EMPLOYMENT & HUMAN RESOURCES *newsletter*

Fall 2019

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BAD IS BAD

"That's a great no-call by the ref right there."

This bit of football lingo always annoyed me. Announcers say this when a player is coming close to committing a penalty, but doesn't quite go over the line, and the referee does not call a penalty. To me it sounds like something to fill air time and over-analyze a non-event. However, in employment law, documenting a "no-call" can be as important as documenting a termination.

When an employer finds that an employee acted badly and takes strong adverse action against that employee (such as termination), what happens next can be nearly automatic. Most employers will think to document the infraction. If the employee is terminated, they will probably ask why, and the employer will be ready to detail the infraction. If there is an unemployment hearing, a MNHR claim, or a full-blown lawsuit over the termination, then the need for documentation and record keeping will be on everyone's mind.

But what about when the employer decides to take no action, or to take only minor action—either because there isn't enough evidence of wrong doing or because the employer has decided to forgive

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

the infraction? In that case, you may still need to build a record of the event, but you won't have the external stimulus of an unemployment hearing or lawsuit to force you to build one.

Here' why:

No Call: Employee Vickie says that Employee Harry harassed her. Employer investigates the allegations and just isn't satisfied that there is enough evidence to prove that Vickie's allegations are true and so it decides to take no action. Or, maybe Vickie's allegations are pretty minor (Harry made some off-color jokes, but only two or three times) and that Harry admitted his guilt, apologized, and shows signs that he's changed his ways; and Harry is a valued employee, so Employer gives him a stern reprimand but doesn't fire him.

Scenario #1: Constructive discharge. Two years later Vickie quits due to what she claims is a hostile work environment arising out of Harry's harassment and the Employer's failure to take appropriate remedial action.

Scenario #2: Negligent retention. Two years from now Harry harasses Vern. There is solid proof that Harry did it, and this time, it's not minor. Vern brings a claim against Employer for negligent retention. He alleges that because of what happened with Vickie, Employer knew or should have known that Harry would harass Vern and that it was negligent for Employer to retain him.

Scenario #3: Discrimination claims. At the same time as the allegations against Harry, Hanna harasses Victor. The allegations against Hanna are worse, there is more evidence that they actually happened, and Hanna was a pretty lousy employee anyway. Employer fires Hanna. Hanna brings a claim of sexual discrimination, alleging that she is similarly situated to Harry but was fired because she is a woman whereas Harry was retained.

Scenario #4: Crying wolf. A week after Vickie's initial complaint is investigated, she brings another one that isn't substantiated. And then another, and another, and another. Some of her alleged harassment is that Harry writes her up for being late, or he insists on her turning out decent product when in fact she was late, and her work product is terrible. You investigate each of these and they are all baloney. At some point, you decide to terminate Vickie for these complaints (that's a risky decision and a topic for another day; point is, it happens—call a lawyer first).

These are all situations where, many months after the fact, Employer will be called upon to explain why it took no action, or very little action, against Harry. Here's how you prepare for that day. (The short answer is, follow every step you would follow for an infraction for which you were going to take action . . . other than the action itself.)

Investigate. You need to conduct some sort of investigation into any allegation of harassment. Even if believe that the claims will be unsubstantiated (and you really shouldn't think that, if you haven't done an investigation yet.) Document all of the facts you collected and give the alleged victim every opportunity to provide his or her entire version of events.

Make a conclusion. This is a step many employers miss. If you don't think the infraction happened, say so in writing and say why. If you think there was an infraction but one not worth more than a talking to, say so and why.

Be public about the lack of publicity. The alleged victim may press you for information regarding your investigation, for most cases, the alleged victim is not entitled to that. This is not a court of law. Similarly, the victim is not entitled to know what punishment was meted out, if any. Remind the alleged victim of that fact: "I understand you have your point of view, but your report was not the only evidence we considered. We don't share your personal information with other employees and we don't share theirs with you. We've taken the action we believe is appropriate and that is more personal information that we do not share with other employees unless there is a need to know."

