EMPLOYMENT & HUMAN RESOURCES *newsletter*

Fall 2017

Fairness | Integrity | Expertise | Hard Work | Common Sense

Shared values. Firm results.

Inside this Issue

GISLASON & HUNTER LLP
ATTORNEYS AT LAW
www.gislason.com

HOW TO KEEP YOUR SECRETS SECRET

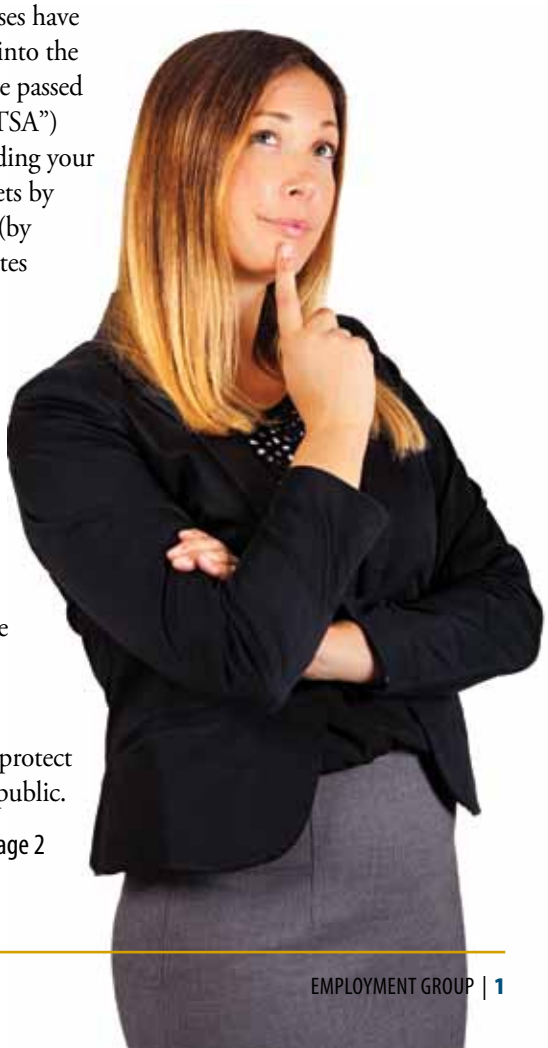
The State of Minnesota recognizes that businesses have important information that simply cannot fall into the hands of a competitor. For that reason, we have passed the Minnesota Uniform Trade Secrets Act ("UTSA") Under the UTSA, it is illegal for anyone, including your employees, to "misappropriate" your trade secrets by acquiring them or disclosing them improperly (by theft, breach of a duty, or the like). Trade secretes include virtually any type of information that

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Unfortunately, Courts will not help businesses protect their trade secrets if those secrets have become public.

continued on page 2



And many, if not most, businesses fail to take the necessary precautions to keep their valuable information protected. Following a few straightforward suggestions can increase a business's odds of enjoying trade secret protections.

