EMPLOYMENT & HUMAN RESOURCES *newsletter*

Spring 2016

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AN EMPLOYER'S DUTY TO ITS EMPLOYEES FOLLOWING A CYBER-ATTACK RELEASING PERSONAL INFORMATION

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

Changes in electronic communications, storage, and other advancements have continued to develop rapidly over the past two decades, moving from the rise of on-site storage of company information to the Internet revolution, mobile devices, and storage in the cloud. While these changes have reaped many benefits for employers, they also raise risks. Specifically, cyber-attacks play an ever-growing role in the modern world, with cyber-attack events now occurring up to 80 or 90 million times a year (all targets, including personal computers). The total number of attacks on businesses has increased, by one estimate, over 90% since 2010. Furthermore, over 70% of attacks go unnoticed.

Reportedly 62% of victims of cyber-attacks are small to mid-sized businesses. This problem is not just for Target, Home Depot, and their ilk to bear. Cyber criminals are able to prey on smaller employers who are ill-prepared for such an attack, making them easy targets. And while it takes those criminals many successful attacks to do the damage one Target-sized breach may cause, reporting on and disclosing an attack can bring associated costs that can be a major burden on small businesses. The average cost per breach is, according to Property Casualty 360, an incredible $690,000 in legal fees.

When a breach occurs, the legal fallout can be sweeping and pinch an affected business from many different directions. This article concerns just one: the requirement that a business notifies any individual whose data has been accessed of the occurrence. That would include not only customers, but employees.

Minnesota is one of 47 states that have a specific disclosure requirement set out in

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statute that governs what a business must do following a cyber-attack (or other breach of confidential personal information in that business's possession), having first passed the statute in 2005. The statute governs any entity that "owns or licenses" confidential personal information, or that maintains that information on behalf of others. "Personal information" is defined to include "an individual's first name or first initial and last name in combination with any one or more of the following data elements":

(1) Social Security number;

(2) driver's license number or Minnesota identification card number; or

(3) account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account.

Obviously, virtually every employer will store some "personal information" of their employees (and customers) in the regular course of their business. Pursuant to the statute's terms, when a system storing this data is breached (whether via cyber-attack or more traditional means) and personal information disclosed, the company that suffered the breach must notify any Minnesota resident whose information was acquired of the breach "in the most expedient time possible and without unreasonable delay." An exception exists if law enforcement believes disclosure may interfere with a criminal investigation. In addition, the victimized business must take all necessary steps to determine which of their customers has had their personal information accessed.

Providing proper notice requires that the business suffering the breach notify affected individuals by sending a written letter to their most recently known address, an email under certain circumstances, or, if those methods prove too costly (over $250,000) or too many individuals must be contacted (more than 500,000), via substitute notice. Substitute notice requires sending an email to the person's last known email address, posting a notice on the business's Web page, and providing notice to statewide media. Obviously, substitute notice can raise the specter of unfavorable media coverage.

Should a company fail to comply with these notification requirements, the Minnesota Attorney General's Office is authorized to enforce the section, obtain injunctions, and levy appropriate fines.

On the other hand, to-date only one reported decision has reviewed the parameters of the notification law, and it determined that no "private cause of action" exists under the section. The case, *In re Target Corp. Data Sec. Breach Litig.,* 66 F. Supp. 3d 1154 (D. Minn. 2014), grew out of the cyber breach at Target stores over the 2013 Christmas season, when over 110 million customers had their credit card information stolen by hackers. Class-action litigation followed and is still ongoing. However, shortly after the case was commenced Target sought dismissal of Plaintiffs' Complaint, which raised seven separate claims. Count one contended that "Target violated the consumer protection laws of 49 states," including Minnesota's disclosure law.

The Court dismissed that Count as it relates to Minnesota law, holding that the Plaintiffs had no private right to make claims under the statute. It specifically calls for enforcement by the Attorney General's Office, not individuals, and thus the Court found no right to sue. However, because that decision was not issued by a Minnesota Appellate Court, it is subject to change. Furthermore, it should be noted that many of the Plaintiffs' claims did survive, and as noted, the class-action litigation continues today. Nevertheless, as matters currently stand, and if the decision remains good law, an employee would not be able to sue his or her employer under the notification statute if the employer breached its notification duties.