Encourage future reports. Remind accused and any manager involved that even though the allegations were not substantiated they cannot take any action in reprisal for the report. Encourage the accuser to immediately report any future incidents, including reprisals for the initial report.

In short, justifying a non-action can be just as important as justifying a termination. And the same steps should be followed.

Gislason & Hunter LLP

Employment Law Conference

Wednesday, October 23, 2019
Courtyard Marriott • 907 Raintree Road • Mankato, MN 56001

11:30 – Buffet Lunch

Noon – Harassment and Sexual Harassment Training
Presented by David Sturges

1:00 – Disasters! Reacting in real time to the unexpected.
Investigating allegations, securing evidence, evaluating liability and implementing solutions.
Presented by Cory Genelin

2:00 – Break

2:15 – Hot Topics and Case Law Update
Led by Cory Genelin

3:00 – Conclude

Registration

Name ______________________________

Company ______________________________

Address ______________________________

Email ______________________________

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

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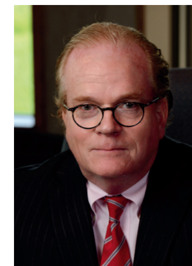
WORKPLACE BEHAVIOR – IT'S NOT JUST ABOUT SEXUAL HARASSMENT



David W. Sturges
Gislason & Hunter Attorney
(507) 354-3111
dsturges@gislason.com
New Ulm Office

Sexual harassment, for anyone who has access to the internet, television, newspapers or magazines, has been – in these past several years – "front page news." And, rightfully so, with a showcase of well known, successful men who have been removed from positions of importance, authority and influence, for their failure to abide by well established rules of conduct meant to protect employees and ensure their safety and well-being at the workplace.

Sexual harassment though is only part of the story. Beyond discrimination based on sex, Federal law and State law set out a number of other important prohibitions against discrimination. These include the prohibition of discrimination based on age, race, creed, disability, public assistance, financial status or membership on a human rights commission, religion, color, national origin, sexual orientation, marital status and familial status. Each of these is considered a so-called protected status and the law prohibits employers from allowing employees to be treated differently because of one's protected characteristic.

While overall total charges of discrimination brought before the United States Equal Employment Opportunity Commission (EEOC) were slightly down in 2018 compared to 2017, certain numbers increased. Overall, claims of retaliation which would include claims of retaliation based upon any protected status, made up 51.6% of all charges filed. Claims of sex discrimination were up as were claims of age and disability discrimination. While slightly