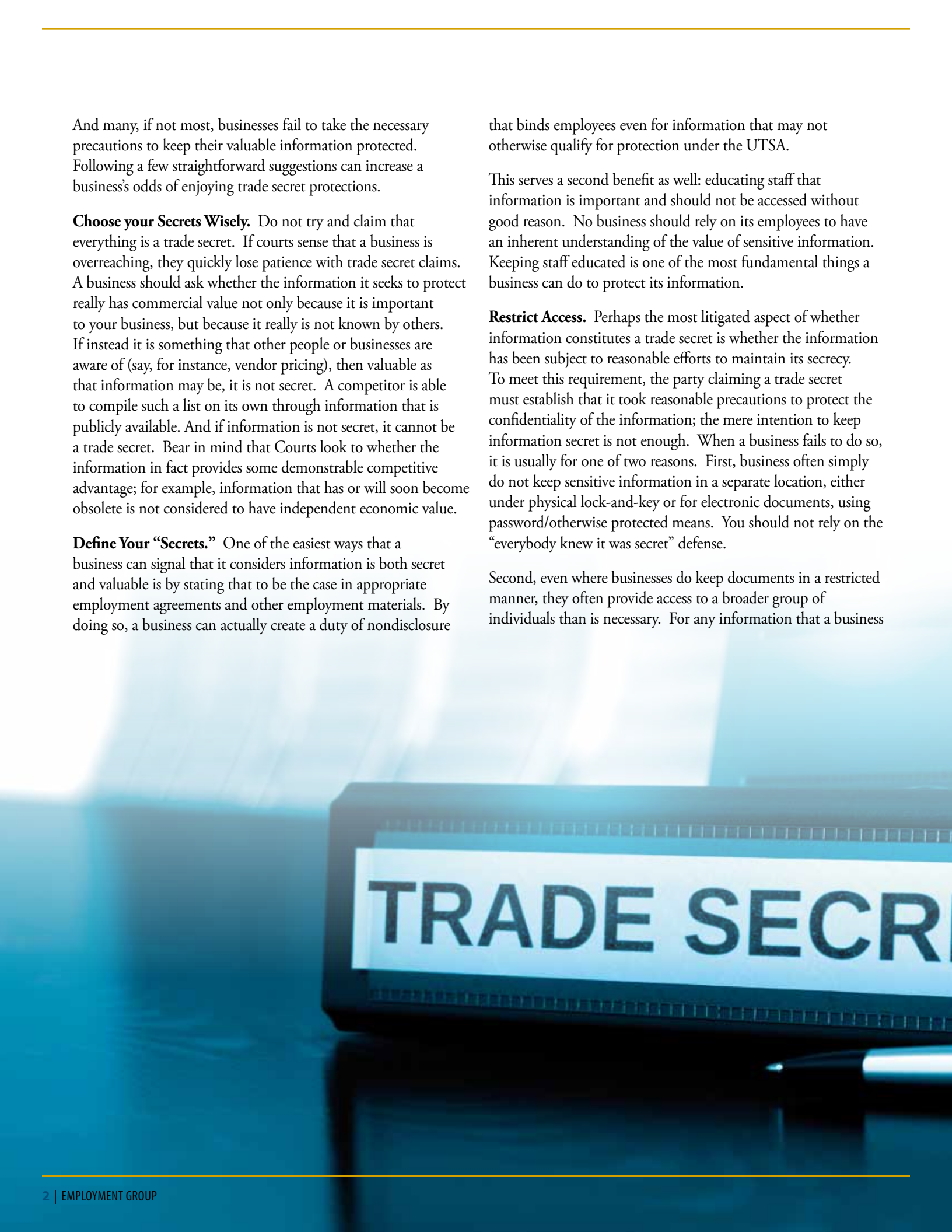
Choose your Secrets Wisely. Do not try and claim that everything is a trade secret. If courts sense that a business is overreaching, they quickly lose patience with trade secret claims. A business should ask whether the information it seeks to protect really has commercial value not only because it is important to your business, but because it really is not known by others. If instead it is something that other people or businesses are aware of (say, for instance, vendor pricing), then valuable as that information may be, it is not secret. A competitor is able to compile such a list on its own through information that is publicly available. And if information is not secret, it cannot be a trade secret. Bear in mind that Courts look to whether the information in fact provides some demonstrable competitive advantage; for example, information that has or will soon become obsolete is not considered to have independent economic value.

Define Your "Secrets." One of the easiest ways that a business can signal that it considers information is both secret and valuable is by stating that to be the case in appropriate employment agreements and other employment materials. By doing so, a business can actually create a duty of nondisclosure that binds employees even for information that may not otherwise qualify for protection under the UTSA.

This serves a second benefit as well: educating staff that information is important and should not be accessed without good reason. No business should rely on its employees to have an inherent understanding of the value of sensitive information. Keeping staff educated is one of the most fundamental things a business can do to protect its information.

