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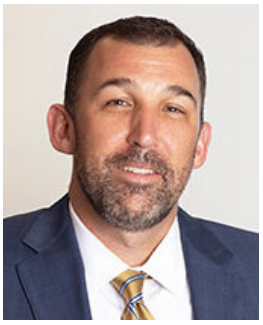
EMPLOYMENT & HUMAN RESOURCES

Avoiding Retaliation Liability

THE DIFFERENCE BETWEEN WHAT AND WHY

by Cory Genelin



Retaliatory discharge is a claim that an employee was fired, not for a legitimate business reason, but rather in retaliation for the employee taking some legally protected action such as: making a workers' compensation claim, taking FMLA leave; or reporting harassment, unsafe working conditions, or some other illegal activity.

Wrongful termination lawsuits are unique. In most lawsuits, the fight is about what happened. For instance, in a suit over a traffic collision, the fight might be about which driver had a red light and which had a green light. If the Defendant is found to have run the red light, it won't matter why she ran it. In a wrongful termination suit—particularly retaliation suits—this is all turned upside down. Most of the time it is clear what happened: The employee engaged in a protected activity, and later the employer terminated the employee.

This difference is crucial because the fact at issue—why the firing took place—can't be photographed, measured, or even directly documented. Why the employee was fired is ultimately in the heads of the people who made the decision; there is never direct evidence of why people did what they did.

With that perspective here are four simple steps you should take any time you are disciplining or discharging an employee who has engaged in protected activity. We'll illustrate these steps with the story of Nine Fingered Joe:

Joe is a pretty careless punch-press operator. The units he produces have about three times defect rate of those produced by other employees. He uses poor body mechanics when lifting product and has had many low back injuries. His injuries have put him out of work which slowed production, and cost the company money for his medical bills.

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Yesterday, he lost a finger doing routine maintenance on his machine because both he and Supervisor failed to follow lockout procedures. After the incident (which Supervisor falsely blamed solely on Joe) Joe reported to the Division Chief that Supervisor was also at fault. There followed a very unprofessional shouting and swearing match between Joe and Supervisor.

Plant Manager calls a meeting of Division Chief and Supervisor to discuss what to do about Joe. Plant Manager, Division Chief and Supervisor all want to fire Joe for "poor performance" but they never specify what that means. By "poor performance" the Plant Manager means that units produced by Joe have three times the defect rate of other employees' units. Division Chief means that Joe has missed a lot of work due to his multiple workers' compensation injuries. Supervisor is outright lying and actually wants Joe fired because Joe reported that Joe's latest injury was because Supervisor didn't enforce lockout procedures during routine maintenance.

As you can see, each manager has their own reason for the termination. One of them is legal, the other two are illegal retaliation.

The following four techniques can help minimize liability for retaliation when Joe is fired.

1. **Put the Reason in Writing.** Minnesota and some other states require that the employee be told, in writing, the truthful reason for termination, if the employee demands it. Even if you don't expect the employee to ask, I recommend that you ALWAYS put the reason in writing BEFORE the termination. Doing this before the termination is really more about the process than the product. What this is really about is making sure you have a simple, truthful, understandable and legal reason for the termination that you can convey to an attorney, investigator, judge or jury.

   Putting the reason in writing is even more important when more than one person has a hand in the decision. By the exercise of putting the company's reason in writing—with anti-retaliation laws in mind—the decision makers can be deliberate about what is officially in and out of the reasons for termination. Rather than "poor performance" they'll end up with something better like "Your defect rate on units you produced was 300% higher than the company average." More importantly, if the Division Chief and Supervisor ever have their deposition taken, they will be able to truthfully give the company's legitimate reason for termination instead of their own illegal reasons.

2. **Bona Fide Business Reason.** This is built into the process of writing the reason for termination. Obviously, Joe's report of Supervisor, and his use of workers' compensation benefits needs to be off the table. Any discussion of firing for these reasons should be shut down immediately.

