Employment Edge 73rd Edition - Minnesota Law Requires Employers To Give New Hires Written Notice Of Personnel File Rights

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MINNESOTA LAW REQUIRES EMPLOYERS TO GIVE NEW HIRES WRITTEN NOTICE OF PERSONNEL FILE RIGHTS

By Megan Anderson and Sitso Bediako*

The Minnesota legislature recently enacted a new Minnesota law that employers will need to add to their compliance to-do lists by January 1, 2008. The new law, S.F. 221, requires an employer to inform all new hires, in writing, of their personnel file rights under Minnesota law. While the new law does not specify the method by which notice must be given, one practical option might be for employers to provide notice through their employee handbook. (Employers who choose to revise their handbooks to address this new Minnesota law might want to take this opportunity to update or add other policies. See article below, *Is Your Employee Handbook Updated?: Policies To Consider Revising or Adding*.)

NEW LAW'S REQUIREMENTS

The new Minnesota law, which will be codified at Minnesota Stat. § 181.9631 and becomes effective January 1, 2008, states that employers must provide written notice to a job applicant upon hire of the rights and remedies provided in Minnesota's statutes governing personnel records (Minnesota Stat. §§ 181.960 to 181.965). Minnesota's personnel file laws generally provide that:

- A "personnel record" includes such things as any job application, payroll, discipline, performance, attendance, and employment history data, but a record does not include such things as written references, information relevant to ongoing civil or criminal investigations, results of employer testing, or medical records.

- Employers must, upon receiving a good faith written request, provide a current employee an opportunity to review his/her personnel file up to once every six (6) months during normal hours of operation. Employers must also provide an accurate copy of the file free of charge if the employee makes a written request for a copy following the review. Employers must also, upon receiving a good faith written request, provide a former employee with an accurate copy of his/her personnel file free of charge up to once a year after termination.
- Employers must generally comply with written file requests within seven (7) business days. If the employer refuses, an employee may bring a civil cause of action to compel compliance and may recover actual damages plus costs. In addition, the Department of Labor & Industry can enforce the statutes and seek additional remedies and impose fines.
- An employer may not retaliate against an individual for exercising personnel file rights, and an employer who does retaliate may be liable for back pay, reinstatement, attorneys' fees and other make-whole relief.
- Employers must allow a current or former employee to submit a written statement to the personnel file if the file contains any disputed information which the employer and employee cannot agree to remove or revise. The law also protects employers from certain claims of defamation when employees have not exercised their rights to dispute file information.
- Information omitted from a personnel file is excluded from legal proceedings unless the information was unintentionally omitted and the employee has a reasonable opportunity to review the information before its use.

Employers with fewer than twenty (20) employees are excluded from the new law's notification requirement. In addition, the new law does not extend to a state agency, statewide system, political subdivision, or advisory board or commission that is subject to Minnesota Government Data Practices Act (Minnesota Stat. Ch. 13).

POSSIBLE FORMS OF NOTICE

Other than requiring written notice, the new Minnesota law does not specify the method by which employers should provide the required notice to new hires. In addition, the law provides no detail regarding the contents of the required notice, leaving employers to determine how to provide notice and whether to provide the verbatim language of the Minnesota personnel records statutes or to provide a summary of the rights and remedies that must be disclosed. Employers should consult with their legal counsel to determine how, within their unique workplaces, to provide sufficient notice to comply with the law.

One unanswered question is whether an employer might comply with the new law by prominently posting the verbatim language of the personnel records statutes, or the employer's accurate summary of the laws, in the workplace. Because a posted notice might not be seen by each new hire, it is not clear whether this form of notice would comply with the new law. Interestingly, an earlier proposed draft of the new law contained posting language, but this language was not included in the final bill. Individualized notice to each new hire may be a safer choice under the new law until further guidance on the law emerges. An employer might

consider, however, posting a notice along with giving individualized notice. To be effective, any such posting should be placed in one or more prominent locations in the workplace, and be of such a size, coloring and typeface to attract attention.