Restrict Access. Perhaps the most litigated aspect of whether information constitutes a trade secret is whether the information has been subject to reasonable efforts to maintain its secrecy. To meet this requirement, the party claiming a trade secret must establish that it took reasonable precautions to protect the confidentiality of the information; the mere intention to keep information secret is not enough. When a business fails to do so, it is usually for one of two reasons. First, business often simply do not keep sensitive information in a separate location, either under physical lock-and-key or for electronic documents, using password/otherwise protected means. You should not rely on the "everybody knew it was secret" defense.

Second, even where businesses do keep documents in a restricted manner, they often provide access to a broader group of individuals than is necessary. For any information that a business



feels is confidential, it should ask itself the fairly fundamental question of whether or not an employee needs access to that information to perform his or her duties. If the answer is no, then the employee should not have access. By way of example, if a business has multiple sales areas with separate customer lists, only those salespeople working in a given area need access to the list in that area. By making a customer list more broadly searchable to all sales staff, a company could potentially lose trade secret protection.

Develop a Policy. Trade secret protection policies can also not only educate employees further about your trade secrets, but help to convince a Court that you considered items secret even if they were wrongfully "let loose" by employees. Such policies train employees on how to identify trade secrets that they encounter or develop in the scope of their employment, how to ensure that important information they identify is brought to the right people, and how to properly keep it protected and confidential after identification. That can include physically marking documents once identified. This demonstration of commitment to keeping secrets secret is often very important in litigation.

Make Third Parties Comply with your Standards. At times, a business will have to provide a contractor or other service provider with confidential information. To maintain the secrecy of that information, business must be able to prove that sharing the information was necessary for business reasons, and that reasonable control has been exercised over the receiving part's use of of the information. Entering into a confidentiality agreement, and enforcing it as necessary, is important. Otherwise, the business risks losing protection of that information.

Keep the Public in Public Areas. This final tip is common-sense, but bears stating: do not let members of the public into areas of your business where sensitive information is stored. Not all confidential items will be under lock-and-key or electronically restricted in your company. The manner in which you handle goods, the order of a manufacturing process, the machines you use for different purposes, and a whole host of other "secrets" will be visible to anyone who enters a business and can see those items. Thus, the public should be kept in areas where they appropriately belong, and developing a good policy with reception staff is of utmost importance.

Brock P. Alton
Gislason & Hunter Attorney
(763) 225-6000
balton@gislason.com
Minneapolis, Minnesota

HOW TO RESPOND TO A MINNESOTA DEPARTMENT OF HUMAN RIGHTS CHARGE

Brittany R. King-Asamoa
Gislason & Hunter Attorney
(507) 387-1115
bking-asamoa@gislason.com
Mankato Office

The Minnesota Department of Human Rights ("MDHR") is a fair employment practice agency that utilizes dual filing with the U.S. Equal Employment Opportunity Commission (EEOC). MDHR enforces state and local laws governing discrimination in the workplace and application process, while the EEOC enforces federal laws governing the same activities. Dual filing allows employees to submit a charge to MDHR and, if a federal law is implicated, MDHR will provide the EEOC with a copy of the charge and determine whether to process the charge or allow the EEOC to process it.

The Letter. Carefully review the letter you received providing notice of the charge before taking any action. The letter will outline the charge filed, requirements for any response, deadlines, and the proper procedures for filing your response. Once you have reviewed the letter, take the following steps:

1. Calendar Deadlines – Employers must file a response within 20 days of their receipt of the charge. This is different from a charge filed with the EEOC, which allows 30 days. These dates should be placed on your human resources manager's calendar along with the dates of interviews for the internal investigation.

2. Tell Your Attorney – The employer's response is critical in MDHR's determination of whether an unfair discriminatory practice occurred. Don't risk drafting a response alone when your experienced attorney can provide valuable assistance in the investigation and legal analysis.

3. Keep All Records – Employment statues have record retention requirements that employers should already comply with. However, following notice of a charge, the employer must immediately refrain from disposing of any payroll records, personnel records, or other document pertaining to any party involved in the charge.

Internal Investigation. Charges often come as a surprise. Nonetheless, employers have a short window of time to respond and must uncover the relevant facts to draft a response. This should be done by completing an internal investigation.