   Bona fide reasons for termination in our process above could include: (1) the high defect rate; (2) improper safety procedures; and (3) swearing at his boss. There are times in life when more is better and one might be tempted to include all three. But (2) and (3) are awfully close to protected activity. Yes, you can fire for a safety violation that led to a work comp injury, without firing for the work comp injury; but it's not a safe bet that a judge, jury, or investigator from the Department of Labor will appreciate the difference. Better, in this case, to pick only the one reason that has nothing to do with protected activity: (1) the high defect rate.

3. **Consistency and Comparables.** The point of all of this is to prove that the stated legal reason for the termination was the real reason and that the protected behavior had nothing to do with it. This is important because the termination is coming close in time to the protected behavior. The company will do well to show that it has always terminated for a high defect rate. At the same time, it would be helpful to show that it has a history of retaining employees who have had workers compensation injuries.

4. **Eliminate Bias From the Decision Makers.** In our hypothetical above, does Supervisor add anything to the conversation? No. His only involvement in the story—getting Joe hurt, and then lying about it, and then fighting about it—is dangerously close to the protected activity of reporting the safety violation. Even the heated argument between Joe and Supervisor could be construed as a fight about the safety violation or Joes' report of the safety violation. Even if Supervisor provides facts about what happened to the people who make the decision, he should have no say in the decision. More importantly, Supervisor's exclusion should be communicated and documented. He should be explicitly told "thank you for telling us what happened; but this is not your decision." Further, any memorandum of the decision should make it clear that only Plant Manager and Division Chief made the decision.

An employer can never make themselves 100% immune from retaliation lawsuits. However, the steps above will minimize the risk. And this is one area where minimizing liability is in lock-step with good leadership and management. Liability aside, your business will benefit from all decisions being based on (1) a proven process; (2) focus on the needs of the business; (3) consistency; and (4) proactive elimination of bias, or any other non-business motivation. ■

Employment Laws and Proposed Legislation Minnesota Employers Should Review in 2023

by Brittany King-Asamoa

Minnesota's CROWN Act—Enacted
Minnesota's Creating a Respectful and Open World for Natural Hair (CROWN) Act amended the definition of "race" under the Minnesota Human Rights Act (MHRA). Race, as a protected class under the MRHA, is now "inclusive of traits associated with race, including but not limited to hair texture and hair styles such as braids, locs and twists." Minn. Stat § 363A.03, subd. 36a. The Council for Minnesotans of African Heritage highlighted the importance of the CROWN Act in eliminating racial bias and prejudice against natural hair styles and textures—this discrimination frequently occurs against people of African heritage: "Black women are 1.5 times more likely to be sent home from the workplace because of their hair."[1] Now, Minnesota recognizes that discrimination on the basis of an individual's hair style, hair texture, and any other trait associated with the individual's race is unlawful race discrimination.

(Proposed) Minnesota Bill to Legalize Recreational Marijuana Use
Minnesota legislators continue to advance HF 100 and SF 73 in their quest to legalize recreational use of cannabis flower and cannabinoid products. Reasonable exceptions to use in the employment context are outlined in the bills. Under the current drafts, employers retain the right to terminate and otherwise discipline employees for using, possessing, selling, transferring, and being under the influence of cannabis flower and cannabinoid products during working hours, on work premises, or while operating an employer's vehicle, machinery, or equipment. Disciplinary action must be pursuant to a written policy prohibiting the conduct for which the employee is being disciplined. The policy must be provided to consistent with notice requirements set forth in Minn. Stat. § 181.952, subd. 2.

(Proposed) Minnesota Paid Family and Medical Leave
Minnesota house bill HF 2 and companion senate bill SF 2 would provide eligible employees paid family and medical leave. Payments would be administered through the Minnesota Department of Employment and Economic Development in a manner similar to the unemployment system. The bill proposes three categories of leave in a single benefit year:

1. up to 12 weeks for employee's serious health condition or pregnancy;
2. up to 12 weeks for bonding, safety leave or family care; and
3. up to 12 weeks for qualifying exigencies arising from a military member's active duty service or notice of impending call or order to service for the U.S. armed forces.

