EMPLOYMENT & HUMAN RESOURCES newsletter

Spring 2019

Fairness | Integrity | Expertise | Hard Work | Common Sense

Shared values. Firm results.

Inside this Issue

The Roses and Thorns of "Love Contracts"

Page 1

Child Support and Spousal Maintenance Withholding Notices

Page 5

Court Recognizes a Common-Law Duty to Keep Employee's Personal Data Safe

Page 8

Recouping Employee Incentive Payments

Page 10

GISLASON & HUNTER LLP

ATTORNEYS AT LAW

www.gislason.com

THE ROSES AND THORNS OF "LOVE CONTRACTS"

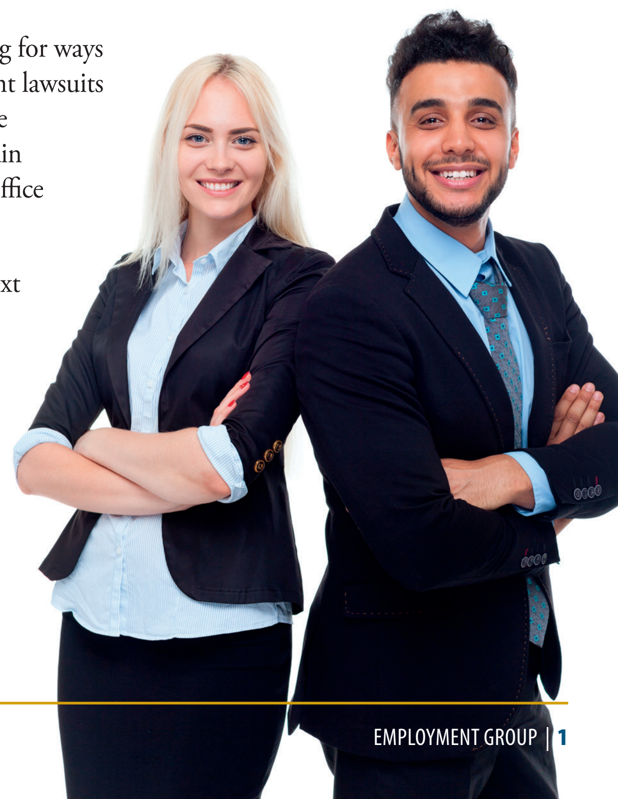
62% of workers say they have gotten romantic with a coworker, 38% of workers admit they have dated a coworker at least once during the course of their career and 17% of coworkers reported dating coworkers at least twice.

[1] *Brandon Gaille, https://brandongaille.com/19-unbelievable-workplace-romance-statistics/ May 23, 2017*

In the #MeToo era, employers are looking for ways protect themselves from sexual harassment lawsuits and regulate romantic relationships in the workplace. One idea that is starting to gain attention is "love contracts" (also called office relationship contracts).

A love contract in the employment context is a signed written agreement between two coworkers that does not require coworkers to disclose intimate details of their relationship but acknowledges that the relationship is a consensual relationship. One key provision in the love contract is an agreement by the employees that the relationship does not constitute a violation of the company's harassment policies.

continued on page 2



Other key components of the love contract are to remind the coworkers of the employer's equal opportunity, anti-discrimination and anti-harassment policies.

Love contracts can help to identify any potential conflict of interest as a result of the relationship and solutions for the conflict. The love contract should also have a provision that states the employees will not engage in public displays of affection while at work or work functions and will maintain professional conduct at all times. Additionally, the love contract should recognize that relationships don't always work out and contain a provision that says each party is free to leave the relationship without any retaliation.

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

For employers, the benefits to having two coworkers who are in a romantic relationship sign are love contract are potentially decreased sexual harassment litigation risk and the opportunity for management and HR to highlight and reinforce acceptable standards in the workplace.

However, love contracts are not all roses. One of the major problems with love contracts, is that they can be viewed by employees who are not involved in the relationship as a signal that the relationship is "blessed by the employer." This can be problematic in that it may lead the way to possible complaints that sexual favoritism is sanctioned by the employer, and thus it may create a hostile work environment for employees.