Who Conducts the Investigation? The human resources manager and the employer's attorney should conduct the internal investigation. The primary goal of the investigation is to determine what events led to the filing of the charge and whether your actions were lawful. However, because investigations often uncover other employment issues an attorney should assist in the investigation to advise the employer of other workplace issues.

Who Should be Interviewed? All individuals specifically named in the charge should be interviewed. The charging party's direct supervisor and individuals in the party's department should also be interviewed.

Location of Interviews. Interviews should take place in a quiet, secluded area of the employer's office. Conference rooms without glass walls and windows facing office hallways are recommended.

Only Provide Information as Necessary. It is suggested that all interviews begin with the disclaimer that information provided during the interview may be shared with other individuals as necessary. No interviewee should be led to believe their statements are confidential. Given the reality that internal investigations often reveal other problems in the workplace, interviews should begin generically with the statement:

"I am completing a workplace investigation. My goal is to learn from you whether there are employment issues or unfair practices occurring in the company."

Many times this is better received when a non-employee conducts the interview. The statement should let the interviewee know the employer wants to ensure employees are treated fairly and in accordance with the law. Employers should also inform employees that they will not be retaliated against for providing truthful statements during the investigation.

Answer and Position Statement. An answer to the charge is the employer's opportunity to present its defense. This should be a complete and polished document supported by relevant documentation and/or statements. The responding document filed with the EEOC is a position statement. The following are essential components of an answer and position statement:

1. Factual Background – There are two sides to every story. The response is the employer's opportunity to correct any facts in the charge that were misstatements of fact and present other facts to MDHR (and/or EEOC) that the charging party omitted from his story. For example, the charging party may have claimed she was fired because she was the only Hispanic. Such could be true, but she failed to disclose her three tardiness write ups and customer complaints received last month. This is important information the employer should bring to the agency's attention.

2. Disclosure of Internal Investigation – Why were the actions now challenged as unlawful discrimination taken? This should be explained in your answer. Did the employee complain prior to filing a charge? Explain how the complaints were handled and why such does not constitute a discriminatory practice. What information did you uncover during the investigation? This information should be disclosed along with relevant statements from individuals interviewed.

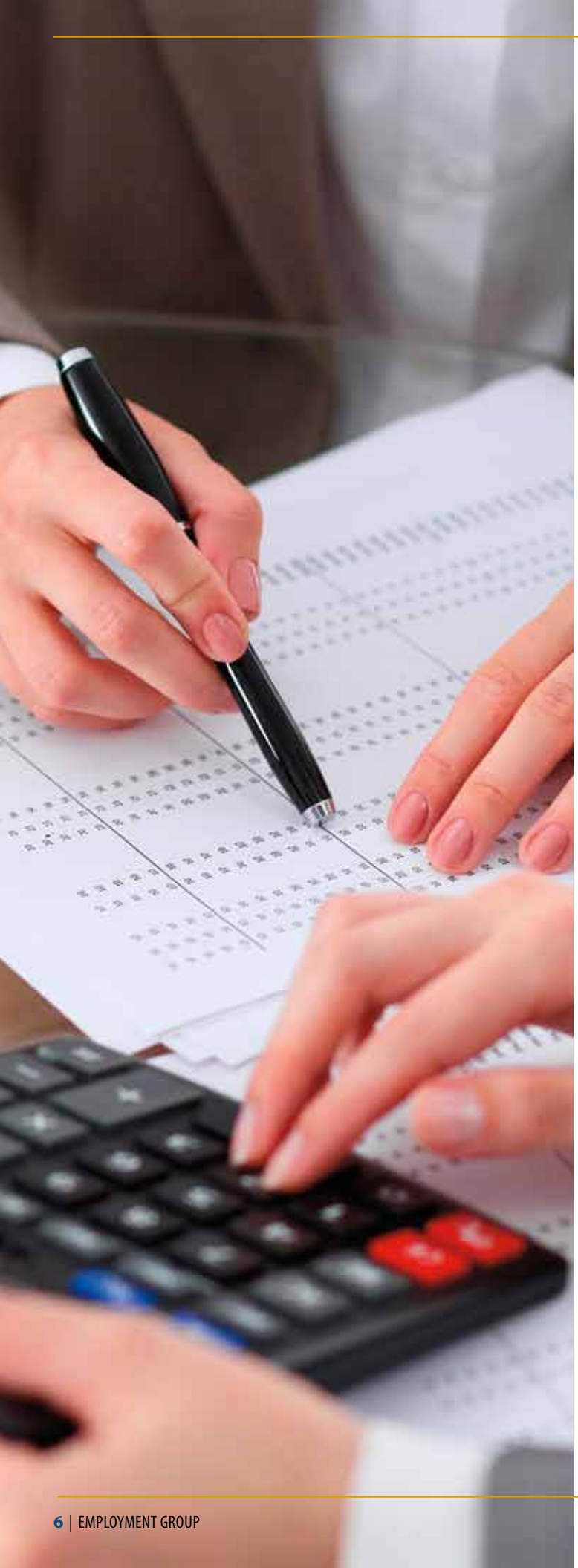
3. Legal Discussion – The charging party has alleged the employer's actions violated state and federal law. What does case law say about these actions? Are such actions a violation of employment laws in light of all relevant facts? Provide analysis of the case law and explain how the employer's actions were appropriate.

