are at work while the retaliation provision protects people for what they do whether of not relating to employment or occurring at work. Employers must be increasingly vigilant in monitoring supervisor interaction with employees who have made discrimination reports or complaints. And, while it remains to be seen just what impact this decision will have on Michigan employers under the State's Elliott Larsen Civil Rights Act, it would seem that Michigan will follow step with Burlington Northern. This is because Elliott Larsen is quite similar to Title VII in the way it links substantive discrimination claims to actions that affect employment or alter workplace conditions, while not similarly limiting retaliation claims.

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