

EXEMPTIONS UNDER THE FAIR LABOR STANDARDS ACT COULD SOON BE LOST.

BY G. ALAN WALLACE

The sweeping effects of the recent change to the Michigan Minimum Wage Law will soon be felt by employers across the State of Michigan. Public Act 81, signed into law by Governor Jennifer Granholm on March 28, 2006, may significantly affect some overtime pay exemptions.

Effective October 1, 2006, the new minimum wage in the State of Michigan will be \$6.95, an increase of \$1.80 per hour from the current rate of \$5.15 per hour. The \$6.95 minimum wage rate will remain in effect until July 1, 2007, then increase to \$7.40 per hour on July 1, 2008.

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With a few exceptions, the Michigan Minimum Wage Law covers most employers in the State. The Michigan Minimum Wage Law defines a covered employer as “a person, firm, or corporation, including the state and its political subdivisions, agencies, and instrumentalities, and a person acting in the interest of the employer, who employs two or more employees at any one time within a calendar year.”¹

Historically, the Michigan Minimum Wage Law has had little significance to employers because the Michigan Minimum Wage Law is inapplicable unless the application of the minimum wage provisions of the Federal Fair Labor Standards Act would result in a lower minimum wage than that prescribed under Michigan law. However, once the new minimum wage becomes effective October 1, 2006, the Michigan minimum wage will exceed the federal minimum.

A major concern arising from the Michigan minimum wage exceeding the federal minimum is the possible loss of exemptions from the separate requirement that employees

receive time and a half pay for overtime work. Both Michigan law and the Federal Fair Labor Standards Act exempt certain executive, administrative, and professional employees from the overtime pay requirement. Yet the federal law contains dozens of additional exemptions which the Michigan law does not. These additional examples include certain employees of: automobile dealerships, broadcasters, motor carriers, and others. Because of the provision that the Michigan Act is inapplicable unless application of the federal minimum wage would result in a lower minimum wage than that prescribed under Michigan law (which will be the case starting October 1, 2006), continued recognition of these special federal exemptions in Michigan is in doubt.

The upcoming increase in the minimum wage, and resulting possible loss of some important overtime exemptions, will force many employers to change their overtime pay practices, and employer compliance is critical. Please feel free to contact Fraser Trebilcock Davis & Dunlap, P.C.’s Labor, Employment and Civil Rights Department regarding any questions or issues that you might have regarding the recent changes to the Michigan Minimum Wage Law and how the changes affect your business.

¹ See MCL § 408.382(a) and (b)



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MICHIGAN SBT: WHAT WILL BE NEXT?

The Michigan Single Business Tax (“SBT”) was enacted in 1976 to replace seven Michigan taxes, including the Michigan Corporate Income Tax and the Michigan Inventory Tax. The SBT is unique among the fifty states, as it is a business activity tax. One of the most unpopular aspects of the tax is that a taxpayer can realize a loss from a business

MICHIGAN SBT: CONTINUED...

activity, but still have a tax liability under the SBT. In its 30 years of existence, it has been the subject of much litigation, frequent amendment, legislative debate and numerous efforts to amend and revise the tax. There now seems to be significant support from a variety of sources to repeal the SBT.

The SBT is currently scheduled to expire on December 31, 2009. However, there has been substantial effort by legislators and other activists to end the SBT sooner than December 31, 2009. Recently, the Michigan House and Senate both approved a bill to repeal the SBT immediately. The bill was predictably vetoed by Governor Granholm, who was not willing to sign the bill until a replacement for the lost revenue was in place. The SBT currently raises approximately \$1.9 billion of the state's \$9.0 billion general fund revenue.

Those that support the immediate repeal of the SBT favor a tax that is less burdensome on employers, less complicated and encourages investment and economic development. A petition drive to repeal the SBT was organized by former Oakland County Prosecuting Attorney, L. Brooks Patterson. Mr. Patterson is gathering signatures to place the repeal of the SBT on the ballot in November, 2006. Governor Granholm has announced she is willing to reconsider the SBT if a suitable replacement for the lost revenue to the state can be enacted.

There appears to be considerable bipartisan support for eliminating the SBT. The impediment to immediate repeal, and the topic that will be the subject of considerable debate, is what type of tax will replace the SBT and the lost revenue to the State of Michigan. Various proposals have surfaced to replace the SBT. These proposals currently include the following:

- SBT abolition proposed by Oakland County executive Brooks Patterson, and implicit in current law after 2009. This proposal involves immediate repeal of the SBT with no replacement of the \$1.9 billion of revenue the SBT currently generates.
- SBT replacement with a gross receipts tax. A gross receipts tax proposal involves a tax on the gross receipts of a business without deductions.
- The Fair Tax. The Fair Tax proposal is essentially a universal sales tax applied to all goods and services, with a rebate for those under a certain income threshold, to

replace all other personal and business taxes. The tax would be assessed on the consumer of goods and possibly services and not on business.

Businesses, employers and associations that are interested in the SBT replacement process may need legislative counsel to represent their interests. Fraser Consulting, LLC, our legislative and lobbying group, is actively involved in the legislative process to draft and adopt the replacement for the SBT. Interested in information or representation? Contact Edward J. Castellani at 517/377-0845 or ecastellani@fraserlawfirm.com.

