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I. AT-WILL EMPLOYMENT

A. Statute

Minnesota does not have an at-will employment statute.

B. Case Law

Employment at-will is well established under Minnesota case law:

The usual employer-employee relationship is terminable at the will of either; the employer can summarily dismiss the employee, the employee is under no obligation to remain at the job. A hiring for an indefinite term is terminable at will. Unless plaintiff can establish that she was to be dismissed only for cause by proving a contract to that effect, her employment could be terminated at any time and without cause.

Cederstrand v. Lutheran Bhd., 117 N.W.2d 213, 221 (Minn. 1962) (internal citations omitted).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

The Minnesota Supreme Court has recognized a number of exceptions to the at-will employment doctrine. *Knudsen v. Northwest Airlines, Inc.*, 450 N.W.2d 131, 133, n.1 (Minn. 1990). For example, independent consideration by an employee, in addition to personal employment services, can create an employment contract limiting discharge of employee to good cause. *Bussard v. Coll. of St. Thomas, Inc.*, 200 N.W.2d 155, 161 (Minn. 1972). In *Bussard*, the plaintiff was employed by the College of St. Thomas as publisher of the "Catholic Digest." He claimed that he gave part of his stock, valued at \$350,000, to the college as part of an arrangement whereby he would continue as the college's publisher. This agreement was entered into in May of 1964. In May of 1969, Bussard was informed that he would be retired effective July 1, 1969. Plaintiff sued, alleging the college had breached the employment contract by dismissing him without cause.

The Minnesota Supreme Court held that "permanent employment" will be construed to be terminable at the will of either party except in compelling circumstances, such as where the employee in effect purchases the permanent employment by giving a valuable consideration other than his customary daily services or otherwise giving up more than one normally gives up when he agrees to take on a new employment. *Bussard*, 200 N.W.2d at 161.

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A. Implied Contracts

1. Employee Handbooks/Personnel Materials

In *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983), Mettille was hired as a loan officer under an oral contract, which did not specify any definite period of employment. After Mettille was hired, the employer distributed a printed “Employee Handbook” to its employees, which included sections on “Job Security” and “Disciplinary Policy.” The latter indicated that a three-stage procedure would be followed prior to termination, consisting of reprimands for the first and second offenses and suspension or discharge thereafter. The policy indicated that discharge would occur only if an employee’s conduct did not improve as a result of the previous action. It also indicated that no person would be terminated prior to a review of the facts by the Executive Officer of the Bank. The Bank never intended these provisions to become part of any employment contract between it and Mettille.

After an investigation of “technical exceptions” (i.e., failure to comply with applicable banking laws and regulations), which disclosed exceptions in 57 of 58 files for which Mettille was responsible, the bank fired him. The disciplinary procedures in the Employee Handbook were not followed, and in fact no mention was made of the Employee Handbook at the time Mettille was terminated. Mettille received no warnings or reprimands prior to his termination. He sued, alleging dismissal without cause and violation of the disciplinary procedures in the Employee Handbook.

The Minnesota Supreme Court held that where an employer disseminates a handbook to its employees that contains language constituting an “offer” of employment (or the language in question concerns substantive employment matters such as termination procedures, paid time off accruals, bonuses, severance pay, or commission rates, as opposed to “general statements of policy”), the employee’s continued service for the employer constitutes an acceptance of the offer of the contract and supplies the necessary consideration of the offer. Thus, the court held:

[W]here an employment contract is for an indefinite duration, such indefiniteness by itself does not preclude handbook provisions on job security from being enforceable, whether they are proffered at the time of the original hiring or later, when the parties have agreed to be bound thereby.

Id. at 629-30. The court held the employer had, as a matter of law, breached its employment contract with Mettille by not following the stated termination procedures in the Employee Handbook.

The court in *Pine River* stated that four elements must be met in order to prove that an employee handbook constitutes a binding employment contract. There must be an offer, which is:

- a) definite in form;
- b) communicated to the employee;
- c) accepted by the employee; and
- d) supported by adequate consideration (i.e., continued employment).

Id. at 626–27.

Subsequent decisions by Minnesota courts have refined the policy on handbooks and personnel manuals. Courts are more likely to find a contract was formed pursuant to the handbook if the language is specific and the guidelines are relatively extensive. See, e.g., *Harvet v. Unity Med. Ctr., Inc.*, 428 N.W.2d

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574 (Minn. Ct. App. 1988); *Fitzgerald v. Norwest Corp.*, 382 N.W.2d 290 (Minn. Ct. App. 1986). Provisions that are general statements of policy will not constitute an offer altering the employment contract. See *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732 (Minn. 2000); *Lindgren v. Harmon Glass Co.*, 489 N.W.2d 804 (Minn. Ct. App. 1992); *Michaelson v. Minn. Mining & Mfg. Co.*, 474 N.W.2d 174 (Minn. Ct. App. 1991), *aff'd*, 479 N.W.2d 58 (Minn. 1992); *Hunt v. IBM Mid Am. Employees Fed.*, 384 N.W.2d 853 (Minn. 1986). However, a later Minnesota Supreme Court decision, while citing the four elements of *Pine River*, concluded that an “employee handbook constitutes an enforceable employment contract” based only on the latter three elements, making no mention of the specificity of the language. *Lee v. Fresenius Medical Care, Inc.*, 741 N.W.2d 117, 123 (Minn. 2007).

While employers may include disclaimer language that an employee handbook is not a contract, boilerplate disclaimers do not protect the employer from a liability claim under every provision of the handbook. In *Hall v. City of Plainview*, the Minnesota Supreme Court held that the disclaimer language in the handbook did not preclude an employee from bringing a claim against the employer when the employer failed to pay accrued paid time off to the employee in accordance with the handbook’s policy. 954 N.W.2d 254 (Minn. 2021). According to the Court, the disclaimer language was “aimed at preserving the [employer’s] ability to terminate an employee... it ha[d] no bearing on the issue of payment of accrued PTO.” *Id* at 266. The disclaimer must be narrowly construed to the provision that would otherwise be interpreted as a binding contract under *Pine River*.

Finally, no contract is formed where the terms in question were not communicated to the employee. See *Feges v. Perkins Rests., Inc.*, 483 N.W.2d 701 (Minn. 1992) (whether employee manual was communicated to employee is question of fact for jury to decide); *Campbell v. Leaseway Customized Transp.*, 484 N.W.2d 41 (Minn. Ct. App. 1992).

2. Provisions Regarding Fair Treatment

Employment handbooks and manuals are generally viewed as the employer’s policies, and not as offers of employment terminable only for cause. This is true even when the handbook contains language about “fair” or “uniform” treatment. See, e.g., *Lee v. Metro. Airport Comm’n*, 428 N.W.2d 815, 822 (Minn. Ct. App. 1988) (statement that “guide is designed to provide . . . guidance in dealing effectively, fairly and uniformly” with employees insufficient to meet requirements of unilateral offer); see also *Poff v. W. Nat’l Mut. Ins. Co.*, 13 F.3d 1189, 1191 (8th Cir. 1994) (language that employer prided itself in “treating our employees fairly and in a consistent manner” lacked specificity required to establish unilateral contract); *Miller v. Certainteed Corp.*, 971 F.2d 167, 172 (8th Cir. 1992) (language of fair treatment insufficient because it lacked specificity to determine whether breach occurred); *Matson v. Cargill, Inc.*, 618 F.Supp. 278, 285 (D. Minn. 1985) (language suggesting “fair treatment” no more than general statement of policy).

3. Disclaimers

“[A]n offer to make a contract may be revoked by words or conduct inconsistent with the offer at any time before the offer is accepted.” *Feges*, 483 N.W.2d at 708. Therefore, disclaimers included in a handbook can preclude employees hired after its distribution from claiming contractual rights under the handbook. *Id*. The Minnesota Court of Appeals has reaffirmed this conclusion, noting that a “disclaimer in an employment handbook that clearly expresses an employer’s intent to retain the at-will nature of the employment relationship will prevent the formation of a contractual right to continued employment.” *Coursolle v. EMC Ins. Group, Inc.*, 794 N.W.2d 652, 659 (Minn. Ct. App. 2011) (quoting *Alexandria Hous. & Redev. Auth. v. Rost*, 756 N.W.2d 896, 906 (Minn. Ct. App. 2008)). The two disclaimers at issue in *Coursolle*

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were fairly typical of standard handbook disclaimer language: “This handbook is a guide for your general background and knowledge only. It does not constitute a contract” and “[T]his handbook is not intended to become expressly or implicitly a part of any agreement or contract of employment. The statements contained in this handbook do not limit the right of either the company or the employee to terminate employment at any time with or without cause.” *Id.* See also *Martinez v. W.W. Grainger, Inc.*, 664 F.3d 225 (8th Cir. 2011); *Roberts v. Brunswick Corp.*, 783 N.W.2d 226, 232-33 (Minn. Ct. App. 2010); *Rost*, 756 N.W.2d at 906.

In recent years, the Minnesota Court of Appeals has held that, where the employer reserves the right to change certain terms and policies, it is unreasonable for an employee to argue that a contract was formed containing the terms under the then-applicable handbook. *Barker v. County of Lyon*, 813 N.W.2d 424, 427 (Minn. Ct. App. 2012) (“Since 1991, the manual has clearly expressed the board’s ‘right to change any of these policies, after notice to and input from employees.’ Thus, the same manual on which appellants rely, to argue that they were promised a particular contribution to their post-retirement health insurance, told them that the board reserved the right to alter or eliminate the manual’s provisions. It is not ‘reasonable’ to rely on language conferring benefits in a document providing that another person or entity has the right to alter or terminate those benefits.”).

4. Statute of Limitations

The Minnesota Supreme Court has made clear that the two-year limitation period of Minn. Stat. § 541.07(5) for recovery of wages, not the general six-year limitation period for contractual claims, governs an action for wrongful discharge based on an oral contract of employment allegedly modified by an employees’ manual or handbook, a so-called *Pine River* claim. *Portlance v. Golden Valley State Bank*, 405 N.W.2d 240, 243 (Minn. 1987).