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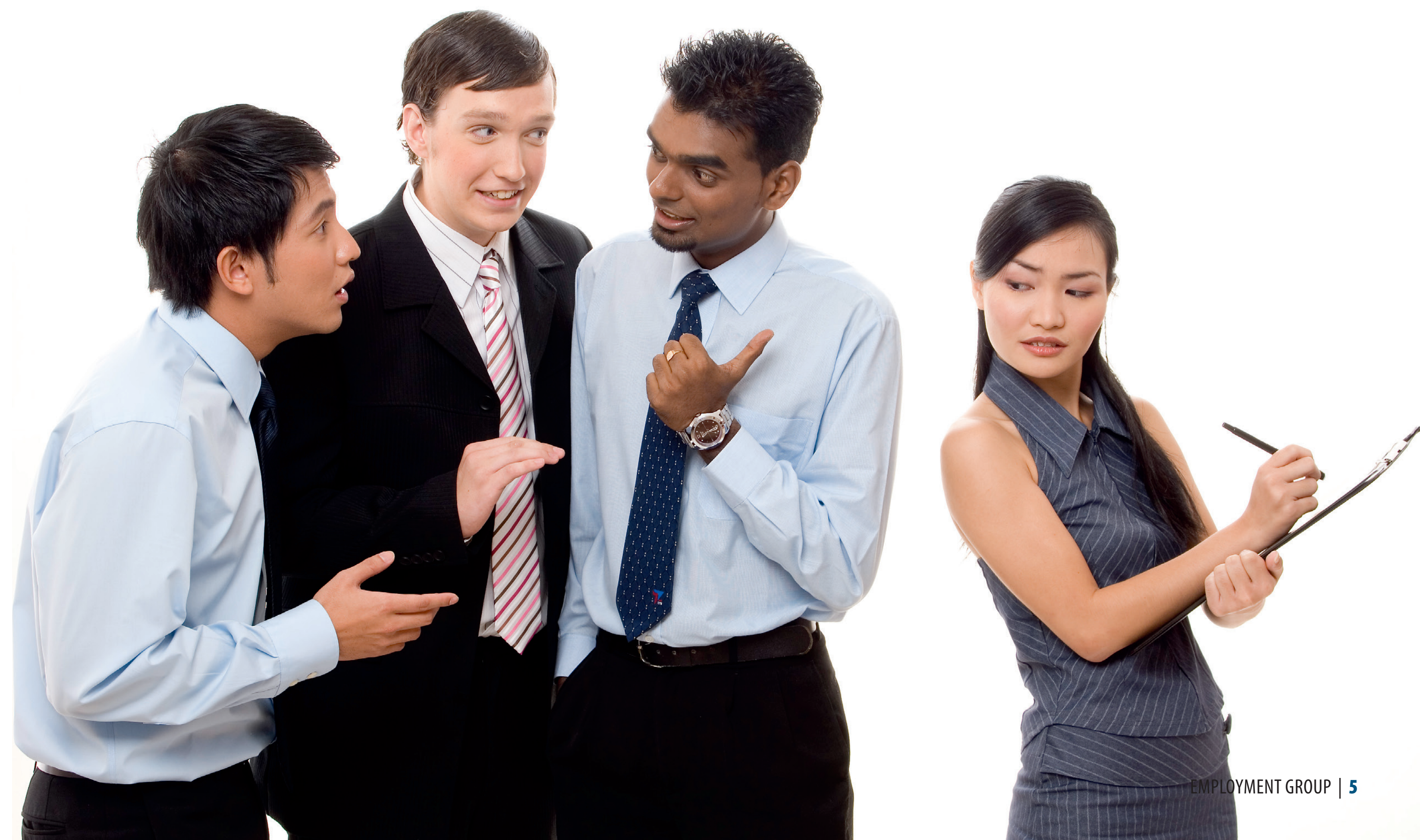