As noted at the outset, the fallout from a successful cyber-attack is damaging on many fronts. Notification requirements are just one issue employers must deal with after a security breach. However, identifying all individuals who have had their personal information accessed, determining how to notify those individuals, and actually executing that notification can be both time-consuming and expensive. Failure to make a proper notification, however, can result in a fine of up to $25,000 from the Minnesota Attorney General's Office.

EMPLOYMENT LAW CONFERENCE

Wednesday, April 20, 2016
Country Inn & Suites Conference Center
1900 Premier Drive, Mankato
11:30 Check In
Noon Buffet Lunch
12:30 – 4:00 Seminar

To Register, fill out the form below and return to:
Julie Donner
Gislason & Hunter LLP
2700 South Broadway, New Ulm, MN 56073
jdonner@gislason.com

Name _____

Company _____

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City_____ State _____ Zip _____

Phone _____

Email _____

Number of participants @ $50.00 _____
If paying by credit card, we will contact you for credit card information.
Please RSVP by April 8, 2016.

TOPICS TO INCLUDE:

ESOPs: Why small businesses are giving them a second look; who should consider one; and HR issues that arise in implementation and administration.

Drug Testing – The Latest and Greatest

Cybersecurity

Case Law and Legislative Update

Continuing education credits will be applied for.

Registration: $50.00 includes seminar, lunch, break and binder of materials.

MINNESOTA DRUG AND ALCOHOL TESTING IN THE WORKPLACE ACT

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

In Minnesota, employer testing of job applicants and employees for drugs and alcohol is governed by the Minnesota Drug and Alcohol Testing in the Workplace Act, Minn. Stat. §§ 181.950-181.957 ("DATWA"). Certain federally mandated drug and alcohol tests conducted pursuant to U.S. Department of Transportation ("DOT") regulations, however, are exempt from DATWA if the testing complies with the procedures for transportation workplace drug and alcohol testing programs in the Code of Federal Regulations.DATWA applies to all employers that conduct drug and alcohol testing of job applicants, employees, or independent contractors in the State of Minnesota.

DATWA does not require any employers to conduct drug and alcohol testing; however, employers who wish to test employees or applicants must strictly comply with the requirements of DATWA. Thus, an employer should be familiar with DATWA before conducting drug and alcohol testing or taking disciplinary action against employees for violation of the employer's drug and alcohol testing policy.

A. Adoption of a Written Policy

Under DATWA, an employer may not request or require an employee or job applicant to undergo drug or alcohol testing unless the employer has adopted a written testing policy that contains specific elements as laid out in the statute. DATWA requires adoption of a written policy with respect to drug and alcohol testing only. Regardless as to whether an employer does or does not adopt a policy with respect to drug and alcohol **testing**, an employer should adopt a policy prohibiting the **use, sale, possession, or trafficking** of drugs or alcohol in the workplace. As the written testing policy lays out the procedures for testing and not only the rights of the employees or job applicants, but also the rights of the employer, employers should work closely with an attorney to draft a testing policy. Employers should treat their drug and alcohol policies the same as any other policy within their handbook and reserve the right to modify applicable policies and procedures at their discretion by inserting the kind of broad disclaimers and statements of "at will employment" that typically appear in employee handbooks.

B. Notice to Employees

An employer must provide written notice of its drug and alcohol testing policy to all affected employees, to a previously nonaffected employee upon transfer to an affected position under the policy, and to a job applicant upon hire and before any testing of the applicant if the job offer is made contingent on the applicant passing drug and alcohol testing. As is good practice for any employment policy, upon distribution of the policy and any revised policies, employers should obtain signed acknowledgment from each individual confirming that the individual has received and understands the employer's policy.

Under DATWA, an employer must also post notice in an appropriate and conspicuous location on its premises that it has adopted a drug and alcohol testing policy and that copies of the policy are available for inspection during regular business hours by employees and applicants in the employer's personnel office or other suitable locations.

C. Testing of Job Applicants

In order to test a job applicant, an employer must first make a conditional job offer of employment to the applicant. In addition, the employer must request or require the same test of all applicants conditionally offered employment for the same position. An employer may not withdraw a conditional job offer made to an applicant based on a positive test result that has not been verified by a confirmatory test. If an employer ultimately withdraws a job offer based on a positive drug or alcohol test result, the employer must inform the applicant of the reason for its decision.