5. Implied Covenants of Good Faith and Fair Dealing

Minnesota does not read an implied covenant of good faith and fair dealing into employment contracts. *Hunt*, 384 N.W.2d at 858 (Minn. 1986). See also *Kreitzer v. Xethanol Corp.*, 2009 U.S. Dist. LEXIS 3197, *11-12 (D. Minn. Jan. 16, 2009) (“Minnesota courts, however, have not extended this doctrine [of an implied covenant of good faith and fair dealing] to employment contracts”); *Schmitt v. Lunchtime Solutions, Inc.*, 2005 Minn. App. LEXIS 209, *4 (Minn. Ct. App. Aug. 23, 2005) (“there is no implied covenant of good faith and fair dealing in employment contracts”); *Johnson v. US Bancorp*, 2003 Minn. App. LEXIS 1067, *9-10 (Minn. Ct. App. Aug. 26, 2003) (same).

B. Public Policy Exceptions

1. General

A discharge that violates a clear mandate of public policy, either legislatively or judicially recognized, creates a narrow exception to the at-will employment doctrine. *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 571 (Minn. 1987) (recognizing action for wrongful discharge where employee is discharged for refusing to participate in activity that employee, in good faith, believes violates state or federal law or rule or regulation adopted pursuant to law).

2. Exercising a Legal Right

Minnesota has not specifically recognized a common law cause of action for wrongful discharge for exercising a legal right, although several statutes expressly prohibit retaliation for rights created therein and are cited elsewhere in this chapter.

3. Refusing to Violate the Law

In *Phipps*, 408 N.W.2d at 570 (Minn. 1987), Phipps was employed as a cashier at a service station owned by Clark Oil. On November 17, 1984, a customer requested that leaded gas be pumped into her car and Chmielewski, the manager, instructed Phipps to do so. Phipps refused on the grounds that it violated the public policy of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* As a result, Phipps was terminated from his position. The court of appeals held that a cause of action accrues when employers discharge employees for reasons contravening clear mandates of public policy. The Supreme Court of Minnesota affirmed the decision, holding that:

The Clean Air Act is a clearly mandated public policy to protect the lives of citizens and the environment, and we hold that an employee may bring an action for wrongful discharge if that employee is discharged for refusing to participate in an activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law.

408 N.W.2d at 571. The court stated that the public policy exception is only to be applied where an employer contravenes a clear mandate of public policy. The Supreme Court has subsequently indicated a reluctance to extend the definition of what constitutes a “clear mandate of public policy” beyond that specifically articulated by the legislature. *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 457, n. 5 (Minn. 2006). The Minnesota Court of Appeals likewise limits the exception to complaints regarding a “violation of ‘any state or federal law or rule or regulation adopted pursuant to law’” See *Martinez v. W.W. Grainger, Inc.*, 664 F.3d 225 (Minn. Ct. App. 2011) (quoting *Phipps*, 408 N.W.2d at 571).

4. Exposing Illegal Activity (Whistleblowers)

The Whistleblower Act, Minn. Stat. § 181.932, was substantially amended effective August 1, 2013. It prohibits an employer from discharging, disciplining, threatening, otherwise discriminating against, or penalizing an employee regarding the employee’s compensation, terms, conditions, location, or privileges of employment because:

(a) the employee, or a person acting on behalf of an employee, in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official;

(b) the employee is requested by a public body or office to participate in an investigation, hearing, inquiry;

(c) the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason;

(d) the employee, in good faith, reports a situation in which the quality of health care services provided by a health care facility, organization, or health care provider violates a standard established by federal or state law or a professionally recognized national clinical or ethical standard and potentially places the public at risk of harm;

(e) a public employee communicates the findings of a scientific or technical study that the employee, in good faith, believes to be truthful and accurate, including reports to a governmental body or law enforcement official; or

(f) an employee in the classified service of state government communicates information that the employee, in good faith, believes to be truthful and accurate, and that relates to state services, including the financing of state services, to:

(i) a legislator or the legislative auditor; or

(ii) a constitutional officer.

Id., subd. 1.

The statute now defines a number of key terms:

- “good faith” means conduct that does not violate the Act’s prohibitions on making statements or disclosures knowing that they are false or that they are in reckless disregard of the truth. Minn. Stat. § 181.931, subd. 4 (referencing Minn. Stat. § 181.932, subd. 3).
- “penalize” means conduct that might dissuade a reasonable employee from making or supporting a report, including post-termination conduct by an employer or conduct by an employer for the benefit of a third party. *Id.*, subd. 5.
- “report” means “a verbal, written, or electronic communication by an employee about an actual, suspected, or planned violation of a statute, regulation, or common law, whether committed by an employer or a third party.” *Id.*, subd. 6.

Courts have applied the familiar *McDonnell-Douglas* burden-shifting analysis to whistleblower claims. A plaintiff must first establish a prima facie claim of retaliation by showing that: (1) she engaged in statutorily protected activity; (2) the employer took an adverse employment action against her; and (3) a causal connection exists between her statutorily protected activity and the adverse employment action. *See Gee v. State Colls. & Univs.*, 700 N.W.2d 548, 555 (Minn. Ct. App. 2005); *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001). If the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nonretaliatory reason for its action. *Cokley*, 623 N.W.2d at 630. The burden thereafter returns to the plaintiff, who is required to produce evidence sufficient to demonstrate that the employer’s articulated reasons were pretextual and that the real reason for her termination was unlawful retaliation. *Id.*

Minnesota courts have generally been skeptical of whistleblower claims, granting summary judgment to employers on various grounds and under a variety of fact patterns. Initially, courts have held that although a whistleblower plaintiff need not prove that an employee actually violated the law, the report must allege what would be a violation of the law if the report was accurate. *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 225 (Minn. 2010); *Kratzer v. Welsh Cos, LLC*, 771 N.W.2d 14, 23-24 (Minn. 2009). In other

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words, the whistleblower plaintiff may establish a claim if he or she is wrong about the facts; but if the facts, even as alleged by the whistleblower, would not establish a violation of the law, the whistleblower may not establish a claim under Minnesota law.

Similarly, the whistleblower plaintiff must specify the nature of the alleged illegality. Merely citing a statute is insufficient. The plaintiff must explain why the conduct would violate the statute. *Crosby v. State*, 2009 Minn. App. LEXIS 614, at *12 (Minn. Ct. App. June 9, 2009) (“Because appellant has failed to articulate how the matters that he reported constituted an apparent violation of the law, we affirm the district court’s dismissal of his retaliation claims under the Minnesota Whistleblower Act”).

In addition, Minnesota courts have held that the Whistleblower Statute protects only reports of legal violations, not violations of employer policies. *Obst v. Microtron*, 614 N.W.2d 196, 202 (Minn. 2000), superseded on other grounds by statute as stated in, *Friedlander v. Edwards Lifesciences, LLC*, 900 N.W.2d 162, 166 (Minn. 2017). As a result, if an employee merely complains about a violation of a company policy, or a decision that the employee disagrees with (but which is not illegal) then the employee cannot claim protection under the Statute. *Kratzer*, 771 N.W.2d at 22 (“a mere report of behavior that is problematic or even reprehensible, but not a violation of the law, is not protected conduct”); *Hedglin v. City of Willmar*, 582 N.W.2d 897, 902 (Minn. 1998) (a report that firefighters were “showing up at fire calls while drunk” suggested reprehensible conduct but did not present a violation of a law such that the report would be protected); *Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 504 (Minn. 1991) (a report about behavior that “seems distasteful and . . . ill-advised, but that is not . . . illegal” is not protected conduct under the Act).

Furthermore, the employee must make the report in good faith. Minn. Stat. § 181.932. The recent amendments to the statute essentially define a “good faith” report as one that is not made knowing it is false or in reckless disregard of the truth. Minn. Stat. § 181.931, subd. 4; see *Friedlander*, 900 N.W.2d at 166 (concluding that 2013 amendments eliminated the judicially created requirement that whistleblower act with purpose of exposing illegality).

In addition to compensatory damages, the Whistleblower Act is a fee-shifting statute; thus, successful plaintiffs are entitled to an award of reasonable attorneys’ fees. Minn. Stat. § 181.935(a). A plaintiff seeking only monetary damages, and not equitable relief, has a right to a jury trial under the Act. *Abraham v. County of Hennepin*, 639 N.W.2d 342 (Minn. 2002). The Minnesota Supreme Court has also clarified that, unlike the common law cause of action enunciated in *Phipps*, the Whistleblower Act protects employees who report any violation of law, regardless of whether the violation constituted a clearly mandated public policy. *Anderson-Johanningmeier v. Mid-Minnesota Women’s Ctr., Inc.*, 637 N.W.2d 270 (Minn. 2002). The Whistleblower Act does not abrogate the common law action, established in *Phipps*, 408 N.W.2d 569, for wrongful discharge for refusal to perform an unlawful act. *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d at 455 (“the Minnesota Whistleblower Act does not preclude common-law wrongful-discharge claims”).

The six-year statute of limitations under Minn.Stat. § 541.05, subd. 1(2) (2012), applies to a whistleblower action under Minn.Stat. § 181.932, subd. 1(1) (2012). *Ford v. Minneapolis Pub. Sch.*, 874 N.W.2d 231 (Minn. 2016).