Furthermore, decreased morale, administrative burdens and increased secrecy are prickly thorns of a love contract that an employer's human resources department has to weed through. Some employees may view the love contract as an invasion of privacy and as a result, morale may be decreased by requiring employees to sign love contracts. The requirement to sign a love contract might push relationships into secrecy, which would defeat one purpose of the love contract. Additionally, an employee who felt pressured into the relationship to start with could also claim he/she was pressured into signing the love contract as well.

By requiring love contracts, human resources will be tasked with additional administrative burdens of keeping track of the love connections in the workplace, maintaining files for those workers who have signed the love contracts, and a heightened sense of duty to monitor the relationship. Human resource professionals would also be tasked with determining when a relationship is serious enough to require a love contract be signed.

Additionally, the relationships most likely to result in sexual harassment claims may be the ones conducted in secrecy and not likely to be memorilized by a love contract. These would include relationships that involve extra-marital affairs or workers who are not engaged in a truly consensual relationship.

If your employer does enforce love contracts, remember, love contracts do not take the place of:

- Effective policies,
- Sexual harassment and discrimination training, and
- Open communication and messaging.

Alternatives to love contracts that should be considered by employers include policies that ban all romantic relationships in the work place or that ban relationships between a supervisor and subordinate. Each employer should think about their workforce, industry and work environment and determine the best tools to use to decrease the likelihood of litigation.

Gislason & Hunter LLP

Employment Law Conference

Tuesday, April 23, 2019

Courtyard Marriott • 907 Raintree Road • Mankato, MN 56001

11:30 – Buffet Lunch

Noon – Employment Policies and Handbooks – Cory Genelin
What is new and essential in 2019 policies and proceedures

1:00 – Case Law Update for Employers – Brittany King Asamoa

1:45 – Break

2:00 – Hot Topics in Employment Law including:
Wage and Hour Law
New FLSA Guidance
Employment Use of Social Media
Discrimination, harassment & retaliation
Marijuana in the Workplace

3:00 – Question & Answer and Open Discussion led by Cory Genelin

3:30 – Conclude

Registration

Name ____

Company ____

Address ____

Email ____

$50.00 includes, lunch, break, seminar and access to materials
RSVP: jdonner@gislason.com

_____ Check enclosed

_____ Please call me for credit card information - Phone______________________

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

CHILD SUPPORT AND SPOUSAL MAINTENANCE WITHHOLDING NOTICES

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

Employers become tangentially involved with family law matters, and exposed to liability, when an obligee or public authority's attempt to collect child support and/or spousal maintenance payments. Collection efforts begin upon the employer's receipt of an income withholding notice and court order. Employers must withhold the required payments in accordance with the notice and court order received beginning no later than "the first pay period that occurs after 14 days" from the date the employer received the "the order for or notice of income withholding." Minn. Stat. § 518A.53. This may differ for financial institutions.

Income Withholding Notice

Income withholding notices are court documents informing a payor of funds, which may include an employer or an entity utilizing services provided by an independent contractor, of court-ordered child support or spousal maintenance payments that must be withheld from the employee or independent contractor's payment for services. For simplicity purposes, "payor of funds" will be referred to herein as an "employer" and "obligor," which is the individual ordered by the court to pay child support or spousal maintenance, will be referred to as an "employee." However, employers should keep in mind that these terms are more encompassing and relate to independent contractors as well.

continued on page 6

A proper notice of income withholding will cite the specific language contained in the court order requiring the employee to pay child support or spousal maintenance and attach the order to the notice. Notices may be served by a public authority, county child support offices, an obligee, or the obligee's attorney. An "obligee" is the person to whom child support and/or spousal maintenance payments are to be paid under the court order, but he or she is not necessarily the individual to whom employers are to send withheld funds to; that is typically the public authority as dictated by the court order. To ensure timely and proper payments, employers receiving a notice of income withholding without an accompanying court order, should contact the signatory of the notice immediately to request a copy of the court order.

Employer's Responsibilities and Exposure to Liability

Once funds are withheld from an employee's pay, employers have seven business days to remit the funds to the public authority specified in the court order. If a specific agency is not identified in the order, the funds may be sent to the Minnesota Child Support Payment Center in St. Paul, Minnesota. To ensure payments are directed to the correct obligee, employer's must include with the remitted funds correspondence identifying the employee's social security number, court case number, case type indicator, and the respective pay date the remaining funds not withheld were or will be paid to the employee.