With respect to individualized notice, an employer might consider providing each new hire the verbatim language of the personnel records statutes or an actual copy of the statutes upon hire, perhaps during orientation. Alternatively, an employer might, with the assistance of counsel, prepare an accurate written summary of the statutes' rights and remedies. Whichever form of notice is used, new hires should be asked to sign a prepared acknowledgement form stating that they have been provided with and have read the required notice. This signed acknowledgement form should then be maintained in the employee's personnel file as proof that the required notice was given individually to each new hire. While this method would allow proof of compliance with the statute for each new hire, one downside is that it creates added paperwork in a new hire's orientation process.

Another alternative might be to provide the required written notice through a policy in the employer's handbook and to have new hires sign a written acknowledgment that they have been provided with and have reviewed the entire handbook. Because many employers already maintain handbooks and require a signed acknowledgment by each new employee that the individual has received and read the handbook, this option may be a practical form of notice for many employers. As for the policy's contents, an employer could chose to reprint the statutes verbatim. Because the statutes are lengthy, however, an employer might also consider working with legal counsel to draft a policy accurately summarizing the rights and remedies at issue.

IS YOUR EMPLOYEE HANDBOOK UPDATED?: POLICIES TO CONSIDER REVISING OR ADDING TO YOUR HANDBOOK

By Megan Anderson and Sitso Bediako*

Employment law and business practices are constantly changing and evolving. As such, it is important for employers to routinely review employee handbooks to update existing policies and add new policies responsive to legal and business developments. When employers are updating an employee handbook, they should think about changes in their own internal business practices that might warrant a handbook update. In addition, employers should consider researching best business practices to determine if policy revisions or new policies should be implemented. Finally, employers should consult legal counsel on legal developments that may warrant revisions to existing policies or the addition of new handbook policies.

While not exhaustive, the following are some policies an employer may want to revisit or add to its handbook based on more recent business and legal developments:

- *Personnel Records Access Policy.* Starting January 1, 2008, Minnesota law will require employers with at least 20 employees to inform new hires in writing of their rights and remedies under Minnesota's personnel record laws. (See Minnesota Law Requires Employers To Give New Hires Written Notice Of Personnel File Rights.) One way of complying with the law would be to add the necessary language to the employee handbook.
- *Social Media Technology Policy.* The growth of blogs and social networking websites, such as myspace.com, is changing the way people communicate. While some of these changes can be good for organizations, employers may also experience problems, such as decreased productivity stemming from employee visits to these sites during business hours or individuals using social websites to disclose proprietary information, disparage the employer, and/or harass other employees. As such, some employers are implementing policies setting forth the boundaries of acceptable uses of social networking sites.
- *Fair Labor Standards Act (FLSA) Safe Harbor Policy.* Under the FLSA, an employer may be entitled to a safe harbor from erroneous deductions taken from an exempt employee's salary if the employer has implemented and followed a safe harbor policy for correcting such mistakes.
- *Document Retention/Destruction Policy.* In light of the increase in electronic data in the workplace and new court rules regarding the discovery of this data in legal proceedings, employers should consider revisiting or creating document retention and destruction policies. Such a policy may help prevent important documents from being inadvertently destroyed and may help provide a defense against destruction of evidence claims in legal proceedings if a requested document was destroyed according to the policy before the legal proceeding was pending or anticipated.
- *Paid Time Off (PTO)/Vacation Policy.* The Minnesota Court of Appeals recently issued a decision in the Lee vs. Fresenius Medical Center case, providing that an employer may not have a policy that results in an employee forfeiting earned, but unused PTO/vacation time. While this opinion is being reviewed by the Minnesota Supreme Court, pending the outcome of that review, the Court of Appeals decision is the law in Minnesota. As such, employers should review their current vacation, PTO, and/or sick leave policies and practices for legal compliance issues and possible revisions.
- *Non-Retaliation Policy.* The U.S. Supreme Court recently issued a decision loosening the standard for employees to prove retaliation by an employer. As a result, employers may want to consider developing a stand-alone non-retaliation policy that specifically includes a means for reporting and addressing an employee's retaliation concerns.
- *Military Leave Policy.* In January 2006, new regulations regarding the Uniformed Services Employment and Reemployment Rights Act (USERRA) were issued. As such, employers should consider reviewing their military leave policy to make sure it is in compliance with the new USERRA regulations.

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