III. CONSTRUCTIVE DISCHARGE

Under Title VII, the Minnesota Human Rights Act (“MHRA”), and other federal and Minnesota civil rights statutes, a constructive discharge exists when an employer deliberately makes the employee’s

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working conditions so intolerable that the employee is forced to quit his job. *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981). To constitute a constructive discharge, the employer's actions must have been taken with the intention of forcing the employee to quit. If the employee cannot prove the employer consciously intended to force the employee to quit, the employee must prove that the employer intended "the reasonably foreseeable consequences of its [discriminatory] actions." *Diez v. Minn. Mining & Mfg.*, 564 N.W.2d 575, 579 (Minn. Ct. App. 1997), citing *Hukkanen v. Int'l Union of Operating Eng'rs*, 3 F.3d 281, 284 (8th Cir. 1993). A constructive discharge arises only when a reasonable person would find conditions intolerable, and for purposes of the MHRA those conditions "must be the result of illegal discrimination. *Laffey v. Indep. Sch. Dist. No. 625*, 806 F.Supp. 1390 (D. Minn. 1992), aff'd, 994 F.2d 843 (8th Cir. 1993). An employee must give an employer a reasonable opportunity to work out a problem before quitting. *West v. Marion Merrell Dow, Inc.*, 54 F.3d 493, 497 (8th Cir. 1995).

Minnesota courts have held that a constructive discharge must be tied to some claim under the federal or Minnesota civil rights statutes, and that there is "not an independent, free-standing cause of action" for constructive discharge under Minnesota law. *Coursolle v. EMC Ins. Group, Inc.*, 794 N.W.2d 652, 661 (Minn. Ct. App. 2011). It is unclear under Minnesota law whether an employee may assert a constructive discharge claim based upon a violation of the Whistleblower Act, but courts have assumed, without deciding, that such a claim may be cognizable under Minnesota law. *Id.*

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

Minnesota courts have not adopted a standard definition of "just cause" for terminations. *Deli v. Univ. of Minn.*, 511 N.W.2d 46 (Minn. Ct. App. 1994). However, the courts often rely on the standard jury instructions for guidance. *Id.* at 52. The relevant jury instruction guide provides, "[a] termination is for good cause if [the employee] breached the standards of job performance that [the employer] established and uniformly applied." *Id.* See also *4 Minnesota Practice*, CIVJIG 55.50 (6th ed.). There is no legal distinction between the terms "cause," "good cause," and "just cause." *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 148 (Minn. 2002) ("in the context of employment terminations 'good cause,' 'just cause,' and 'cause' are interchangeable, and none carries any higher level of proof than another").

Applying the definition of just cause in *Deli*, the Minnesota Supreme Court stated as follows: "[b]y its terms, this definition of just cause contemplates that an employer treat employees uniformly when applying job standards. Further, under this definition, the termination of an employee for any cause not affecting job performance or otherwise relating to job duties might be considered arbitrary and unreasonable." *Deli*, 511 N.W.2d at 52 (internal citations omitted).

B. Status of Arbitration Clauses

Arbitration clauses are generally enforceable under Minnesota law, but an arbitration clause may be considered an invalid contract of adhesion under certain circumstances. *Ottman v. Fadden*, 575 N.W.2d 593, 597 (Minn. Ct. App. 1998). To determine whether a particular clause constitutes a contract of adhesion, Minnesota courts "examine the sophistication of the parties, the circumstances surrounding the execution of the agreement, and the burden arbitration places on the complaining party." *Id.*, citing *Brown v. Lynch, Pierce, Fenner & Smith, Inc.*, 664 F.Supp. 969, 974 (D. Pa. 1987).

The Court of Appeals of Minnesota in *Ottman* adopted the position of the federal courts in favoring arbitration agreements, and held that mere inequality in bargaining power is an insufficient basis to

invalidate an arbitration agreement. *Id.*, citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

Over the 20 years since *Ottman*, Minnesota courts have continued to follow its principles and have rejected various challenges to the application of arbitration agreements. *See e.g.*, *Yufanzhang v. United Health Group*, 2019 WL 626429, *3 (D. Minn. Feb. 14, 2019) (modification provision did not render arbitration policy illusory); *Chiafos v. Restaurant Depot, LLC*, 2009 WL 2778077, *4-5 (Aug. 28, 2009) (rejecting claims of fraud in the inducement, lack of consideration, and adhesion); *Alexander v. Minnesota Vikings Football Club, LLC*, 649 N.W.2d 464, 467 (Minn. Ct. 2002) (contract of adhesion, unequal bargaining power, and unfair process).

With regard to the scope of an arbitration agreement, the Minnesota Supreme Court has held that any doubts concerning the “scope of arbitrable issues” should be resolved in favor of arbitration, whether the asserted problem is “the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Johnson v. Piper Jaffray, Inc.*, 530 N.W.2d 790, 795 (Minn. 1995), citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). An “arbitration agreement need not list every arbitrable dispute under the instrument” under Minnesota law, and courts will require arbitration of even disputes not specifically listed in the agreement, as long as the language of the agreement encompasses the claim at issue. *Elsenpeter v. St. Michael Mall, Inc.*, 794 N.W.2d 667, 672 (Minn. Ct. App. 2011).

Minnesota courts have accepted the principles articulated by the United States Supreme Court in *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct.1740 (2011) regarding waivers of collective or class arbitration. In *Mork v. Loram Maintenance of Way, Inc.*, 844 F. Supp. 2d 950, 953-54 (D. Minn. 2012), the Court held that the parties could limit arbitration to individual claims, instead of authorizing a collective arbitration. The Court held that the determination of individual versus collective action should be resolved by a court, and not by an arbitrator. *Id.* at 953 (noting that while questions of procedural arbitrability are generally left to the arbitrator, “that rule does not extend to the question of whether collective arbitration may proceed”). The Court analyzed the arbitration clause and concluded that it affirmatively authorized collective arbitration because it allowed arbitration of claims or disputes “of any nature” arising out of or related to the employment relationship. *Id.* at 955. As a result, the Court granted the defendant’s motion to compel arbitration, but held that the arbitration must be allowed to proceed as a collective action.

V. ORAL AGREEMENTS

A. Promissory Estoppel

In *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981), Grouse became employed as a retail pharmacist at Richter Drug in 1975. He desired employment in a hospital or clinic due to the increased benefits and compensation. That summer, Grouse called Group Health to inquire about a position. He filled out an application and went for an interview. On December 4, 1975, Grouse was offered a position as a pharmacist at Group Health’s St. Louis Park Clinic. Grouse accepted and requested the two weeks necessary to terminate his existing contract. That afternoon, Grouse rejected an offer from another hospital because of his agreement with Group Health. On December 15, 1975, Grouse reported that he was free to commence working, but he was informed that someone else had been hired. Grouse filed suit for damages.

The Supreme Court of Minnesota held that Grouse was entitled to damages under a theory of promissory estoppel that, in effect, implies a contract in law where no contract exists in fact. Group Health

knew that Grouse would need to resign in order to accept its offer, making it unjust to let Group Health back out of its promise.

The conclusion we reach does not imply that an employer will be liable whenever he discharges an employee whose term of employment is at will. What we do hold is that under the facts of this case the appellant had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of respondent once he was on the job. He was not only denied that opportunity but resigned the position he already held in reliance on the firm offer which respondent tendered him. Since, as respondent points out, the prospective employment might have been terminated at any time, the measure of damages is not so much what he would have earned from respondent as what he lost in quitting the job he held and in declining at least one other offer of employment elsewhere.

Id. at 116. The Supreme Court allowed Grouse a new trial on the issue of damages.

The courts use the elements of promissory estoppel as stated in the RESTATEMENT OF CONTRACTS § 90 (1932):

A promise which the promisor should reasonably expect to induce action or forbearance . . . on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Grouse, 306 N.W.2d at 116.

Some subsequent decisions by the courts have limited the scope of promissory estoppel in employment cases. The employer's representations must be specific, not general. *See Aberman v. Malden Mills Indus., Inc.*, 414 N.W.2d 769 (Minn. Ct. App. 1987); *Corum v. Farm Credit Servs.*, 628 F. Supp. 707 (D. Minn. 1986). The employee must also make some showing of reliance. *Dumas v. Kessler & Maguire Funeral Home*, 380 N.W.2d 544 (Minn. Ct. App. 1986) (court rejected promissory estoppel claim of an employee who alleged detrimental reliance based only upon his continued employment). And the employee's reliance must be reasonable. *Barker v. County of Lyon*, 2012 Minn. App. LEXIS 41, *6 (Minn. Ct. App. May 7, 2012) (holding that "any reliance [by an employee] on oral promises that contradicted provisions in the [employer's] policy manual was, as a matter of law, unreasonable."). In addition, Minnesota courts have held that "[b]ecause promissory estoppel implies a contract where none exists in fact, such a claim may not proceed where a legally enforceable contract was formed." *InCompass IT, Inc. v. XO Commc'ns Servs.*, 2012 WL 28267, *5 (D. Minn. Jan. 5, 2012) (citing *Gorham v. Benson Optical*, 539 N.W.2d 798, 801-02 (Minn. Ct. App. 1995)).

However, a plaintiff may plead a breach of contract claim and unjust enrichment claim in the alternative. *Genz-Ryan Plumbing and Heating Co. v. Weyerhaeuser NR Co.*, 352 F. Supp. 3d 901, 904 (D. Minn. 2018).

However, Minnesota courts still deny summary judgment on promissory estoppel claims based upon oral representations, if the employee can present sufficient evidence of reliance and specific oral representations by the employer. In *Hempel v. Nor-Son*, 2010 Minn. App. 627, *15-17 (Minn. Ct. App. 2010), the employee alleged that he would not have left his previous job without the assurance of job security, and claimed that the employer had promised "lifetime employment." The Court of Appeals overturned the trial court's grant of summary judgment for the employer, holding that the employee had

presented evidence of sufficiently specific representations to create a fact issue, even though the employer's handbooks and other documents specifically stated that employment would be at-will. *Id. See also Ewald v. Royal Norwegian Embassy*, 902 F. Supp. 2d 1208, 1213-14 (D. Minn. 2012) (denying motion to dismiss and/or for summary judgment on promissory estoppel claim regarding representations that employee would be paid similarly to a male colleague); *Eklund v. Vincent Brass and Aluminum Co.*, 351 N.W.2d 371 (Minn. Ct. App. 1984) (fact issue precluded summary judgment when employee terminated 26-year career with previous employer to take new job).