In almost all cases, a pre-employment test should be for illegal drugs but not alcohol. Pre-employment alcohol tests impose additional costs on the employer, and may be attacked as unlawful under the Minnesota Lawful Consumable Products Act. In addition, a pre-employment alcohol test is considered a "medical examination" under the Minnesota Human Rights Act ("MHRA") and the Americans with Disabilities Act ("ADA"), and must be "job-related." In many cases, it may be difficult to demonstrate why passing a pre-employment alcohol test is job-related, unless the employer is attempting to screen out alcoholics – something which is illegal under the ADA. Thus, the potential value of a pre-employment alcohol test is generally outweighed by the associated practical and legal risks of such a test.

D. Testing of Current Employees

DATWA permits four types of testing for current employees:

- routine physical examination testing;
- random testing (for safety-sensitive employees);
- reasonable suspicion testing (including post-accident/injury testing); and
- treatment program testing.

1. Routine Physical Examination Testing

An employer may request or require an employee to undergo drug and alcohol testing as part of a routine physical examination provided that the drug or alcohol test is requested or required no more than once annually and the employee has been given at least two weeks' written notice that a drug or alcohol test may be requested or required as part of the physical examination.

Putting aside whether drug or alcohol testing can be conducted during a routine physical examination, employers should be aware that the MHRA and ADA restrict such medical examinations for employees. They must be "job-related" and "consistent with business necessity." Thus, the employer must have a legitimate purpose for conducting the medical examination in the first place before adding a drug or alcohol test to the examination. Given the potential liability under the MHRA and ADA for conducting an unlawful medical examination or inquiry, employers should consult with legal counsel before requiring physical examinations of any employee or class of employees. An employer should not require an employee to undergo a routine physical examination for the sole purpose of conducting a drug or alcohol test.

2. Random Testing of Safety-Sensitive Employees

An employer may request or require employees in safety-sensitive positions to undergo drug and alcohol testing on a random selection basis. A safety-sensitive position is any position, including supervisory or management positions, in which an impairment caused by drug or alcohol usage would threaten the health or safety of any person. The best practice would be for the employer to specifically identify which positions or employees are considered "safety-sensitive" for purposes of random testing in its policy. While DATWA grants employers considerable latitude in classifying "safety-sensitive" positions, employers should be prepared to defend their classifications if challenged. Improperly classifying an employee as "safety-sensitive" could result in a legal challenge to a positive test result, any adverse employment action taken based on the result or a violation of MHRA or ADA.

The method of random selection must result in an equal probability that any employee from a group of employees subject to the selection method will be selected and does not give an employer discretion to waive the selection of any employee selected under the mechanism. An employer may contract with a third-party drug and alcohol testing administrator or consortium to oversee the random selection process. DATWA permits employers to select the applicable testing rate (e.g., 50% of safety-sensitive employees each year).

3. Reasonable Suspicion Testing (Including "Post-Accident" and "Post-Injury" Testing)

An employer may request or require an employee to undergo drug and alcohol testing if the employer has reasonable suspicion, based on specific facts and rational inferences drawn from those facts, that the employee:

- is under the influence of drugs or alcohol;
- has violated the employer's written work rules regarding the use, possession, sale, or transfer of drugs or alcohol while the employee is working or while the employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment, provided that the work rules are in writing and contained in the employer's written drug and alcohol testing policy;
- has sustained a personal injury at work or has caused another employee to sustain a personal injury; or
- has caused a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.

In order to make effective determinations of reasonable suspicion, supervisors should receive training concerning the manifestations of alcohol and drug use, abuse, and withdrawal. Records of such training should be maintained by the employer for later use in the event an employee challenges the basis of a reasonable suspicion test.

The employer may also want to consider creating a "reasonable suspicion" checklist form to be completed by the supervisor at the time the determination of reasonable suspicion is made. Such a form can serve as critical evidence should the employee later challenge the legality of the test or allege that the test was motivated by an unlawful discriminatory purpose (e.g., race, gender, age, etc.), arbitrary, or capricious.