4. Supporting Documents – Employers should submit all documents supporting their response. The EEOC explicitly states in its notice of charge to "submit all documentary evidence you believe is responsive to the allegations of the charge." In the absence of such, the MDHR or EEOC may conclude the employer has no evidence to support its defense, thereby likely resulting in an unfavorable decision for the employer. Confidential information should be sent separately and designated as such.

Commissioner's Investigation. Following the filing of the employer's response, the commissioner of human rights may conduct an investigation. This may include sending written discovery requests to the employer, requesting documents, and deposing witnesses. Your human resources manager should receive and organize compliance with these requests. Employees should be notified of their obligation to comply with all requests.

Depending on the priority of the case, it could take a year for the commissioner to determine whether the charge identified an unfair discriminatory practice. Regardless of the outcome, employers should use their efforts responding to a charge as the time to re-evaluate workplace practices and re-train employees where appropriate.

Gislason & Hunter LLP's Employment Law and Benefits Practice Group includes experienced attorneys qualified to assist employers with responses to charges of discrimination filed with the U.S. Equal Employment Opportunity Commission or a local fair employment practice agency. Contact our office at 507-387-1115 for assistance.



HOW TO SUCCESSFULLY RESPOND TO A WAGE AND HOUR AUDIT REQUEST

Jennifer G. Lurken
Gislason & Hunter Attorney
(507) 387-1115
jlurken@gislason.com
Mankato Office

Like most employers, you work hard to comply with the law, including the wage and hour laws. So when you receive a notice that a complaint has been filed with the Minnesota Department of Labor and Industry ("DOL") and the DOL is requesting you conduct a self-audit, you may get angry and defensive. The important thing to remember is to stay calm and to provide the information requested.

Self-Audit

The main information the DOL is looking for when conducting a self-audit are the hours worked by each employee during the relevant time frame and the amount the employees were paid. Make sure to provide truthful and accurate responses.

Hopefully, that is the last you will hear from the DOL. Unfortunately, however, you might receive a Notice of Initial Findings stating you may have violated the law. Read the Notice and then ask yourself, are the DOL's facts correct or does an exemption apply.

Are the DOL Facts Correct of Does an Exemption Apply?

After reviewing the Notice, you should ask yourself whether the investigator has the facts correct? More importantly, does

the investigator have all of the facts? If not, you need to educate the investigator on the facts. The best way to do this is through documentation. You should collect all the relevant information and documentation for the investigator, which includes:

- Job descriptions
- Time cards or documentation showing hours worked
- Pay stubs or documentation showing amount paid
- Proof of the actual work performed

The time cards or similar documentation showing hours worked is one of the most important pieces of documentation when responding to a FLSA wage and hour audit. The time card, showing the hours the employee claims to have worked, will be the main determination of any potential back wages. If for some reason the employee was not paid for all the ours identified on the employee's time card, make sure to obtain documentation to show why.