B. Fraud

In *Hanks v. Hubbard Broadcasting, Inc.*, 493 N.W.2d 302 (Minn. Ct. App. 1992), plaintiff Hanks sued her former employer alleging *inter alia* breach of her employment contract and intentional misrepresentation. *Id.* at 304. With regard to her intentional misrepresentation/fraud claims, the Minnesota Court of Appeals stated that while "a contract claim should never be converted into a tort claim," allowing the plaintiff's tort claim in *Hanks* did not "impermissibly expand a contract claim into a tort claim" because the defendant had committed an independent tort. *Id.* at 307.

The court stated that, under Minnesota law, a party may properly recover under a breach of contract and a fraud theory in the employment context. *Id.* at 308. To succeed in a fraud/intentional misrepresentation case, a plaintiff must show the following elements:

(1) there was a representation; (2) the representation was false; (3) the representation had to do with a past or present fact; (4) the fact was material; (5) the fact was susceptible to knowledge; (6) the representor knew the represented fact to be false, or, in the alternative, asserted it as his or her own knowledge without knowing whether it was true or false; (7) the representor intended to have the other person induced to act or justified in acting upon it; (8) that person was so induced to act or so justified in acting; (9) that person's action was in reliance upon the representation; (10) that person suffered damage; and (11) the damage was attributable to the misrepresentation.

Id. at 308, citing *Weise v. Red Owl Stores, Inc.*, 175 N.W.2d 184, 187 (Minn. 1970), overruled in part by *Humphrey v. Alpine Air Prods.*, 500 N.W.2d 788 (Minn. 1993) (holding that the standard of proof in all fraud cases is a preponderance of the evidence).

Regarding the element of reliance, the *Hanks* court stated that the existence of the employment contract did not bar a finding of legal reliance, and that even the inclusion of a full integration clause would not prevent proof of fraudulent representations by a party to the contract. 493 N.W.2d at 310, citing *Johnson Bldg. Co. v. River Bluff Dev. Co.*, 374 N.W.2d 187, 193 (Minn. Ct. App. 1985).

Minnesota courts have subsequently held that an employee may show "reliance" by alleging that they not only remained in their job, but also increased their efforts on behalf of the employer, made personal sacrifices for the employer, and turned down other job opportunities to remain with the employer. *Williams v. Heins, Mills & Olson*, 2010 Minn. App. LEXIS 883, at * 13-14 (Minn. Ct. App. 2010).

Misrepresentation in the inducement of an employment contract may lead to damages exceeding mere "out of pocket" expenses. In *Brooks v. Doherty, Rumble & Butler*, 481 N.W.2d 120 (Minn. Ct. App. 1992), plaintiff Brooks claimed that the defendant law firm had misrepresented the circumstances surrounding his hiring and firing at the law firm of Doherty, Rumble & Butler (DRB). *Id.* at 128. When Brooks, a labor law specialist, interviewed for the job at DRB, the firm's attorneys all agreed that he was

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not a suitable fit for a partnership track. Still, to meet a short-term need, he was offered a job and was told that the other attorneys at the firm approved of his hiring. A few months later, DRB fired Brooks. The court found that the misrepresentations that led him to accept the job ultimately caused emotional distress, damage to his personal and professional reputation, lost income, and other costs. *Id.* The court reasoned that “(r)ecovery of strict out-of-pocket losses would have failed to compensate [Brooks] for the fraud which damaged him beyond any loss he suffered from the breach of his employment contract.” *Id.* at 129. *See also Williams*, 2010 Minn. App. LEXIS 883, at * 15-16 (permitting more than out-of-pocket loss damages in employment context).

C. Statute of Frauds

Minn. Stat. § 513.01, the statute of frauds, provides in part:

No action shall be maintained, in either of the following cases, upon any agreement, unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party charged therewith:

- (1) Every agreement that by its terms is not to be performed within one year from the making thereof * * *.

“The test is simply whether the contract by its terms is capable of full performance within a year, not whether such occurrence is likely.” *Eklund v. Vincent Brass & Aluminum Co.*, 351 N.W.2d 371, 375 (Minn. Ct. App. 1984) (quotation omitted). Contracts without minimum terms, including those for indefinite employment until retirement, can be fully performed within one year, considering the employee can die or quit within that period. Therefore, such contracts can be oral. *Id.*

The uncompleted part performance of an oral contract for employment, not to be performed within one year, does not take the contract out of the statute of frauds. *Roaderrick v. Lull Engineering Co.*, 296 Minn. 385, 388 (Minn. 1973).

VI. DEFAMATION

A. General Rule

For a plaintiff to successfully assert a defamation claim, they must show that a defamatory statement (1) was communicated to someone other than the plaintiff, (2) was false, and (3) tended to harm the plaintiff’s reputation and to lower them in the estimation of the community. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980); *see also McKee v. Laurion*, 825 N.W.2d 725, 730, Minn. 2013 (listing elements of a defamation claim in Minnesota); *Mandel v. Multiband Corp.*, No. A15-1133, 2016 WL 1175073, at *8 (Minn. Ct. App. Mar. 28, 2016) (same). The Supreme Court has, however, provided exceptions to this rule. Statements that are of a “qualified privilege” or of “opinion” are protected against claims based on defamation. *Stuempges*, 297 N.W.2d at 255.

Minnesota courts have held that the defamatory statement must be specifically alleged in the complaint. *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 326 (Minn. 2000). However, some courts have held that a plaintiff need not recite the “exact language” of the defamatory statement, but they must identify which defendants made defamatory statements and where and to whom they were made. *See Schibursky v. Int’l Bus. Mach. Corp.*, 820 F. Supp. 1169, 1181 (D. Minn. 1993). Moreover, statements with only minor inaccuracies, subjective statements, and those that lack precision and

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specificity are not actionable under Minnesota law. *McKee*, 825 N.W.2d at 730 (holding that minor inaccuracies “cannot serve the basis for satisfying the falsity element of a defamation claim”).

1. Libel

To recover for libel, an individual must show that the defendant’s false written statements harmed the reputation of the individual. See *Advanced Training Sys. Inc. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1, 9 (Minn. 1984); *Thompson v. Olsten Kimberly Qualitycare, Inc.*, 33 F. Supp. 2d 806, 815 (D. Minn. 1999).

2. Slander

Slander is defamation by spoken words. *Larson v. R.B. Wrigley Co.*, 235 N.W. 393 (Minn. 1931).

B. References

1. Caselaw

In *Lewis v. Equitable Life Assurance Society of the United States*, 389 N.W.2d 876 (Minn. 1986), employees brought an action against their former employer for breach of contract and defamation. The employees’ defamation claim was based on compelled self-publication, which they asserted occurred while they were searching for new jobs. *Id.* at 887-88. The Minnesota Supreme Court held that the employees had been compelled to publish the defamatory statements in question; however, the court noted that Minnesota law recognizes a qualified privilege between former and prospective employers as long as the statements are made in good faith and for a legitimate purpose. The court applied that privilege to relieve the employer of liability. *Id.* at 889. In so holding, the court stated, “[w]here an employer would be entitled to a privilege if it had actually published the statement, it makes little sense to deny the privilege where the identical communication is made to identical third parties with the only difference being the mode of publication.” *Id.* at 889-90.

To support its holding, the court reasoned that the “recognition of a qualified privilege seems to be the only effective means of addressing the concern that every time an employer states the reason for discharging an employee it will subject itself to potential liability for defamation.” *Lewis*, 389 N.W.2d at 890. The *Lewis* court further held that whether a communication is privileged is for the court to decide, but that whether the privilege was abused, and therefore lost, is a jury question. *Id.*, citing RESTATEMENT (SECOND) OF TORTS, § 619 (1977).

The Supreme Court in *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980), also noted that “in the context of employment recommendations, the courts generally recognize a qualified privilege between former and prospective employers as long as the statements are made in good faith and for a legitimate purpose.” *Id.* at 257.

2. Minnesota Reference Statute

Minnesota’s “reference” statute provides employers with heightened protection from defamation suits by employees. Minn. Stat. § 181.967. The statute states, “No action may be maintained against an employer by an employee or former employee for the disclosure” of certain categories of information unless the employee or former employee demonstrates by clear and convincing evidence that:

1. The information was false and defamatory; and

2. The employer knew or should have known the information was false and acted with malicious intent to injure the current or former employee.

Id. at subd. 2.

Before the enactment of this statute, if an employer was charged with defamation based on an alleged disclosure of information, the employer could assert qualified privilege as a defense, as discussed below. The qualified privilege allows an employer, who in good faith and upon proper occasion and motive and based on reasonable cause, to provide true information about an employee in response to a reference. To overcome the defense, an employee has to prove by a preponderance of the evidence that the employer acted with actual malice. The clear and convincing standard under the new statute provides a higher threshold for the employee to meet than a preponderance of the evidence. An employer may still assert the traditional qualified privilege defense but may now also assert the defense provided in the newly enacted statute.

The protection given by the statute applies to the disclosure by a private employer to a prospective employer or employment agency of the following information about a current or former employee in response to a request for such information:

1. Dates of employment;
2. Compensation and wage history;
3. Job description and duties;
4. Training and education provided by the employer; and
5. Acts of violence, theft, harassment, or illegal conduct documented in the personnel file that resulted in disciplinary action or resignation and the employee's written response, if any, in the personnel record.

Minn. Stat. § 181.967, subd. 3(a). A disclosure of the type of information listed in item five must be in writing with a copy sent contemporaneously by regular mail to the employee's last known address in order for the statute to protect the employer. *Id.* The statute does not require a specific form of disclosure for items one through four or state that the employer is under an obligation to notify the employee of these types of disclosures.