4. Treatment Program Testing

An employer may request or require an employee to undergo drug and alcohol testing if the employee has been referred by the employer for chemical dependency treatment or evaluation or is participating in a chemical dependency treatment program under an employee benefit plan. The employee may be required to undergo testing without prior notice during the evaluation or treatment period and for a period of up to two years following completion of any prescribed chemical dependency program. In essence, the treatment program testing provision authorizes an employer to conduct a "return-to-duty" test and "follow-up" testing of employees who have received chemical dependency evaluation or treatment (akin to the DOT regulations in this area). Thus, following a positive drug or alcohol test, it is recommended for the employer to refer the employee to a chemical dependency evaluation. This will trigger the employer's right to conduct treatment program testing.

Employers must be very careful when confronting employees who have failed a drug or alcohol test. The employer initially should only require the employee to submit to an "evaluation" – not "treatment" – or else the employee may accuse the employer of assuming that the employee is an illegal drug addict or alcoholic. While current users of illegal drugs are not protected under the ADA or MHRA, current alcoholics are protected from discrimination. Further, these laws prohibit employers from discriminating against an employee because the employer wrongly regards the individual as being disabled.

If the chemical dependency evaluation indicates that the employee has a drinking problem or is using or addicted to illegal drugs, then the employer generally has the right to require the employee to follow all recommendations for treatment and recovery. The employer's drug and alcohol policy that prohibits drinking on the job, reporting for work under the influence of alcohol, or using illegal drugs can reinforce the employer's right to require treatment; making it easier for the employer to demonstrate that requiring the chemical dependency treatment is "job-related" and "consistent with business necessity" for purposes of the ADA and MHRA.

E. Limitation Against Arbitrary and Capricious Testing

Although DATWA authorizes testing under the circumstances described above, employers may not request or require drug or alcohol testing on an "arbitrary and capricious basis." The Minnesota Court of Appeals has suggested that a decision to test is arbitrary and capricious "only where the decision lacks any rational basis." Despite the court's expansive interpretation of the phrase "arbitrary and capricious," uniform and consistent application of an employer's policy is imperative.

F. Procedure for Testing

1. Required Consent Form

Before requesting an applicant or employee to undergo drug or alcohol testing, an employer must provide the employee or job applicant a form, developed by the employer, on which the employee or job applicant must acknowledge that he or she has seen the employer's drug and alcohol testing policy. This form should be signed by the employee. The consent form should only acknowledge that the individual has seen the employer's drug and alcohol testing policy. The consent form should not include a request for information regarding medications the individual is currently taking. Instead, information regarding medications the individual is taking should be requested only after a positive drug test. Requesting such information prior to a test may constitute an unlawful medical "inquiry" under the ADA and/or MHRA, which limit both medical examinations and inquiries.

2. Use of Certified Laboratories and Forms of Testing

Drug and alcohol testing in the State of Minnesota must be conducted by a certified laboratory which meets certain criteria contained in DATWA. The employer should ensure that its drug and alcohol testing laboratory is properly certified to conduct workplace testing under Minnesota law as not all of them are.

Non-DOT drug and alcohol testing in Minnesota is limited to blood, urine, and hair testing insofar as the accreditation bodies required under Minnesota law generally do not set forth criteria for breath alcohol testing. Prior to implementing their drug and alcohol testing program, employers should discuss the legal risks associated with various collection methods with an attorney. (*The collection methods and samples required by Minnesota law differ greatly from those for DOT-mandated testing under federal law and employers who fall under DOT-mandated testing should stay up to date on the DOT standards.*)

3. Notification of Test Results

Within three working days after the employer receives the laboratory's test result report, it must inform the employee or job applicant in writing of a negative test result on an initial screening test or confirmatory test. In addition, the employer must inform the individual in writing of his or her right to request and receive a copy of the test result report.

Within three working days after the employer receives a positive confirmatory test result from the laboratory, the employer must inform the employee or job applicant of the result of the test, that the individual may receive a copy of the test result report from the employer, and of the individual's rights as laid out in DATWA.

In order to ensure compliance with DATWA's complex notification requirements for positive drug and alcohol tests, employers should consult legal counsel to develop an appropriate notification form that contains the required information. Failure to provide adequate notice can invalidate the entire test and subject the employer to considerable liability for wrongful termination, back pay damages, and attorney's fees.