**CUNO v DAIMLERCHRYSLER:
WILL THE SUPREME COURT STRIKE DOWN
BUSINESS TAX INCENTIVES?**

By Joshua S. Smith and John D. Miller

The *Cuno v DaimlerChrysler* saga which we wrote about in the March 2006 issue of *Law & Business* has finally come to an end. As you may recall, in *Cuno* local taxpayers and property owners challenged Ohio's system of tax credits and property tax exemptions which resulted in DaimlerChrysler receiving an approximately \$280,000,000 credit against its Ohio franchise taxes in exchange for expanding its facilities in Toledo. The District Court held that the tax credits and exemptions were completely lawful, but the Sixth Circuit found that they violated the Commerce Clause. The U.S. Supreme Court heard the case on March 1, 2006 and issued an opinion reversing the Sixth Circuit on May 15, 2006. *DaimlerChrysler v Cuno*, 126 S Ct 1854 (2006).

DaimlerChrysler and Ohio both argued that *Cuno* and the other taxpayers lacked standing to bring their claim. In order to bring suit in a federal court, a party has to show that it suffered an actual or imminent injury that is concrete and specific, that the conduct complained of caused the injury and that a favorable decision will redress the injury. The plaintiffs argued that they had standing as taxpayers relying on a specific constitutional provision, the Commerce Clause.

According to the Supreme Court, a party has standing to pursue a claim where it suffered a personal injury which was caused by the defendant's conduct and that injury can be cured by the relief requested. *Id.* at 1861. Generally taxpayers cannot meet these requirements because the injury is shared by millions of people, hence it is not "personal." *Id.* at 1862-1863. Moreover, the *Cuno* Plaintiffs' claimed

injuries—higher taxes and a reduction in services—were based on pure conjecture. First, it assumed that state revenue would decline. *Id.* Second, it assumed that the Ohio legislature would respond by increasing citizens' taxes and reducing services enjoyed by the Plaintiffs. *Id.* Thus, the Court reasoned that if the *Cuno* Plaintiffs could establish standing, anyone could, which would eviscerate the Constitution's Article III "case or controversy" requirement. *Id.* at 1867-1868.

DaimlerChrysler and Ohio also argued that the tax credits did not violate the Commerce Clause. Needless to say, the Court never reached the Commerce Clause issue in light of its ruling on the plaintiffs' inability to establish standing. Thus, the substantive merits of the case remain unresolved, and another party, with standing, could mount a future challenge to similar tax credits.

Although Michigan businesses and governments may have breathed a collective sigh of relief, the Court's reversal on purely procedural grounds may complicate the issue further. As stated above, the issue may be relitigated in federal courts by parties with standing. In addition, plaintiffs may be able to raise the same issues in state courts. In either case, the substantive issues will remain active. More problematically, instead of having a single uniform rule, there could potentially be subject to 50 different rules. On the other hand, any Michigan suit would apply Michigan's standing rules, which mirror those of the federal courts, and thus would likely prevent a *Cuno*-claim from getting very far.

ATTORNEY ACTIVITIES OF NOTE

■ Ed J. Castellani recently represented a taxpayer whose spouse had pleaded guilty to embezzlement of a substantial amount from their employer. The IRS assessed both spouses for tax, interest and a fraud penalty on the unreported income on the embezzled amount. On appeal to the Appeals Division of the IRS, Mr. Castellani was able to convince the Appeals Division that the spouse was an innocent spouse and not liable for the tax, interest and penalty of their spouse.

■ Robert B. Nelson spoke at the Michigan Chamber of Commerce Energy Technology & Telecommunications Committee meeting on May 25 about State Energy Policy.

■ Ryan M. Wilson has been appointed Co-chair of the 2006-2007 Ingham County Bar Association Probate and Trust Section.

■ Robert B. Nelson spoke to the MSU Institute of Public Utilities Advanced Regulatory Conference on June 5 regarding video franchising.

GOLDEN NUGGET

Question: I hold everything joint with my spouse. I thought I would simply put my children's names on all real estate that we own so we can avoid probate. Is there any problem with this?

Answer: This type of estate planning often result in many problems down the road. The use of joint tenancy between husband and wife will avoid probate at the first death but probate at the second death will be required. The addition of children as joint owners introduces a lack of control by the parents over the disposition of that joint property because all joint owners must agree to sell or transfer. Creditors of the children may be able to attack and attempt to apportion property to satisfy the children's debts. A child may file for bankruptcy or divorce and the joint property may be affected. A child might get sued and the joint property may be exposed to a civil judgment. In addition, a child may predecease you and his or her children may be left out as a beneficiary. Please beware.

Interested in more information about Estate Planning and Probate issues? Sign up for Ryan Wilson's free monthly *Golden Bullets*. It is available in print and email format. For a subscription call Mr. Wilson at 517/377-0897 or email him at rwilson@fraserlawfirm.com.

G. ALAN WALLACE JOINS FRASER LAW FIRM

G. Alan Wallace has joined the law firm of Fraser Trebilcock Davis & Dunlap, P.C., as an associate with the Litigation Department.

Mr. Wallace received his law degree from Thomas M. Cooley Law School and a B.A. in Business Management from Freed-Hardemen University.

While in law school, Mr. Wallace served as an extern in the Michigan Court of Appeals for the Honorable Bill Schuette. He previously worked as a Legal Assistant for Tatum and Weinman, P.C., in Henderson, Tennessee, and as an intern for Waldrop and Hall, L.L.P. in Jackson, Tennessee.

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