Based on the reading of the statute, it does not apply to information outside of the topics listed in items one through five, such as general performance or behavior issues. It also does not apply to any disclosures of the listed acts in item five if the act is not documented in the employee's personnel file and that did not lead to disciplinary action or resignation.

Further, the written disclosure for the requested information is just that -- a writing of the information. It appears that copies of the actual documents contained in the employee's personnel file may not be sent unless the employee has given prior written authorization to the employer to do so.

If the employee has provided written authorization, it allows the employer to disclose, in writing:

1. Written employee evaluations conducted before the employee's separation and any

- response by the employee in the employee's personnel record;
2. Written disciplinary warnings and actions in the five years preceding the written authorization, along with any employee response contained in the employee's personnel record; and
 3. Written reasons for separation from employment.

Minn. Stat. § 181.967, subd. (3)(b).

To come within the protection of the statute, when disclosing this type of information under written authorization, an employer must contemporaneously mail the current or former employee a copy of the information disclosed and tell the employee to whom it was disclosed. *Id.*

The statute specifically states that it does not provide protection against an action involving an alleged violation of the Minnesota Human Rights Act or "other statute." The statute also states that it does not "diminish or impair the rights of a person under a collective bargaining agreement." *Id.*

Although the enumerated disclosures are protected by the statute, it does not require an employer to provide such information to other potential employers. Still, though no such case has yet been tried, at least some observers foresee the possibility of "negligent nondisclosure" claims being filed against employers who fail to disclose such information when requested, if the former employee commits the same wrongdoing at his or her new job. See Linda L. Holstein, *Tell it Like it Is: Minnesota's New Reference Law*, 61 SEP Bench & B. Minn. (2008).

C. Privileges

"The law is that a communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause." *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d, 252, 256-257 (Minn. 1980); see also *Lewis v. Equitable Life Assur. Soc'y.*, 389 N.W.2d 876, 889 (Minn. 1986). The courts, as a matter of law, will decide if the statements have a proper purpose and are made on a proper occasion. *Bahr v. Boise Cascade Corp.*, 77 N.W.2d 910, 920 (Minn. 2009). However, it is a question of fact in determining whether the statements were based upon reasonable cause. *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380 n.4 (Minn. 1990). Various courts have held that "statements made during an internal investigation are generally privileged given an employer's interest in protecting itself and the public against dishonest or harmful employees." *Lorene de Jung v. Metropolitan State Univ.*, No. A12-0829, 2012 WL 5990306, at *4 (Minn. Ct. App. Dec. 3, 2012); see also *McBride v. Sears Roebuck & Co.*, 235 N.W.2d 371, 374 (Minn. 1975); *Mandel*, 2016 WL 1175073, at *9 ("We conclude that the statements communicated among the [board], the investigative report, and in [plaintiff]'s termination letter are privileged. The intra-[board] statements and investigative report were made upon a proper occasion and with a proper motive because they occurred either immediately before, during, or after the official investigation into [plaintiff]'s activities.").

Of course, a qualified privilege will be lost if abused. *Lewis*, 389 N.W.2d at 890. An abuse exists if a defendant acts with actual malice. *Id.*, citing *Stuempges*, 297 N.W.2d at 257. A privilege may also be lost if "statements are not made in furtherance of the purpose that the privilege protects." *Barr*, 766 N.W.2d at 921; see also *W. Page Keaton, Prosser & Keaton on Torts*, Section 115 at 834 (5th Ed., 1984).

In Minnesota, the plaintiff bears the burden of proving malice. *Lewis*, 389 N.W.2d at 890. The *Lewis* court held that the common law definition of malice is most appropriate in the employer-employee situation because it focuses on the employer's attitude toward the plaintiff. *Id.* at 891. Under the common law definition, malice exists where the defendant made the statement from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff. *Id.* "Malice is not proved merely by the fact that the statement has been made or by the fact that the statement is later proven to be false." *Bahr*, 766 N.W.2d at 920; *see also Bol v. Cole*, 561 N.W.2d 143, 150 (Minn. 1997). Evidence that the defendant made statements out of spite or specifically to harm the plaintiff may constitute malice under Minnesota law. *Bahr*, 766 N.W.2d at 920; *Mandel*, 2016 WL 1175073, at *9 (stating that extrinsic evidence of personal spite, as well as intrinsic evidence of exaggerated language may evidence malice).

D. Other Defenses

1. Truth

Truth is a complete defense to a defamation claim. *Stuempges*, 297 N.W.2d at 255; *McKee*, 825 N.W.2d at 730. "Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge is justified." *McKee*, 825 N.W.2d at 730.

2. No Publication

To be defamatory, a statement must be communicated to someone other than the plaintiff. *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 411 (Minn. 1994). Without any evidence of publication, as a matter of law, there can be no defamation. *Lorene de Jung*, 2012 Minn. App. Unpub. Lexis 1151, at *8-9.

Consent to publication is also an absolute defense to a defamation claim. *Otto v. Charles T. Miller Hosp.*, 262 Minn. 408, 414, 115 N.W.2d 36, 40 (1962).

3. Self-Publication

The publication requirement for defamation may be satisfied by facts showing the plaintiff was compelled to publish defamatory statements to a third person if it was foreseeable to defendant that plaintiff would be so compelled. *Lewis*, 389 N.W.2d at 888; *Keuchle v. Life's Companion P.C.A., Inc.*, 653 N.W.2d 214, 219 (Minn. Ct. App. 2002) (applying doctrine of compelled self-publication and defamation context), rev. dismissed (Minn. Jan. 21, 2003). It is important to note, however, that "some actual communication must occur to satisfy the publication element of a claim for defamation by self-publication." *Groeneweg v. Interstate Enterprises, Inc.*, No. A04-1290, 2005 WL 894768, at *6 (Minn. Ct. App. Apr. 19, 2005). If the employee cannot identify particular individuals to whom they communicated the employer's alleged defamatory statement, they may not raise a claim for defamation through self-publication. *Ruse v. Dunkley and Bennett, PA*, 520 N.W.2d 406, 411 (Minn. 1994); *Groeneweg*, 2005 WL 894768, at *6).

4. Invited Libel

A high standard of proof is imposed upon public officials seeking to recover in defamation for statements made about their official conduct. *Britton v. Koep*, 470 N.W.2d 518, 520 (Minn. 1991). A "public official" is a government employee whose position and duties are of such a nature that the First Amendment demands open debate about them. *See id.* at 520; *see also Range Dev. Co. of Chisholm v. Star Tribune*, 885 N.W.2d 500 (Minn. 2016) ("[The First Amendment] requires a plaintiff who is a public official

or figure to prove that the defendant published a false statement of fact with actual malice and that proof of malice must be proved by clear and convincing evidence.”).

A “public figure,” on the other hand, is a person who has invited comment by assuming special prominence in society or by thrusting themselves to the “forefront” of public controversies seeking to influence their outcome. *Jadwin v. Minneapolis Star & Tribune*, 367 N.W.2d 476, 483-84 (Minn. 1985). Determination of who qualifies as a “public figure” is a question of law for the court to determine. *Id.*

5. Opinion

Statements of opinion are protected by the First Amendment and are not actionable on a defamation claim. *Lee v. Metro. Airport Comm’n*, 428 N.W.2d 815, 820 (Minn. Ct. App. 1988). In determining whether a statement is fact or opinion, the courts use a four-part test:

- a) The precision and specificity of the statement (the more imprecise, the more likely opinion);
- b) The statement’s verifiability;
- c) The literary or social context of the statement; and
- d) The statement’s public context.

Id. at 820; *see also Marchant Inv. & Mgmt. Co., Inc. v. St. Anthony W. Neighborhood Org. Inc.*, 694 N.W.2d 92, 96-98 (Minn. Ct. App. 2005); *Weissman v. Sri Lanka Curry House, Inc.*, 469 N.W.2d 471 (Minn. Ct. App. 1991); *Hunt v. Univ. of Minn.*, 465 N.W.2d 88 (Minn. Ct. App. 1991).

E. Job References and Blacklisting Statutes

Minnesota has several statutes that prohibit “blacklisting” an employee or former employee for particular conduct. Each is described below:

Section 179.60 of the Minnesota statutes prohibits “[i]nterfering with employee or membership in union” and provides in pertinent part:

It shall be unlawful for any two or more corporations or employers to combine, to agree to combine, or confer together for the purpose of interfering with any person in procuring, or in preventing the person from procuring, employment, or to secure the discharge of any employee by threats, promises, circulating blacklists, or any other means whatsoever. It shall be unlawful for any company or corporation, or any agent or employee thereof, to blacklist any discharged employee, or by word or writing seek to prevent, hinder, or restrain a discharged employee, or one who has voluntarily left its employ, from obtaining employment elsewhere. Every person and corporation violating any of the foregoing provisions shall be guilty of a misdemeanor.

Minn. Stat. § 179.60.

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It is an unfair labor practice for an employer: . . . (6) to distribute or circulate a blacklist of individuals exercising a legal right or of members of a labor organization for the purpose of preventing individuals who are blacklisted from obtaining or retaining employment.

Minn. Stat. § 179.12.

Public employers, their agents and representatives are prohibited from: . . . (7) distributing or circulating a blacklist of individuals exercising a legal right or of members of a labor organization for the purpose of preventing blacklisted individuals from obtaining or retaining employment.

Minn. Stat. § 179A.13.

F. Non-Disparagement Clauses

Minnesota courts allow employers and employees to enter into non-disparagement clauses in connection with a termination or other separation from employment. Such clauses are creatures of contract and will be analyzed under standard contract principles. *Diversified Water Diversion v. Standard Water Control Sys.*, No. A07-1828, 2008 WL 4300258, at * (Minn. Ct. App. Sept. 23, 2008).