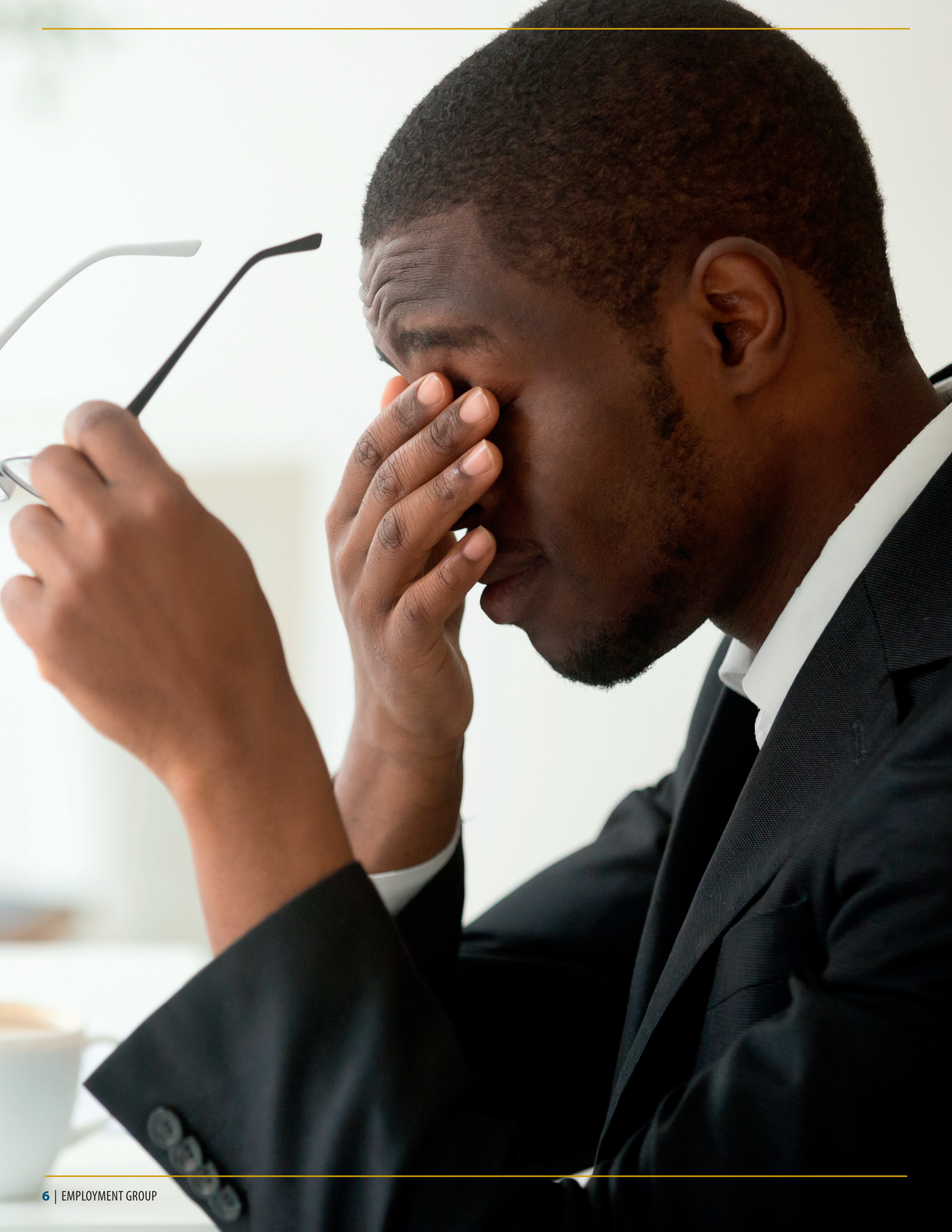

down, three other major categories were the subject of a significant number of charges of discrimination. These include race (32.2%), national origin (9.3%), and religion (3.7%).

Whether it is sexual harassment or harassment based on age, race creed, sex, disability, public assistance, etc., there are a number of reasons why we do not condone harassment of any type and why an employer must take every step possible to ensure that it does not occur.

First, it is unfair to subject an employee to harassment, or permit an employee to be subject to harassment. Acquiescence to harassment is not part of any employee's employment bargain.

Second, the impact of harassment on an employee may be profound. Depending on the nature, frequency, and severity of the behavior, a harassment victim may be psychologically impacted. An employee does not bargain for such a risk.

Third, harassment has a negative impact on the quality of an employee's job performance. Every employee has a legitimate expectation that he or she will be able to carry out his or her job responsibilities free of harassment.

Fourth, harassment in the workplace causes tension. This affects other employees and should not be an accepted part of the workplace culture. It causes tension not only between the harasser and the victim, but amongst friends and coworkers as well. This may have an overall negative impact on the productivity of the workforce.

Fifth, if harassment is sufficiently severe or pervasive, it may contribute to a high employee turnover rate, with a consequential loss of qualified employees. If publicized, especially as a result of litigation-harassment may also deter qualified applicants from seeking employment with that employer.

Sixth, allowing harassment to occur and continue is costly; whether measured in absenteeism, job turnover, or other variables that affect productivity. Litigation stemming from harassment complaints may be expensive. Monetary awards resulting from harassment may be substantial, and may include monetary damages for pain and suffering, and punitive damages. Sometimes attorneys' fees may be awarded as well.