4. Confirmatory Retests

Within five working days after notice of a positive confirmatory test result, an employee or job applicant may request a confirmatory retest of the original sample at the individual's own expense. Within three working days after receipt of this request, the employer must notify the original testing laboratory that the employee or job applicant has requested a confirmatory retest. If the confirmatory retest does not confirm the original positive test result, the employer may not take adverse personnel action based on the original confirmatory test.

G. Discharge and Discipline of Employees

If an employee's initial screening test is positive, but it has not been verified by a confirmatory test, the employer may not discharge, discipline, discriminate against, or require or request the individual's rehabilitation based on the test result. Instead, the employer must obtain a confirmatory test of the same sample to confirm the positive test result. For this reason, most testing laboratories will routinely conduct confirmatory tests before notifying employers of the test result.

In the case of a first positive test result verified by a confirmatory test, the employer may not discharge the employee unless both of the following conditions are met:

- the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under an employee benefit plan, either a drug or alcohol counseling or rehabilitation program as determined by the employer after consultation with a certified chemical use counselor or physician trained in the diagnosis and treatment of chemical dependency; and
- the employee has refused to participate in the counseling or rehabilitation program or has failed to successfully complete the program, as evidenced by withdrawal from the program before its completion or by a positive test result on a confirmatory test after completion of the program.

Because these limitations apply to decisions to discharge only, DATWA does not explicitly prohibit an employer from taking disciplinary action short of discharge (e.g., suspension, demotion, or warning) against an employee based on a first positive test result.

DATWA also permits an employer to temporarily suspend (with or without pay) or transfer a tested employee to another position at the same rate of pay pending the outcome of a confirmatory test or, if requested, a confirmatory retest, if the employer believes that this action is reasonably necessary to protect the health or safety of the employee, co-employees, or the public. An employee who has been suspended without pay must be reinstated with back pay if the outcome of the confirmatory test or retest is negative.

If any adverse employment action is taken as a result of a drug or alcohol test, the employer likely must notify the employee of the employer's reason for the decision within 10 days of the decision. This notice should be given in writing.

H. Conclusion

Because DATWA sets out specific procedures an employer must follow when performing drug and alcohol testing on existing employees or job applicants, it is best to review the laws and the employer's testing policy thoroughly prior to proceeding with testing, or consult with an attorney.


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SHARES

EMPLOYEE STOCK OWNERSHIP PLANS

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

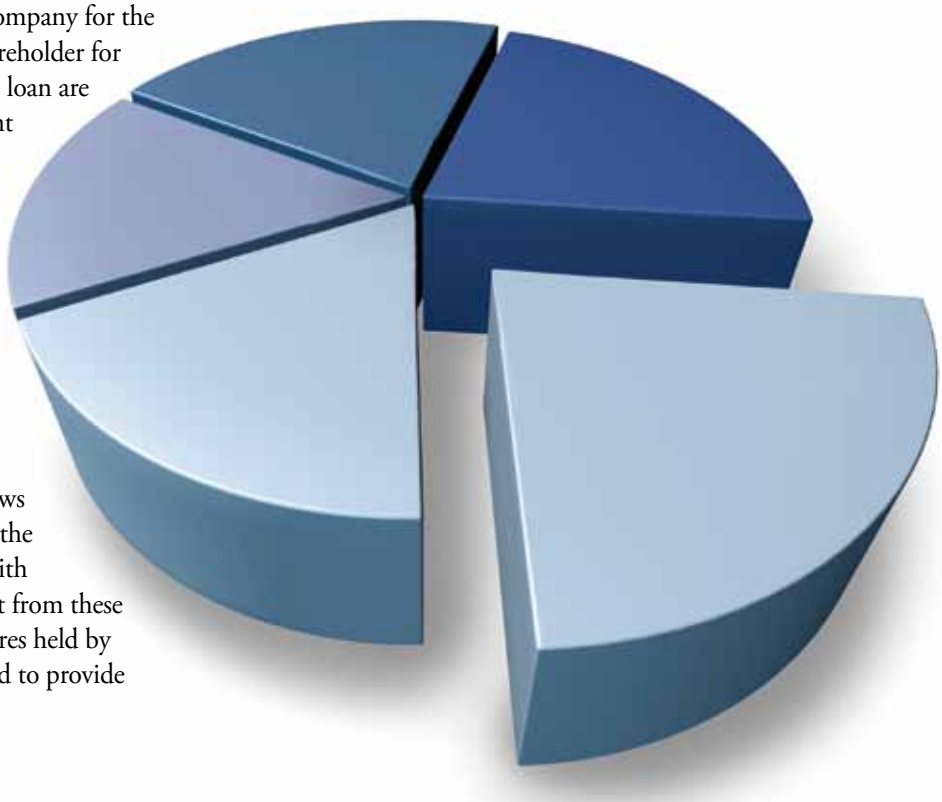
A nice alternative that allows small and medium business owners to sell equity in their business without going "public" is to offer their employees equity in the business through employee stock ownership plans (ESOPs). ESOPs have allowed employees across the country to become beneficial owners of their employer's company and enjoy the potential of up to six-figure retirement earnings, without having to pay an arm and a leg to purchase stock in the company.