Employers that fail to make required withholdings or forward withheld funds to the public authority in a timely manner, will be subject to substantial penalties including, but not limited to, the following:

a. Civil fine of $500.00 or more per violation;

b. Liable to the obligee for child support and/or spousal maintenance payments plus interest;

c. Liable for reasonable attorney's fees incurred by the obligee or public authority to collect the funds the employer failed to withhold; and

d. Be held in contempt for failure to withhold required payments.

Although income withholdings may expose employers to liability, an employer cannot circumvent liability by making employment decisions based on whether an employee or applicant has withholdings for child support or spousal maintenance obligations. In other words, employers cannot fire, refuse to hire, or take disciplinary action against an individual because he or she is ordered to pay child support or spousal maintenance via income withholding. Minn. Stat. § 518A.53, subd. 5(c).

Minimizing Liability

Of course, employers can minimize their exposure to liability arising from a failure to make appropriate and timely income withholdings, by complying with all notice of income withholdings received. Employers should seek legal advice promptly when they receive a notice of income withholding that they do not understand or know how to comply with. Employers should seek legal counsel upon receipt of multiple income withholding notices and/or garnishment summons for a single employee that collectively require a withholding greater than the earnings owed to that employee in a pay period or exceed the maximum withholding allowed for a pay period. The maximum amount of earnings that may be withheld is established by federal law and differs depending on the purpose of the withholding or garnishment. Withholdings and garnishments for child support and spousal maintenance shall not exceed 50-65% of the employee's disposable earnings per week, depending on the specific support order. 15 U.S.C. § 1673(b)(2). Employers questioning whether a withholding or support garnishment exceeds the maximum withholding allowed under the law, should contact their attorney immediately.

Employers should also seek legal counsel when they receive an income withholding and garnishment summons for the same employee, because such withholdings must be made in accordance with priority. Withholdings and garnishments relating to child support or spousal maintenance payments, generally take priority over garnishments for any other collection effort or judgment. Further, current support orders take priority over past due support.

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

COURT RECOGNIZES A COMMON-LAW DUTY TO KEEP EMPLOYEE'S PERSONAL DATA SAFE

In a case that is likely to reach well beyond the Commonwealth, the Pennsylvania Supreme Court recently determined that employers have a common-law duty to use reasonable care to safeguard electronically stored personal information of its employees. The case, Dittman v. UPMC, 196 A.3d 1036 (Pa. 2018), began with a security breach at the University of Pittsburgh Medical Center ("UPMC"). As a result of the breach, personal information of over 60,000 employees was stolen via UPMC computers, and some employees suffered tangible harm from that breach when the hackers used the information to file false tax returns.

A group of employees started a class-action lawsuit on behalf of themselves and similarly situated co-workers, asserting two common-law claims against UPMC: negligence and breach of implied contract. They alleged that UPMC had a duty to exercise reasonable care to protect their "personal and financial information within its possession or control from being compromised, lost, stolen, misused, and/or disclosed to unauthorized parties," and specifically claimed that UPMC failed to meet data security industry standards in handling the personal information at issue.

UPMC argued before the District Court that no cause of action exists for negligent failure to secure employee information, arguing both that no duty of care existed, and that the "economic loss doctrine" barred their claims. Under that doctrine, purely economic loss must be recovered via a claim of breach of contract, where a contract exists. The District Court agreed, holding that it should not impose "a new affirmative duty of care that would allow data breach actions to recover damages recognized in common law negligence actions." In short, the District Court noted that data breaches have become widespread and pervasive, and that creating a new right to sue would beget "hundreds of thousands of lawsuits."

Finally, the District Court further noted that the Pennsylvania Legislature had passed a Breach of Personal Information Notification Act, similar to a law existing in Minnesota, and that had it wished to create a private cause of action it could have done so. As it did not, no cause of action should be created by the Courts.