Job descriptions should accurately state the employee's responsibilities and job duties. Confirm the job descriptions for the employees at issue are accurate. Compare the job description with the information you obtained of the actual work performed. If the job descriptions do not accurately describe the employee's responsibilities and job duties, figure out why not.

Proof of the work performed varies based upon the position being audited and potential exemptions applicable to that position. For example, the administrative exemption can often have grey areas as to whether the person is exercising discretion and independent judgment with respect to matters of significance. If the administrative exemption applies in your case, you should collect emails, letters, reports and other documentation to show examples of when the employee exercised discretion and independent judgment. You should also collect documentation to show why the matter was significant to you as the employer.

If you are claiming the agricultural worker exception applies, collect documentation to show the work was in conjunction with the farmer's farming operation. An example would be documentation to show an employee was hauling grain to the elevator for the farmer.

Now that you have collected all the information and documentation you need, ask yourself whether, based upon the information and documentation you have gathered, an exemption applies.

Know when to hold them and know when to walk away.

Once you have pulled together the necessary documentation and analyzed the law, you need to decide how to proceed. You can concede your prior good-faith interpretation of the law was incorrect and voluntarily agree to pay the back wages or you can request an informal conference with the DOL.

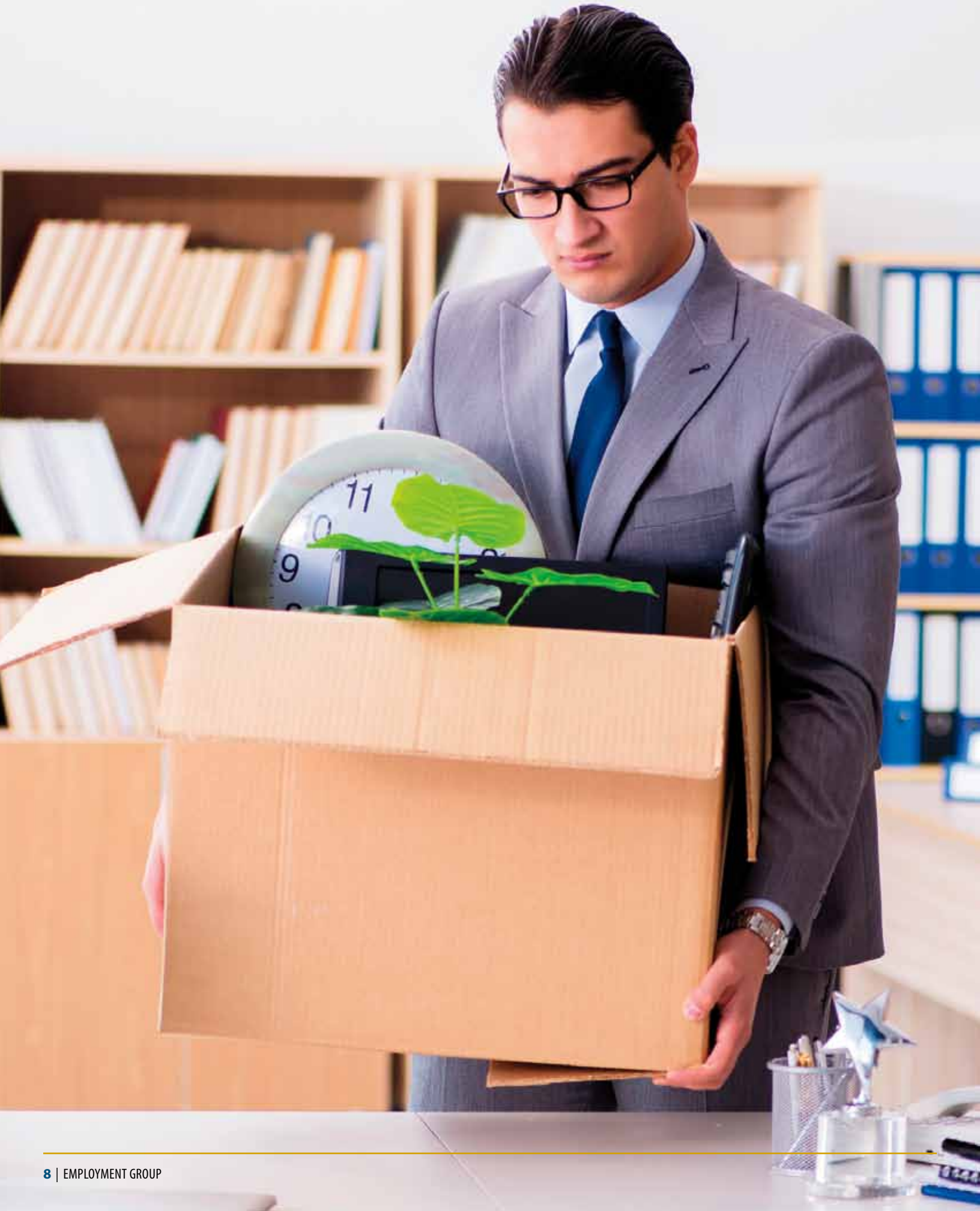
If you concede your prior interpretation of the law was incorrect, you will need to pay the back wages that should have been paid previously. You should also change your practices to make sure that you are complying with the law going forward. One main issue employers run into is not keeping the documentation needed to show an exemption applies. Changing your practices will help you if another investigation is conducted in the future.