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

In *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428, 430 (Minn. 1983), the plaintiff sued his former employer alleging discrimination based on an alcoholism disability, retaliatory discharge, and intentional infliction of emotional distress. The employer appealed a jury verdict in favor of the plaintiff on the emotional distress claim. The *Hubbard* court recognized that “[t]ort claims seeking damages for mental distress generally have not been favored in Minnesota,” and that the courts “have been careful to restrict the availability of such damages to those plaintiffs who prove that emotional injury occurred under circumstances tending to guarantee its genuineness.” *Id.* at 437.

Despite its reluctance, the Minnesota Supreme Court recognized, for the first time, the tort of intentional infliction of emotional distress. *Hubbard*, 330 N.W.2d at 438. In so doing, the court adopted the definition of the tort from the Restatement of Torts.

The *Hubbard* court stated as follows:

Four distinct elements of proof necessary to establish a claim may be implied from the Restatement definition: (1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe. The commentary to the Restatement emphasizes the high threshold standard of proof required of a complainant before his [or her] case may be submitted to the jury. We have previously noted that the type of conduct referred to in the Restatement as ‘extreme and outrageous’ must be ‘so atrocious that it passes the boundaries of decency and is utterly intolerable in civilized community.’

330 N.W.2d at 438-39, citing *Haagenson v. Nat’l Farmers Union Prop. and Cas. Co.*, 277 N.W.2d 648, 652 n.3 (Minn. 1979), citing RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

With regard to the fourth element relating to the severity of the emotional distress, the court stated that “the law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it.” *Hubbard*, 330 N.W.2d at 439, citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965); *Elstrom v. Independent Sch. Dist. No. 270*, 533 N.W.2d 51, 57 (Minn. Ct. App. 1995). Minnesota courts have subsequently held that “general embarrassment, nervousness and depression are not in themselves a sufficient basis for a claim of intentional infliction of emotional distress.” *Strauss v. Thorne*, 490 N.W.2d 908, 913 (Minn. Ct. App. 1992); see also *Kearney v. Orthopaedic & Fracture Clinic, P.A.*, No. A14-1835, 2015 WL 5194832, at *7 (Minn. Ct. App. Sept. 8, 2015) (bullying, ostracism, unpleasantness, and insensitivity of coworkers is not sufficient).

In creating the tort of intentional infliction of emotional distress, the *Hubbard* court noted that it thereby discarded the “parasitic” theory, which restricted recovery to cases involving contemporaneous physical injury or the allegation of malicious conduct sufficient to constitute an underlying tort. 330 N.W.2d at 430.

In *Langeslag v. KYMN Inc.*, 664 N.W.2d 860 (Minn. 2003), the Minnesota Supreme Court rejected an employer’s counterclaim for intentional infliction of emotional distress against an employee based on allegations that the employee made false police reports against him, threatened him with litigation, and initiated workplace arguments with him. The court found unpersuasive the argument that non-frivolous threats of litigation constituted extreme and outrageous conduct allowing for an emotional distress action. The court also found that even if the employee made a false statement to the police (resulting in the owner’s arrest) and started workplace arguments with him, the employee’s actions would not rise to the level of “extreme and outrageous” conduct “utterly intolerable to the civilized community” required for intentional infliction of emotional distress.

B. Negligent Infliction of Emotional Distress

In *Stadler v. Cross*, 295 N.W.2d 552, 553 (Minn. 1980), plaintiffs brought an action against the defendants for negligent infliction of emotional distress arising from the plaintiffs’ witnessing a traffic accident in which the defendants’ truck struck the plaintiffs’ child as he crossed the street. In deciding whether the parents could recover for witnessing the injury of their child, the Minnesota Supreme Court stated that “[w]e have recognized that a person within the zone of danger of physical impact who reasonably fears for his or her own safety and who consequently suffers severe emotional distress with resultant physical injury may recover.” *Id.* at 554, citing *Okrina v. Midwestern Corp.*, 282 Minn. 400, 165 N.W.2d 259 (Minn. 1969).

However, the court held that the parents, who were not in physical danger from the accident, could not recover for the emotional distress caused by witnessing the injury of their child. *Stadler* at 555. In so holding, the court stated that “[n]o arguments have been presented that persuade us that the problems we see in limiting liability once it is extended beyond the zone of danger of physical impact can be justly overcome.” *Id.* The court reiterated its previous position that “[u]nder the zone-of-danger rule the courts and juries can objectively determine whether plaintiffs were within the zone of danger. Furthermore, plaintiffs can be cross-examined regarding whether their fear was for themselves or for another. None of the other proposed limitations can be as readily and consistently applied.” *Id.* at 554.

The Minnesota Court of Appeals has applied the above-stated zone-of-danger rule in the employment context. *Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 57 (Minn. Ct. App. 1995); *Markgraf v. Douglas Corp.*, 468 N.W.2d 80 (Minn. Ct. App. 1991).

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However, Minnesota courts have also allowed plaintiffs to assert a negligent infliction of emotional distress claim based upon a second theory: the “direct invasion of rights” claim. Under this theory, the plaintiff may add a claim for negligent infliction of emotional distress if they establish another actionable claim, such as defamation. *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 560 (Minn. 1996). It does not appear that Minnesota courts will accept an employment discrimination claim as meeting this “other actionable claim” test, though. See *Lindgren v. Harmon Glass Co.*, 489 N.W.2d 804, 811 (Minn. Ct. App. 1992).

VIII. PRIVACY RIGHTS

A. Generally

Minnesota does not have any specific statutory right to privacy. On July 30, 1998, however, the Minnesota Supreme Court recognized a common law cause of action for invasion of privacy in *Lake v. Wal-Mart*, 582 N.W.2d 231 (Minn. 1998). The case involved a suit by two high school students against Wal-Mart and Wal-Mart employees alleging all four traditional invasion of privacy torts (intrusion upon seclusion, appropriation, publication of private facts, and false light publicity). *Id.* Because Minnesota had never before recognized a cause of action for invasion of privacy, the district court and court of appeals dismissed the case for failure to state a claim upon which relief could be granted. *Id.*

The Minnesota Supreme Court reversed the court of appeals in part, recognizing the torts of (1) intrusion upon seclusion, (2) appropriation, and (3) publication of private facts. *Lake*, 582 N.W.2d 231. In so holding, the court stated that:

Today we join the majority of jurisdictions and recognize the tort of invasion of privacy. The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close.

Id. at 235.

The court refused to recognize the tort of false light in Minnesota. *Id.* In support of its refusal to recognize this tort, the Minnesota Supreme Court stated as follows:

We are concerned that claims under false light are similar to claims of defamation, and to the extent that false light is more expansive than defamation, tension between this tort and the First Amendment is increased. False light is the most widely criticized of the four privacy torts and has been rejected by several jurisdictions.

....

Although there may be some untrue and hurtful publicity that should be actionable under false light, the risk of chilling speech is too great to justify protection for this small category of false publication not protected under defamation.

Id. at 235-36.

On March 30, 1999 the Minnesota Court of Appeals held that the cause of action for invasion of privacy, first recognized in *Lake v. Wal-Mart*, would be applied retroactively. *Summers v. R&D Agency*, 593

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N.W.2d 241 (Minn. Ct. App. 1999). In *Summers*, the court of appeals allowed a claim for invasion of privacy against a private investigation agency to proceed even though the alleged invasion occurred in 1997, well before the privacy tort was recognized in Minnesota. The court of appeals decision, however, did not specify the statute of limitations that would be applicable to claims under this privacy tort.

Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550 (Minn. 2003), addressed an invasion of privacy claim based on the publication of private facts, a tort action established in *Lake*. The claim was based on the unauthorized faxing of 204 employee names and Social Security numbers to 16 managers in six states. The court of appeals had held that this disclosure of information was a violation of the employees' privacy rights. The court of appeals relied on *Lake*, holding that the definition of publicity could turn on whether the dissemination of private information unreasonably exposed the plaintiff to a significant risk of loss. In reversing the court of appeals, the Minnesota Supreme Court adopted the Restatement definition of "publicity," which provides that a matter is made public by communicating it to the public at large, or to so many people that the matter is substantially certain to become public knowledge. The Supreme Court also noted that the tort of publication of private facts should provide a remedy for the truthful but damaging dissemination of private facts, thus filling a narrow gap left by the tort of defamation.

The statute of limitations for claims for invasion of privacy under Minnesota law is two years. Minn. Stat. § 541.07.

Except when it is based on a bona fide occupational qualification, the Minnesota Human Rights Act makes it an unlawful employment practice for employers to require or request a job applicant to furnish information that pertains to the applicant's race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, familial status, disability, sexual orientation, or age. Minn. Stat. § 363A.08, subd. 4(1).

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

In Minnesota, no employer may require an employee to apply for or use an enhanced identification card or an enhanced driver's license, both of which denote citizenship, as a condition of employment, nor may an employer discharge an employee or otherwise discriminate or retaliate against an employee who refuses to apply for or use an enhanced identification card. Minn. Stat. §§ 171.066 (enhanced driver's license); 171.068 (enhanced identification card).

Additionally, a contract for services with the state of Minnesota valued in excess of \$50,000 must require certification from the vendor and any subcontractors that, as of the date services on behalf of the state of Minnesota will be performed, the vendor and all subcontractors have implemented or are in the process of implementing the federal E-Verify program for all newly hired employees in the United States who will perform work on behalf of the state of Minnesota. Minn. Stat. § 16C.075.

2. Background Checks

Neither public nor private employers can inquire into, consider, or require disclosure of an applicant's criminal record or history until (1) the applicant has been selected for an interview, or (2) in the event there is no interview, the applicant has received a conditional offer of employment. Minn. Stat. § 364.021. (This prohibition does not extend to employers who have a statutory duty to conduct a criminal history background check.) Any complaints or grievances regarding violations of this "ban the box" statute

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by public employers are processed under Minnesota's Administrative Procedures Act. In contrast, alleged violations of the statute by private sector employers are investigated by the Minnesota Department of Human Rights. Minn. Stat. § 364.06. If the Department finds a violation by a private employer, it may impose the following penalties:

- Employers of ten or fewer persons at a site in Minnesota will be subject to a fine of up to \$100 per violation and a total not to exceed \$100 per month;
- Employers of between 11 and 20 employees at a site in Minnesota will be subject to a fine of up to \$500 per violation and total not to exceed \$500 per month; and
- Employers of more than 20 at one or more sites in Minnesota will be subject to a fine of up to \$500 per violation and total fines not to exceed \$2,000 per month.