All employers, regardless of size and location, would be required to provide the leave to employees engaged in covered employment. "Covered employment" is currently defined as including all services performed by an employee if:

1. the service is localized in this state; or
2. the service is not localized in any state, but some of the service is performed in this state and:
   i. the base of operations of the employee is in the state, or if there is no base of operations, then the place from which such service is directed or controlled is in this state; or
   ii. the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

HF2 4th Engrossment 9.9 to 9.19; SF2 6th Engrossment 9.11 to 9.21.

(Proposed) Restrictions on Non-compete Agreements
The Federal Trade Commission (FTC) proposed a rule for notice and comment in January 2023. The comment period originally scheduled to end March 20, 2023, was extended to April 19, 2023. The FTC's rule, as proposed, bans all non-compete and de facto non-compete provisions. Only certain non-competes restricting substantial owner of a business in connection with the sale of the business, ownership interests or operational assets are excepted from the proposed rule.

Contract provisions "prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with employer" are de facto non-competes also banned under the proposed rule.[2] FTC offers two examples of de facto non-competes:

i. A non-disclosure agreement between an employer and a worker that is written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer.

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ii. A contractual term between an employer and a worker that requires the worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified time period, where the required payment is not reasonably related to the costs the employer incurred for training the worker.

Non-Compete Clause Rule, 88 F.R. 3482, 3535 (proposed Jan. 19, 2023). The rule would apply retroactively to agreements predating publication of the final rule. If finalized, employers must rescind all non-compete and *de facto* non-compete clauses in worker contracts (including independent contractor contracts) within 180 days of the final rule's publication date. While the proposed rule remains in the comment period, legal challenges are expected if the rule is finalized. **Public comments on the proposed rule can be submitted here**.

Minnesota's state legislature has renewed its efforts to restrict non-compete agreements. Versions of HF 295 and SF 405 bills amended in March 2023 differ substantially. The HF295 version referred to the Judiciary Finance and Civil Law committee on March 13, 2023, would ban covenants not to compete restricting the after-termination conduct of employees earning or expected to be paid an amount equal to or less than Minnesota's median family income for a four-person family for the most recent year published by the U.S. Census Bureau. The SF 405 version referred to the senate's Finance committee on March 16, 2023, would ban employees and independent contractors' covenants not to compete, regardless of the worker's earnings. The senate's proposal excludes those covenants entered into in connection with a business sale or anticipation of the business's dissolution. Both versions would only apply to agreements entered on or after the bill becomes law. View all versions and bill status here: **HF 295**; **SF 405**.

Bloomington, Minnesota's Earned Sick and Safe Leave—Ordinance Effective July 1, 2023

Beginning July 1, 2023, all employees working at least 80 hours within the boundaries of Bloomington, Minnesota shall earn sick and safety time (SST). Employees have the right to use Bloomington SST for the following reasons:

1. The employee's mental or physical illness; injury; health condition; need for medical diagnosis; care, including prenatal care; treatment of a mental or physical illness, injury, or health condition; or need for preventive medical or health care.

2. The care of a family member with a mental or physical illness, injury or health condition who needs medical diagnosis, care including prenatal care, treatment of a mental or physical illness, injury or health condition; who needs preventive medical or health care; or the death of a family member.

3. An absence due to domestic abuse, sexual assault or stalking of the employee or employee's family member, provided the absence is to:

   i. seek medical attention or psychological or other counseling services related to physical or psychological injury or disability caused by domestic abuse, sexual assault or stalking;
   ii. obtain services from a victim services organization;
   iii. seek relocation due to domestic abuse, sexual assault or stalking; or
   iv. seek legal advice or take legal action, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from domestic abuse, sexual assault or stalking.

4. The closure of the employee's place of business by order of a public official to limit exposure to an infectious agent, biological toxin, hazardous material or other public health emergency.

5. To accommodate the employee's need to care for a family member whose school or place of care has been closed by order of a public official to limit exposure to an infectious agent, biological toxin, hazardous material or other public health emergency.

6. To accommodate the employee's need to care for a family member whose school or place of care has been closed due to inclement weather, loss of power, loss of heating, loss of water or other unexpected closure.