If you request an informal conference, you should draft a response to the Notice explaining why the exemption applies. Misclassifying employees as exempt or non-exempt from mandatory overtime pay, as well as minimum wage, is one of the most common wage and hour errors. Your response should include references to the exemption at issue and to relevant documentation supporting your position.

Classification of employees is also based upon numerous factors that are different for each employee. The DOL issues opinion letters applying the law to particular factual situations. If the DOL has already conducted its investigation and has sent you a Notice, it is too late to request an opinion letter. However, the opinion letters are useful to argue why an exemption applies. Citing to relevant DOL opinion letters in your response and showing how the same facts exist in your case may be persuasive to the DOL.

Make sure to submit the relevant information, records or documentation that you gathered to the DOL prior to the informal conference. Doing so will allow the investigator to review the documentation prior to your meeting, allowing all parties to speak fluently about how the law applies to the facts.

After the informal conference, the DOJ will either request additional documentation or issue its decision. If you are not happy with the decision, you can appeal the matter to Court. However, doing so puts you at risk for paying double the back pay. So it is important to cooperate with the DOL from the beginning, provide all the documentation and information requested and attempt to work through these matters congenially.



HOW TO WIN AT A MINNESOTA UNEMPLOYMENT HEARING

Cory A. Genelin
Gislason & Hunter Attorney
507-387-1115
cgenelin@gislason.com

Attorneys in Gislason & Hunter's Employment, Labor, and Benefits Practice Group are experienced in litigating unemployment cases. But a lot of employers and HR managers are comfortable handling these themselves. If you are looking at handling your own hearings for the first time, or looking to gain an edge for next time, here are a few points to consider. (This article is not a guide to the procedure of unemployment hearings themselves. Minnesota Unemployment Insurance actually publishes a pretty good guide which can be found here: http://www.uimn.org/assets/appealhearingguide_tcm1068-192399.pdf.)

Begin at the end. Make your plan with your end in mind. In most unemployment cases, what you'll be trying to show is that the employee was terminated for employment misconduct. That means something worse than ordinary errors, absences, poor performance, or honest mistakes. "Employment misconduct means any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect

of the employee; or (2) a substantial lack of concern for the employment."

Interestingly, many cases turn not on what the employee did but on what the standards of behavior actually are. This may be particularly true if you are part of a unique industry. For instance, someone in the swine industry may have terminated an employee for not "showering in." In such a case, you might need to focus more on explaining to the judge why showering in is so important, rather than on proving that the employee failed to do it.

Exhibits. The documents you submit before the hearing can make or break your outcome. Even if you have a witness that can testify to something like a company policy, it's still better to have the judge see it in writing. You might forget to testify to a certain fact or run out of time, but as long as you've submitted an exhibit you know the judge will see it.