And finally, workplace harassment is ILLEGAL. It is a form of discrimination clearly prohibited by both Federal Law and Minnesota law.

There are two forms of workplace harassment: (1) quid pro quo (something for something); and (2) hostile work environment.

In a quid pro quo situation, decisions connected to hiring, firing, promotion, work assignments, or salaries, are based on whether the victim of gender discrimination is receptive to sexual advances. Quid pro quo workplace harassment is singularly limited to sexual harassment claims.

In other words, submission of such conduct is made either explicitly or implicitly a term or condition of an individual's employment. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individuals. An example: If you do not kiss me, I will terminate your employment.

A hostile work environment on the other hand is conduct that has the purpose of effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. This applies to all protected classes. It may include classification; written or graphic material that denigrates or shows hostility or aversion to persons of a protected class may result in a hostile environment.

An employer's duty to take steps to prevent discriminatory behavior in the workplace notwithstanding, an employer also has a duty to monitor the workplace and respond quickly to claims made by employees of discriminatory behavior in the workplace. In short, an employer cannot turn its collective head from the problem. Instead, it must have in place a policy by which it acknowledges a claim of discrimination; a means of investigating such claims; and, a means on how to resolve such claims.

Following these simple rules will help ensure a workplace free of improper conduct coupled with a mechanism to resolve any claims of improper conduct and with that the safety and wellbeing of employees in the workplace.

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

MINNESOTA'S WAGE THEFT LAW SUMMARIZED

Buried in the Jobs and Economic Development Omnibus bill signed by Minnesota Governor Tim Walz on May 30, 2019, were new employer requirements and announcement of the new wage theft crime. The requirements took effect on July 1, 2019, and wage theft became a crime on August 1, 2019. This article highlights some of the major changes implemented by the new bill.

The Employee Notice. Under the new law, employees must receive and execute a notice at the start of their employment detailing the following information:

a. Rate(s) of pay and basis of pay, including whether the employee is paid by the hour, shift, day, week, salary, piece, commission, or another method;

b. Allowances for meals and lodging;

c. Exemption status with respect to minimum wage and overtime, and the legal basis for exemption;

d. PTO and sick time benefits, including accruals and terms of use;

e. Deductions that may be made from pay;

f. Regularly scheduled pay day, number of days in pay period, and date employee will receive first pay check;

g. Legal and operating name of employer;

h. Employer's main office or principal place of business physical address and mailing address; and

i. Employer's telephone number

Notice requirements a, b, h, and i must also appear on every paystub now. The notice must be provided to the employee in English and any other language requested by the employee. Language identifying that the notice is available in other languages is provided by the Minnesota Department of Labor and Industry Commissioner ("Commissioner") and must be used by employers. Fillable notices may be found at: https://www.dli.mn.gov/business/employment-practices/employee-notice. In addition to the initial signature at the start of their employment, employees must also receive and execute notice of all changes to the above information before the change takes effect.

The Commissioner's Investigation. To ensure employers are complying with Minnesota wage laws, the Commissioner is now empowered to enter an employer's premises without unreasonable delay to investigate and enforce state employment laws. Employers that refuse to grant the Commissioner entrance or access to records may be subject to civil penalties, and the Commissioner may immediately apply for an inspection order from the court. Lastly, and most drastic, the Commissioner may now privately interview non-management employees regarding the employer's compliance with state employment laws.

Employer Recordkeeping. Employers should already have a good system in place for keeping employment records for the requisite period of time. In addition to those records, employers must now maintain the following for three (3) years in a location that may be accessed upon demand within 72 hours:

a. Employee notice (described above);

b. List of personnel policies provided to employees, including dates provided and a description of the same;

c. Hours worked each day and workweek by the employee, including for all employees paid at piece rate, the number of pieces completed at each rate.