(Bloomington, Minnesota Ord. 2022-31, passed June 6, 2022.) Use of SST hours may be limited to the time the employee would be scheduled to work in the City of Bloomington. Employers with five (5) or more employees must provide paid SST, while smaller employers have the option of providing the time as unpaid leave. The count includes all employees regardless of status (full-time, part-time, temporary) and location. Employers can **review the ordinance for specific accrual and carryover requirements here.** ■

[1] *Council for Minnesotans of African Heritage, Legislative Toolkit: The CROWN Act (2022) at p. 1, available at https://mn.gov/cmah/legislation/crown-act/.*

[2] *Non-Compete Clause Rule, 88 F.R. 3482, 3535 (proposed Jan. 19, 2023).*

Crime and Employment

NAVIGATING STATE AND FEDERAL LAW ON JOB APPLICANTS AND EMPLOYEES WITH CRIMINAL HISTORIES

by Jonathan Janssen

One of the more common issues faced by employers and hiring managers when seeking new employees involves job applicants' criminal backgrounds and histories. One of the reasons this remains a prevalent issue is due to the commonality of Americans with criminal records, which the Bureau of Justice Statistics estimates includes 80 million Americans, or roughly 25% of the total population.

MINNESOTA "BANS THE BOX": QUESTIONS ABOUT CRIMINAL HISTORY ON JOB APPLICATIONS

The rule for employers in Minnesota has been relatively straightforward since 2014. Under Minnesota's so-called "ban the box" law, public and private employers, regardless of size, are not allowed to ask about, consider, or require job applicants to disclose their criminal histories until they are selected for an interview. Employers should wait to initiate a criminal background check until after they have decided to interview a job applicant. For their protection, employers may even want to wait until the end of the interview before asking a job applicant to submit to a criminal background check, or at least notify the applicant in writing that he or she has been selected for an interview *before* informing the applicant that he or she is subject to a criminal background check.

If the employer does not hold job interviews, the employer may not ask about, consider, or require disclosure of criminal history until a conditional office of employment has been made to the job applicant. In this case, the employer would show proof of compliance with the law by first informing the applicant that he or she will be hired, dependent on the results of a criminal background check prior to requesting that the applicant submit to a criminal background check.

In either case, the employer is still allowed to notify applicants that particular criminal history backgrounds will disqualify the applicant from particular positions. For example, if the employer's policy states that an applicant will be prohibited from working in a particular position, the applicant should be informed of the types of offenses that are subject to the employer's policy and what steps, if any, the applicant can undertake to obtain an exception from the employer.

An exception is also carved out for employers who have a statutory duty to conduct a criminal history background check of that are directed to gather information such that a criminal history background check may be run by a licensing authority; however, the Minnesota Department of Human Rights has reiterated that this exception is particularly narrow, and will not apply to the majority of employers.

Employers should take the following steps to ensure compliance with Minnesota's ban-the-box law:

1. Review their job application forms to ensure that none of the questions could lead to the disclosure of criminal information. If no job application form is used, review their initial applicant interview script to ensure that it contains no questions that could lead to the disclosure of criminal information.

2. If the employer is in several states and has an electronic job application, ensure that the application states—in bold and distinct font—that applicants applying for Minnesota positions should not answer questions inquiring into criminal history under Minnesota law.

3. If an employer inadvertently learns of a job applicant's criminal history, the employer should not track or in any way use this information until it is authorized by law to do so.

FEDERAL ANTI-DISCRIMINATION LAWS: USING CRIMINAL RECORDS IN EMPLOYMENT DECISIONS

Importantly, the Minnesota "ban the box" law does not require an employer to hire an applicant with a criminal record. However, an employer may still be liable for discrimination under state or federal law—such as Title VII—if the employer's policy has a disproportionate impact for a class of individuals or the employer fails to provide the applicant with an opportunity to respond to the criminal background information obtained on the applicant.

Discrimination may also be found where the employer fails to use a targeted screen, which should include a consideration of "the nature and gravity of the offense or conduct, the time that has passed since the offense or conduct and/or completion of the sentence, and the nature of the job held or sought."

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Employers should follow these best practices to ensure compliance with Federal Anti-Discrimination laws:

1. Eliminate policies or practices that exclude people from employment based on any criminal record.

2. Train managers, hiring officials, and decisionmakers about Title VII and its prohibition on employment discrimination.