An ESOP is a defined contribution plan that invests primarily in an employer's stock. It allows the company to borrow money on a tax-deductible basis to purchase stock for the benefit of its employees. An interested employer must first establish an ESOP by negotiating with an ESOP trustee which, given the fact that ESOPs may be investigated by the Department of Labor for compliance, should be an institutional independent trust company. The employer and trustee then determine what the fair market value is of the portion of the company the employer wishes to sell. Once this is determined, the ESOP loans money to the company for the stock purchase and the trustee becomes the shareholder for the benefit of the employees. As portions of the loan are repaid, the shares reflective of the repaid amount become available for the employees' benefit.

In addition to allowing employees to benefit from the company's success without paying out of pocket, the attractiveness of these retirement plans lies in their inherent tax benefits to the company and the employer's ability to sell portions of its company without losing management control. A company can make annual tax-deductible contributions to the ESOP of up to 25% of its payroll. This allows the company to make substantial payments on the loan. Capital gains taxes may also be avoided with qualified ESOP transactions. Employees benefit from these plans by having a beneficiary interest in the shares held by the ESOP trust. But, employers are not required to provide employees with typical shareholders rights, as the ultimate shareholder is the ESOP trustee who is typically not interested in the management of the company. Thus, the voting rights associated with the shares held in trust for the benefit of the employees may be voted (essentially at the employer's direction) by the ESOP trustee. However, an employer may pass the voting rights to its employees if it so chooses.

Each employee must meet three criteria to participate in an ESOP: (1) be at least 21 years of age; (2) have continuous employment with the employer during the twelve months prior to enrollment; and (3) work at least 1,000 hours a year. These are the same requirements that apply to most retirement plans governed by the Early Retirement Income Security Act of 1974 (ERISA). ESOPs are also governed by ERISA.

Distributions of an employee's shares are paid upon a triggering event. If a participating employee ceases to be employed with the company due to death, disability, or retirement, then he, his heirs, or his estate shall begin receiving distributions within one year of the plan year end following the triggering event. However, an employer is not required to begin paying distributions as quickly to an employee who quits or is terminated. These individuals do not have a right to receive distributions until one year after the fifth plan year end following their termination or resignation.



THE "IDEAL" TERMINATION OF AN EMPLOYEE

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

Steering clear of blatant discriminatory firing, such as: "You're fired because you are a woman, have AIDS, or filed a worker's compensation claim," is fairly easy. But what about those times where you are faced with a person who is a member of a protected class and actually is a bad employee? Can you still fire that employee?

Surprisingly, this is a common question. Employers must remember that the legal environment's ever-expanding list of protected classes does not eliminate the status of employment in Minnesota as "employment at will." If an employer has not altered this status, it can fire an employee for any reason that is not illegal. The key to avoiding illegal reasons is to have a clear, articulable reason for termination *before* firing an employee. This can be done by keeping the following questions in mind.

1. Why is the Employee being fired?

Even in an employment at will workplace, an employee cannot be fired because of his membership in a protected class. This is illegal. To ensure termination is legal, identify why you wish to fire the employee. It should be for a documented reason that is supported by facts. Once you have this, an employee's coincidental membership in a protected class becomes irrelevant. Develop this reason by keeping detailed records of employment performances, evaluations, and employee behavior. If your reason is not well documented, contemporaneously with the occurrence of the frowned-upon action by the employee, expect the termination to be challenged.