Id. (c). Importantly, these remedies are exclusive, and aggrieved applicants cannot file a lawsuit to enforce the statute. *Id.* (d).

C. Other Specific Issues

1. Workplace Searches

See discussion below under "Electronic Monitoring" and "Taping of Employees."

2. Electronic Monitoring

The Minnesota Privacy of Communications Act, Minn. Stat. §§ 626A.01 *et seq.*, contains similar language to the federal Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521.

3. Social Media

Minnesota has not yet adopted any statutes regarding employer uses of, searches of, or requests for employee's social media account information.

4. Taping of Employees

Minnesota's interference with privacy statute, Minn. Stat. § 609.746, subd. 1, prohibits employers, other than medical facilities and commercial establishments that post conspicuous notes, from peeping or spying upon persons in areas where there is a reasonable expectation of privacy and where those persons are likely to expose their "intimate parts" or underwear. The same statute prohibits the peeping or spying into an employee's home.

Surveillance of an employee in public areas outside of the workplace will not constitute an invasion of privacy. See *Manion v. Nagin*, 2003 WL 21459680, No. Civ. 00-238 (D. Minn. June 20, 2003).

5. Release of Personal Information on Employees

Under Minnesota's Personnel Records Act, an employee is entitled to request removal or revision of information in a personnel record and, if the employer denies that request, may submit a written statement of up to 5 pages disputing the personnel record contents; a copy of that statement must be

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provided to any other person who receives a copy of the disputed information after the statement is submitted. Minn. Stat. § 181.962, subd. 1. A defamation action premised either on an employee's "self-publication" or an employer's communication of information in the employee's personnel record is barred unless the employee has complied with the Act's procedure for disputing information contained in the personnel record. *Id.*, subd. 2(a)-(2).

Additionally, employee assistance records may not be disclosed to a third person (including the employer or its representative), without prior written authorization from the person receiving services or their legal representative unless the disclosure is made pursuant to a state or federal law or judicial order, is required in the normal course of providing the requested services, or is necessary to prevent physical harm or the commission of a crime. Minn. Stat. § 181.980.

Public disclosure of personnel information regarding public employees is covered by the state's government data practices act. Minn. Stat. § 13.43.

6. Medical Information

The Minnesota Human Rights Act generally makes it an unlawful employment practice for an employer to require or request a job applicant to undergo a physical examination. Minn. Stat. § 363A.08, subd. 4(1). An employer may, however, require a physical examination for the purpose of determining a person's capability to perform available employment, provided that the exam is conducted after a conditional offer of employment has been made, the exam tests only for job-related abilities, the exam is required for all persons conditionally offered employment for the same position, and the results are maintained in separate medical files and treated as confidential. Minn. Stat. § 363A.20, subd. 8(a)(1).

After employment has commenced, an employer may obtain medical information with the employee's consent for "assessing continuing ability to perform the job or employee health insurance eligibility; for purposes mandated by local, state, or federal law; for purposes of assessing the need to reasonably accommodate an employee. . . ; or other legitimate business reason not otherwise prohibited by law." *Id.*, subd. 8(a)(2). This information must also be maintained in separate medical files and treated as confidential. *Id.*, subd. 8(b).

An employer may also gain access to medical information pertaining to a current workers' compensation claim. Minn. Stat. § 176.138(a).

IX. WORKPLACE SAFETY

A. Negligent Hiring

Negligent hiring imposes direct liability on the employer only where the claimant's injuries are the result of the employer's failure to take reasonable precautions to protect the claimant from the misconduct of its employees. *M.L. v. Magnuson*, 531 N.W.2d 849, 856 n.3 (Minn. Ct. App. 1995) (citing *Ponticas v. K.M.S. Inv.*, 331 N.W.2d 907, 911 n.5 (Minn. 1983)). More specifically, negligent hiring occurs where:

the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of employment, it should have been foreseeable that the hired individual posed a threat of injury to others.

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Ponticas, 331 N.W.2d at 911. As a precondition to liability, “under the theory of negligent hiring[,] an employer must breach its ‘duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public.’” *Smith v. DataCard Corp.*, 9 F.Supp.2d 1067, 1082 (D. Minn. 1998) (quoting *Ponticas*, 331 N.W.2d at 911). The tort imposes what is essentially a sliding-scale duty of care for hiring a new employee, with the degree of care required being largely dependent upon the nature of the position:

The scope of the investigation is directly related to the severity of the risk third parties are subjected to by an incompetent employee . . . [O]nly slight care might suffice in the hiring of a yardman, a worker on a production line, or other types of employment where the employee would not constitute a high risk of injury to third persons.

Ponticas, 331 N.W.2d at 913.

In adopting this sliding scale duty, the court rejected “the contention that, as a matter of law, there exists a duty upon an employer to make an inquiry as to a prospective employee’s criminal record even where it is known that the employee is to regularly deal with members of the public.” *Ponticas*, 331 N.W.2d at 913. In the court’s view, such a bright-line rule “would offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community,” and would also “counter the many worthwhile efforts of individuals, organizations and employers to aid former offenders to re-establish good citizenship[.]” *Id.*

However, in *Ponticas*, the court concluded that the employer did not conduct a reasonable investigation. The employee’s position as an apartment manager constituted a high risk of injury to the public. While the employer contacted the employee’s former employers, and conducted a credit check, the employer did not contact the employee’s references and ignored several suspicious answers on the employee’s application. 331 N.W.2d at 913.

B. Negligent Retention

Minnesota courts generally distinguish negligent hiring and negligent retention claims as follows:

Negligent hiring occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness, and the issue of liability primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background (citations omitted). Negligent retention, on the other hand, occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment (citations omitted).

Yunker v. Honeywell, Inc., 496 N.W.2d 419, 423-24 (Minn. Ct. App. 1993) (emphasis added) (citing *Garcia v. Duffy*, 492 So.2d 435, 438-39 (Fla. Dist. Ct. App. 1986)).

The elements of a negligent retention claim are as follows:

- A duty of care owed to plaintiff by employer;
- Breach of that duty by retaining an employee the employer knows is unfit for duty;

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- The employee caused injury or a threat of injury; and
- Causation, including proximate causation.

L.M. v. Karlson, 646 N.W.2d 537, 545 (Minn. Ct. App. 2002); *Bruchas v. Preventive Care, Inc.*, 553 N.W.2d 440 (Minn. Ct. App. 1996)

Unfortunately, some confusion about negligent retention claims still exists in Minnesota's courts. For example, the United States District Court for the District of Minnesota held that the plaintiff's negligent retention claim failed because the conduct in question occurred within the scope of the employee's employment. *Leidig v. Honeywell, Inc.*, 850 F. Supp. 796, 807 (D. Minn. 1994). However, other Minnesota courts have not imposed that standard. See, e.g., *Yunker*, 496 N.W.2d at 422; *M.L.*, 531 N.W.2d at 858; *Ponticas*, 331 N.W.2d at 911 n.5. Obviously, Minnesota defendants will want to argue that the *Leidig* standard is correct, as it could eliminate many negligent retention claims. This may be an uphill battle, though, as the *Leidig* holding has been criticized by two other decisions, *Orth v. Coll. of St. Catherine*, No. C9-94-2260, 1995 WL 333875 (Minn. Ct. App. June 6, 1995) and *D.W. Radisson Plaza Hotel Rochester*, 958 F. Supp. 1368 (D. Minn. 1997).

C. Negligent Supervision

The doctrine of negligent supervision imposes a duty on employers only to exercise ordinary care in supervising the employment relationship, so as to prevent the foreseeable misconduct of an employee from causing harm to others. See *M.L.*, 531 N.W.2d at 858. Unlike the doctrines of negligent hiring and negligent retention, negligent supervision evolved from the respondeat superior doctrine. See *Ponticas*, 331 N.W.2d at 910. As a consequence, liability for this cause of action is based only upon tortious conduct committed within the employee's scope of employment. See *Karlson*, 646 N.W.2d at 545; see also *C.B. ex rel. L.B. v. Evangelical Lutheran Church in Am.*, 726 N.W.2d 127, 135 (Minn. Ct. App. 2007); *Leidig v. Honeywell, Inc.*, 850 F. Supp. 796, 807 (D. Minn. 1994). For this reason perhaps, negligent supervision claims are seldom successful on the merits.

In addition to the requirement that the tortious conduct must occur within the scope of employment, elements of the claim are:

- Duty of care owed by employer;
- Foreseeable misconduct by the employee;
- Failure by the employer to exercise ordinary care when supervising the employee;
- Injury or threat of injury; and
- Causation, including proximate causation.

C.B. ex rel. L.B. v. Evangelical Lutheran Church in Am., 726 N.W.2d 127, 136 (Minn. Ct. App. 2007)

D. Interplay with Worker's Comp. Bar

Minnesota's Workers' Compensation Act ("WCA"), Minn. Stat. § 176.031, provides that it is the exclusive liability mechanism for workplace injuries or death. Minnesota courts, however, have determined that the WCA does not provide the sole remedy if an employer "intentionally and maliciously assaulted an employee, while engaged in employment." *Hildebrandt v. Whirlpool Corp.*, 364 N.W.2d 394, 395 (Minn. 1985). This exception is narrowly interpreted by the courts.

The WCA also provides an exception to the exclusivity rule for injuries caused by the gross negligence of co-employees. Section 176.061, subd. 5(e) states that “[a] coemployee working for the same employer is not liable for a personal injury incurred by another employee unless the injury resulted from the gross negligence of the coemployee or was intentionally inflicted by the coemployee.”