On appeal, the Pennsylvania Supreme Court disagreed. It determined that recognizing a duty of care to safely store information was not akin to the "imposition of a new, affirmative duty," but applying an existing duty of care (a duty everyone owes to others to exercise the care of a reasonable person to protect them against an unreasonable risk of harm) to a new factual scenario. UPMC was on notice that "a cybercriminal might take advantage of the vulnerabilities in UPMC's computer system and steal [its] [employees'] information," and thus had a duty to reasonably care for that information. The Court further stated that the criminality of the breach did not absolve UPMC of that duty of care since the risk of breach was foreseeable the moment UPMC required employees to provide it with personal data, and stored that data electronically.

The Court went on to hold that since no duty arises between UPMC and its employees via written contract, "purely economic" damages were available in tort.

What does this mean for employers outside of Pennsylvania? Potentially, probably even likely, quite a lot. Like Pennsylvania, Minnesota (and an additional 45 other states) has a statute, Minn. Stat. § 325E.61, that requires companies to notify affected individuals of security breaches and take certain steps to ensure damage from the breach is minimized. Like Pennsylvania's law, no private cause of action was created by that statute. Because of that, the only Minnesota case on point determined that individuals who suffered from the Target breach in 2013 could not sue under Minnesota law. In re Target Corp. Data Sec. Breach Litig., 66 F. Supp. 3d 1154 (D. Minn. 2014). That decision was made by a Federal District Court, however, and is not binding on the Minnesota Supreme Court. Our Supreme Court has yet to consider the issue.

When it does, it will look around the country at the trend in other states. As a result of the Pennsylvania decision, a Minnesota Court (or any other Court) will have a basis upon which to determine that a private cause of action, in negligence, exists for data breaches. At the very least, employers can expect to see a spike in litigation arising out of data breaches alleging claims of negligence, and will now have a harder time seeking dismissal early in the case.

Benefits

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

RECOUPING EMPLOYEE INCENTIVE PAYMENTS

The shortage of qualified workers in rural Minnesota has many employers looking for unique ways to attract, train, and keep the right people in important positions. Many of these solutions include a large, up-front, monetary investment by the employer such as a signing bonus, paying for training, or even paying a salary during training. Employers of course want to secure a return on this investment; but also want to continue their practice of employment-at-will. Getting both at the same time can be a challenge

In short, most of these employers want to provide a financial benefit, but they want to be able to recoup that benefit if the employee doesn't stay with the company for a given period of time. Minnesota Law, the Federal Fair Labor Standards Act, and the U.S. Department of Labor have made it nearly impossible to legally recover wages, salary, or bonuses paid to employees once they have vested. At the same time, both Federal and State statutes and regulations have approved the enforcement of bona fide loan agreements between employers and employees.

So the key here is to structure these recoverable bonuses or education finance plans as a separate and distinct legal relationship from the employment relationship. So ABC Corp and John Doe can be both Employer/Employee and Lender/Debtor. Here's a rough outline of how I've structured these relationships for employers recently.

For a signing bonus, which might include a potential employee agreeing to join an employer in a year or more after finishing school, I would style the bonus as a loan which requires a cash repayment, but which can be satisfied by the employee working for the employer for a given length of time. Funding school is a little more complex, especially if the funding will include living expenses beyond tuition. Even if, in effect, the employer wants to "pay the employee a salary" while in school, the employer can't recover this amount if it is a true salary. Instead, just like the money for tuition, make this amount a loan which the future employee can spend as she wishes.

In any scenario, the loan agreement should make it clear that the loan is payable even if the potential employee never comes to work for the employer and that it doesn't matter why the potential employee doesn't work for the employer for the full repayment period (meaning that the loan is repayable if the employee doesn't come to work, quits, is fired, or fails to complete schooling).

There is another practical concern here. Students sometimes change their plans, fail to complete school, or select a different employer upon graduation. If you are going to enter into a relationship like this, you need to be willing to pursue repayment. You need to consider whether suing a recipient in court might do more damage to your reputation as an employer than the good you hoped to do with your original bonus program. Even if you are willing to sue, realize that a recent graduate, or recent dropout, might be hard to locate, and collecting on your judgment might be difficult.

While recoupment of bonuses and education investments is possible, there are many pitfalls. Any such plan should be carefully reviewed by a competent attorney.

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
666 Walnut Street, Suite 1710
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

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