Once you have determined the ultimate reason for the firing, put it into a three- to five-sentence paragraph.

> *Example: Tommy is being fired because of his attendance issues. Tommy is required to be at his station ready to work by 9:00 a.m. In the last two weeks, Tommy's punch cards show that he has been more than five minutes late to his station on the following days: March 8, 17, 18, and 22. This is unacceptable behavior and grounds for termination.*

Then review state and federal law with a keen eye toward whether your reason can be construed as founded upon any of the characteristics of the protected classes. Reviewing both is important because one may be more expansive than the other. This is the case in Minnesota. In Minnesota, it is illegal to fire a person because he is gay or transgender (sexual orientation includes those "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness"). Currently, this is not illegal under Title VII, thus employers in states without this protection may fire employees on this basis (although, I do not suggest this action, as the laws and applications are changing based on discrimination "on the basis of sex"). The reason developed in Tommy's example has no connection to his race, religion, nationality, or any other protected class. Therefore, his firing appears to be legal.

2. What is the Employee entitled to under Minnesota law?

There are three things that all terminated employees are entitled to when they request the receipt of such in writing. These items include: (1) all wages due and owing; (2) the truthful reason for their termination; and (3) their personnel record. If an employer is not prepared to hand these over immediately, it should not terminate the employee until it is prepared. This will protect the employer from penalties imposed by Minnesota law for the late and/or incomplete delivery of these items.

Final Paycheck. If an employer fails to provide the employee with his final paycheck within twenty-four (24) hours of his request, the employer will face a penalty equal to the employee's daily wage for each day payment is late, not to exceed fifteen (15) days. *Plus* the employer must pay any attorney's fees and costs incurred by the terminated employee while seeking payment of said penalties.

Truthful Reason for Termination. If you prepared for this termination as suggested in section one of this article, complying with this statutory entitlement is easy. For those employers who have not, the more severe penalty imposed for failing to provide this to the employee within ten (10) days of his request is not of a monetary nature. The employer faces an insignificant fine of $25 per day for a max of $750. But, if the termination is challenged, an employer's delay or failure to provide this reasoning could diminish its credibility. This may assist the court in finding that the provided reason for termination is merely pretextual and the truthful reason may be illegal.

Personnel Record. The consequence for providing an incomplete record, or no record, may only be experienced if the termination is challenged. In that instance, the employer could be barred from using information that was not included in the provided record. This could be dire in situations where the employer terminates due to performance issues, but fails to document the alleged misbehavior or fails to include performance evaluations in the personnel file.

3. What will simplify the Termination process?

Once you have determined that the statutory items are ready and you are armed with a truthful, legal, and well-documented reason for termination, develop an agenda for the termination meeting. The goal is to sever the relationship speedily and allow the employee to leave with dignity. Ideally, this can be done by sticking to your agenda and avoiding confrontation.

First, have the items the employee is able to request available in a sealed envelope. Second, inform the employee of the reason for his termination by reading the paragraph you prepared earlier (remember the Tommy example) verbatim. It is important to not deviate from this, as you may say something that could be construed as termination on other grounds. Do not engage in a discussion with the employee, but for your safety and that of your employees, do not cut off the terminated employee either. Let the employee speak as he chooses and, once finished, repeat the reason for his termination and acknowledge the items he is entitled to. Inform him that you are prepared to hand over these items today. Have a letter requesting these items prepared and available for his signature. Once this is complete, inform him that it is company policy to escort him off the premises immediately. Then provide him with a supervised timeframe for him to retrieve personal items from his desk or locker.

As the title of this article suggests, it was developed to assist employers in the handling of an "ideal" termination. Emotions may creep in to the termination meeting and attempt to derail your termination agenda, but being prepared and organized is an employer's best defense against a termination challenge.

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

Gislason & Hunter
Employment Law Group
is pleased to announce the addition of

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

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- 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

This publication is not intended to be responsive to any individual situation or concerns as the content of this newsletter is intended for general informational purposes only. Readers are urged not to act upon the information contained in this publication without first consulting competent legal advice regarding implications of a particular factual situation. Questions and additional information can be submitted to your Gislason & Hunter Attorney.

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