This is one of the reasons that for a termination, I recommend always drafting a written reason for termination pursuant to 181.933 Subdivision 1, prior to termination. In addition to forcing you to think through your basis for termination, this letter, when submitted as an exhibit, will serve as a one page outline of your best point showing that the employee's behavior warranted termination and amounts to employment misconduct.

The Hearing. Because the initial determination is made by a written decision, the first hearing in an unemployment matter is actually an appeal. However, it is like a first trial in district court because evidence is taken and testimony is heard.

Focus. To you, this hearing may be a distraction from your business but to the unemployment judge, this is both the law and her job. It's also the employee's income at stake. Attend the phone hearing from a quiet location with all of your documents and witnesses present. I once had a client try to testify (against my advice) while loading hogs onto a truck. The judge put up with the squealing for about thirty seconds before loudly voicing his displeasure. Not a good way to start a hearing.

Brevity. As Shakespeare said "brevity is . . . wit." Unemployment judges have a busy docket and there is only so much information they can process for each case. You need to trim out anything that doesn't go directly to the points you are trying to make. You also need to prioritize—you don't know how long the judge will let you talk so get the important parts out first.

Politeness. There is always some amount of discretion for each judge to use. The judge can't change the law based on whether or not she likes you but she can change her view of the facts. Sometimes, exactly what happened in a case is a matter of who is most believable. Someone who interrupts, loses their temper, or insults the other side is not going to be will liked or believed.

Appeals to the Court of Appeals. If you lose at the appeal hearing, you can still appeal to the Minnesota Court of Appeals. However, this appeal is not a "do-over." The Court of Appeals isn't going to hear or see any evidence that you didn't put in at the original hearing. That's why when it comes to exhibits, you need to present a complete case. Sadly, we get a lot of cases where the employer handled the initial hearing themselves but didn't input the winning evidence. There is little that can be done to change a bad hearing decision without good facts on record.

When to hire an attorney. If you manage more than a dozen employees, and have a fairly standard turnover rate, then you can probably learn to handle these hearings yourself. Most employers choose to bring in an attorney on unemployment issues if there is some reason to believe that other claims may be on the way. If a terminated employee thinks they may have a discrimination or other claim against their employer, handing them a solid defeat at unemployment may take the wind out of their sails.

Employment Law
PRACTICE GROUP

Brock Alton
balton@gislason.com

Cory Genelin
cgenelin@gislason.com

Brittany King-Asamoa
bking-asamoa@gislason.com

Jennifer Lurken
jlurken@gislason.com

Dean Zimmerli
dzimmerli@gislason.com

Locations

Minneapolis Office
Golden Hills Office Center
701 Xenia Avenue S, Suite 500
Minneapolis, MN 55416
763–225–6000

Des Moines Office
Bank of America Building
317 Sixth Avenue, Suite 1400
Des Moines, IA 50309
515–244–6199

Mankato Office
Landkamer Building
124 E Walnut Street, Suite 200
Mankato, MN 56001
507–387–1115

New Ulm Office
2700 South Broadway
New Ulm, MN 56073
507–354–3111

www.gislason.com

Employment Law Services

- Defense or investigation of harassment, discrimination, whistleblower, and retaliation claims under state and federal law by employees
- Development of EEOC compliance policies and procedures
- Compliance audits or investigations by government agencies such as OSHA or state or federal wage and hour regulators
- Design of drug testing policies and procedures
- Crafting of leave and other personnel policies and handbooks
- Advice concerning termination or other discipline of employees
- Guidance on layoff, furlough, or other changes to your workforce
- Defense or investigation of wage and hour claims, including prevailing wage violations
- Enforcement of non-compete, non-disclosure and other confidentiality contracts
- Negotiation of employment contracts and severance agreements
- Issues relating to compensation disputes
- Individual defense of employment law claims made by employees or their employer
- Negotiations regarding buy-outs or other issues regarding non-compete agreements

GISLASON & HUNTER LLP
ATTORNEYS AT LAW
www.gislason.com