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Commissions Must be Paid Every Three (3) Months. All commissions earned by an employee must now be paid at least once every three (3) months. Numerous employers utilize commission earning structures associated with activities that last for periods longer than three months. For example, some employers have commissions based on the total annual sales of the company and therefore they are not calculated every three months. Under this example, the commissions would arguably not be earned in three month increments and thus not available for payment. Nevertheless, to avoid civil and criminal liability employers should modify commissions calculation structures to quarterly (every three months) payments.

Wage Theft the Crime. As of August 1, 2019, an employer in Minnesota acting with the "intent to defraud" that engages in any of the following acts has committed wage theft:

a. Fail to pay an employee compensation as required by law, contract, or other legal authority;

b. (In)directly cause an employee to give a receipt for wages greater than the amount actually paid;

c. (In)directly demand or receive from an employee any rebate or refund from the wages owed the employee under contract; and

d. Make or attempt to make it appear that the wages paid to an employee were greater than those actually paid.

Prosecution of this crime may be of any person(s) acting in the interest of an employer in relation to the employee. This essentially means, human resource professionals, payroll personnel, and employer management may all be subject to these crimes if any of the acts above were committed. Keep in mind that prosecution requires the state to prove the employer acted with the intent to defraud, such therefore should protect individuals making innocent mistakes of payment calculations.

This article is intended for general informational purposes only. This article is not intended to and does not contain legal advice.

Employment Law
PRACTICE GROUP

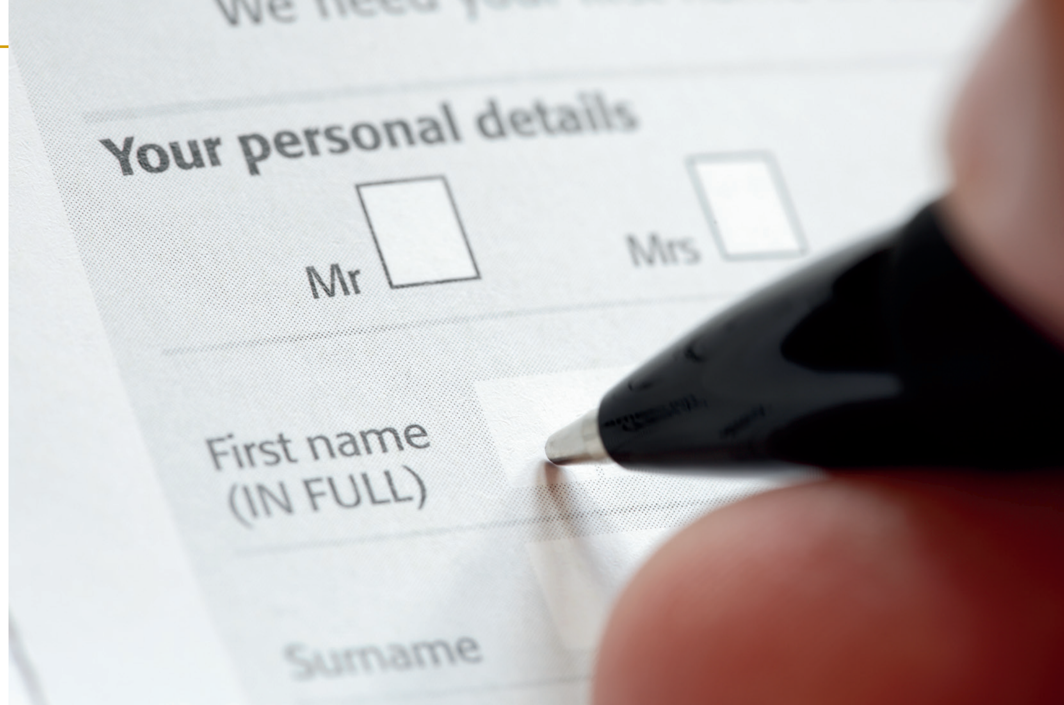
Brock Alton
balton@gislason.com

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

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