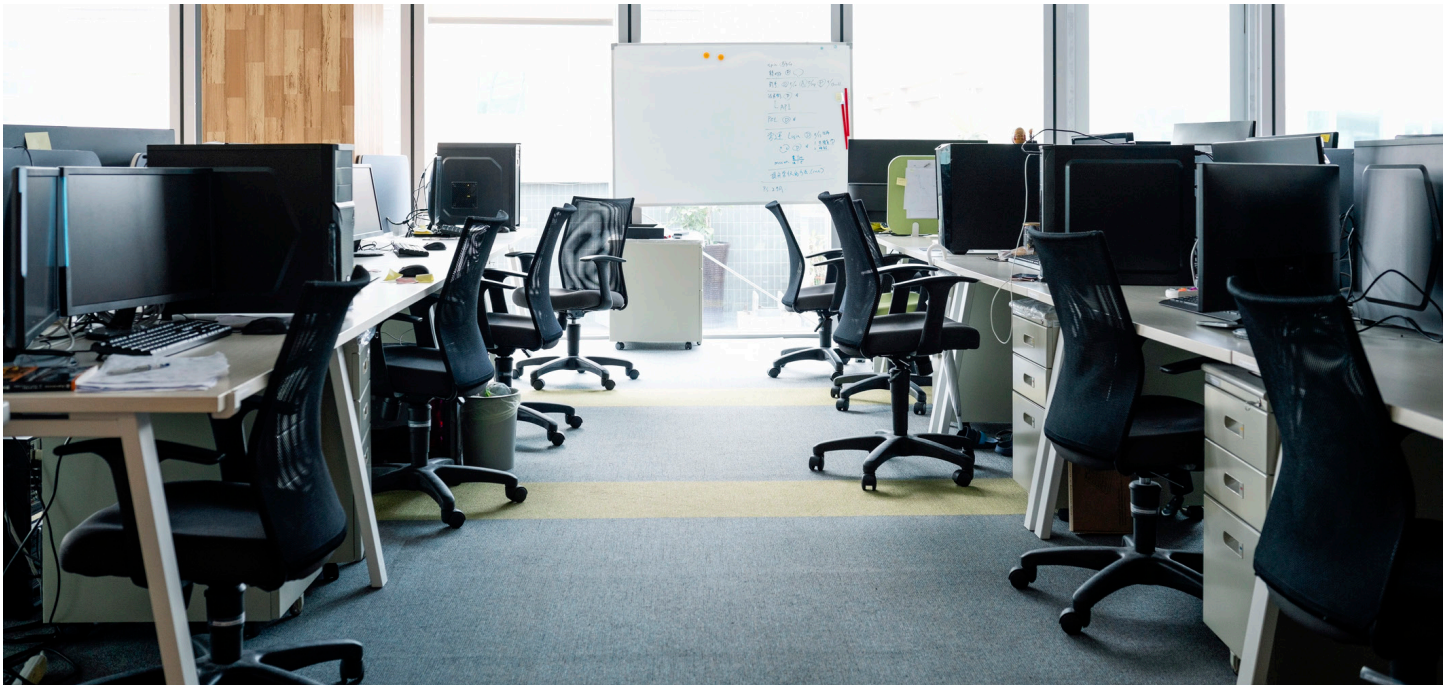
3. Develop a narrowly tailored *written* policy and procedure for screening applicants and employees for criminal conduct. These policies should do the following:

    a. identify essential job requirements and the actual circumstances under which the jobs are performed,
    b. determine the specific offenses that may demonstrate unfitness for performing such jobs,
    c. determine the duration of exclusions for criminal conduct based on all available evidence,
    d. document the justification for the policy and procedures, and
    e. keep a record of consultations and research considered in crafting the policy and procedures.

4. When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.

5. Keep information about criminal records confidential and only use them for their intended purposes.

For more detailed questions or assistance in compliance with federal and state law during hiring and firing decisions, consider contacting an experienced employment law attorney at Gislason & Hunter LLP. ■



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