Finally, the WCA provides an exception to the exclusivity rule for assault by co-employees unrelated to work. Minn. Stat. § 176.011, subd. 16. The WCA creates this exception through the definition of “personal injury,” which states, “[p]ersonal injury does not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of personal reasons, and not directed against the employee as an employee, or because of the employment.”

E. Firearms in the Workplace

Minnesota’s conceal and carry law provides that an employer — whether public or private — “may establish policies that restrict the carry or possession of firearms by its employees while acting in the course and scope of employment.” Minn. Stat. § 624.714, subd. 18(a). An employer cannot, however, “prohibit the lawful carry or possession of firearms in a parking facility or parking area.” Minn. Stat. § 624.714, subd. 18(c).

F. Use of Mobile Devices

Minnesota does not currently regulate employees’ use of mobile devices. However, drivers in Minnesota may not operate a motor vehicle while using a wireless communications device to compose, read, or send an “electronic message” when the vehicle is in motion or stopped in traffic. Minn. Stat. § 169.475. The prohibition does not apply when the mobile device is used: 1) solely in a voice-activated or other hands-free mode; 2) to make a call; 3) to obtain emergency assistance for traffic accidents, medical emergencies, serious traffic hazards, or to prevent a crime that is about to be committed; 4) in the reasonable belief that a person’s life or safety is in immediate danger; and 5) in an authorized emergency vehicle while in the performance of official duties. *Id.*

The Minnesota legislature passed a hands-free bill, effective Aug. 1, 2019, which prohibits all cell phone use while driving, except for hands-free use. Under this bill, drivers may use voice command or single touch functions as long as the action does not require the driver to look at the device, such as live-streaming videos or reading text messages. Minn. Stat. § 169.475. Drivers who are subject to motor carrier safety regulations must comply with additional requirements. Minn. Stat. § 169.025. There are exceptions for emergency vehicles. Minn. Stat. § 169.03.

X. TORT LIABILITIES

A. Respondeat Superior Liability

The Minnesota Supreme Court has held that Minnesota employers may be vicariously liable for torts committed by an employee that cause injury. *Lange v. Nat’l Biscuit Co.*, 211 N.W.2d 783, 786 (1973). In the context of intentional misconduct that causes an injury, an employer is liable only if the plaintiff shows that the conduct occurred within the scope of employment. *Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.*, 329 N.W.2d 306, 309-11 (Minn. 1982). Intentional misconduct is within the scope of employment if: (1) the employee was engaged in conduct that was related to or reasonably incidental to employment duties; (2) the conduct was foreseeable from the nature of the employment; and (3) the conduct occurred within the work-related limits of time and place. *Marston*, 329 N.W.2d at 309-

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11. “Foreseeability” as a test for respondeat superior in the context of intentional misconduct means that “in the context of the particular enterprise an employee’s conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer’s business.” *Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905, 912 (Minn. 1999) (citation omitted) (emphasis added).

Minnesota employers may also be vicariously liable for the negligence of their employees, but the foreseeability test differs somewhat from the test for vicarious liability for intentional torts. *Odenthal v. Minn. Conf. of Seventh-Day Adventists*, 657 N.W.2d 569, 576 (Minn. Ct. App. 2003). To demonstrate that an employee’s negligence was foreseeable to the employer, a plaintiff must prove that: “(1) the conduct was to some degree in furtherance of the employer’s interests, (2) the employee was authorized to perform the type of conduct, (3) the conduct occurred substantially within authorized time and space restrictions, and (4) the employer should reasonably have foreseen the conduct.” *Id.* (citation omitted).

B. Tortious Interference with Business/Contractual Relations

A cause of action for tortious interference with a contractual relationship requires five elements: (1) the existence of a contract; (2) the alleged wrongdoer’s knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages. *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 362 (Minn. 1998).

Under Minnesota law, an employment contract, even if at-will, may satisfy the first element of a tortious interference claim. *Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 505 (Minn. 1991). Significantly, a party cannot interfere with its own contract, and as a result, corporate personnel cannot be held personally liable for tortious interference with an employment contract if they were acting within the scope of their employment. *Id.* at 506. In explaining the reasoning for this holding, the *Nordling* court stated, “[t]o allow the officer or agent to be sued and to be personally liable [for tortious interference with employment contracts] would chill corporate personnel from performing their duties and would be contrary to the limited liability accorded incorporation.” Therefore, to prove a claim of tortious interference with an employment contract against another employee, a plaintiff must also allege and establish that the employee acted outside the scope of their employment. *Bouten v. Richard Miller Homes, Inc.*, 321 N.W.2d 895, 900-01 (Minn. 1982).

One defense to a tortious interference claim is that the conduct was justified. *Kallok*, 573 N.W.2d at 362. “[T]he justification defense to tortious interference with contract may encompass reasonable reliance on advice of counsel.” *Sysdyne Corp. v. Rousslang*, 860 N.W.2d 347, 354 (Minn. 2015).

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

In *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 360 (Minn. 1998), the plaintiff and his new employer brought a declaratory judgment action against his former employer to determine his rights and obligations under a non-compete provision of his employment contract with his former employer. In evaluating the plaintiff’s rights, the Minnesota Supreme Court stated that, in Minnesota, employment noncompete agreements are looked upon “with disfavor, cautiously considered, and carefully scrutinized.” *Kallok*, 573 N.W.2d at 361 (citing *Bennett v. Storz Broad. Co.*, 134 N.W.2d 892, 898 (Minn. 1965)).

However, the court also noted that “non-compete agreements are enforceable if they serve a legitimate employer interest and are not broader than necessary to protect this interest.” *Kallok*, 573

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N.W.2d at 361, citing *Walker Employment Serv., Inc. v. Parkhurst*, 219 N.W.2d 437, 441 (Minn. 1974), and *Bennett*, 134 N.W.2d at 898. In determining whether to enforce a particular noncompete agreement or provision, the court balances the employer's interest in protection from unfair competition against the employee's right to earn a livelihood. *Kallok*, 573 N.W.2d at 361; *Walker Employment*, 219 N.W.2d at 441; *Bennett*, 134 N.W.2d at 899-900. If the employer's interest predominates, the noncompete agreement is valid and enforceable. *Kallok*, 573 N.W.2d at 361; *Alside, Inc. v. Larson*, 220 N.W.2d 274, 279-80 (Minn. 1974).

Noncompete agreements require consideration to be enforceable under Minnesota law. Minnesota courts have held that a job offer may be conditioned upon a noncompete and that the job itself may then serve as consideration for the agreement. The terms of the agreement should be included in the offer of employment, or an employer risks a finding that the agreement was offered after the employee accepted employment. *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740-41 (Minn. 1982).

Continued employment is not sufficient consideration if the agreement is executed after employment has begun. Such a "midstream" agreement must be supported by some type of additional consideration. *Id.* Courts have allowed a variety of items to serve as consideration for a noncompete agreement, including a bonus, *Tenant Constr., Inc. v. Mason*, 2008 WL 314515 (Minn. Ct. App. Feb. 5, 2008) (\$500 payment sufficient), additional training, *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 130-31 (Minn. 1980), a promotion, *Softchoice, Inc. v. Schmidt*, 763 N.W.2d 660, 669 (Minn. Ct. App. 2009), and various other benefits. *Overholt Crop Ins. Serv. Co. v. Bredeson*, 437 N.W.2d 698, 703 (Minn. Ct. App. 1989). It is preferable to ensure a concrete benefit in exchange for a "midstream" agreement in Minnesota, rather than the ability to receive a benefit. *Valspar Corp. v. Mueller*, 2017 WL 1210132 (Minn. Ct. App. Apr. 3, 2017).

Minnesota also recognizes a claim against a new employer for tortious interference with a non-compete agreement. The claim has five elements, including: (1) a contract, (2) the wrongdoer's knowledge of the contract, (3) intentional procurement of its breach, (4) without justification, and (5) damages. *Sysdyne Corp. v. Rousslang*, 880 N.W.2d 347, 351 (Minn. 2015). The Minnesota Supreme Court has found that honest reliance on the advice of outside counsel, even if that advice is erroneous, can constitute justification if the advice was based on a reasonable inquiry. *Id.* at 354. An inquiry may be reasonable if all material facts (including the agreement's terms) were disclosed to the attorney, even if there is incomplete documentary evidence of the disclosure of that information and the attorney's advice. *Id.*

B. Blue Penciling

Minnesota courts have adopted the "blue pencil" doctrine. When a noncompete agreement is overbroad or unreasonable in scope, either as to duration or geographic breadth or otherwise, courts have the equitable power to rewrite the scope of the agreement to whatever it deems is reasonable. *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 131-32 (Minn. 1980). In *Davies*, the Minnesota Supreme Court approved of the trial court's use of the blue pencil doctrine to reduce both the geographic scope (50-mile radius down to Hennepin County) and duration (five years down to one year) of a noncompete agreement in the insurance business. The Minnesota Supreme Court went further and limited the noncompete to prevent the former employee from soliciting customers of his former agency, but to limit the former employee to otherwise compete, even in Hennepin County. *Id.*

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C. Confidentiality Agreements

Confidentiality agreements must be supported by consideration. *See Josten's, Inc. v. Nat'l Computer Sys., Inc.*, 318 N.W.2d 691, 702 (Minn. 1982). But even in the absence of a contractual requirement, employees "have a common law duty not to wrongfully use confidential information or trade secrets obtained from an employer." *Id.* at 701. Confidential information is that which an employee knew or should have known was confidential. *Id.* at 702.

D. Trade Secrets Statute

Minnesota has enacted its own version of the Uniform Trade Secrets Act, Minn. Stat. §§ 325C.01 *et seq.* Under the Act, one may bring an action under sections 325C.01 to 325C.07. In such an action, "a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval." Minn. Stat. § 325C.05.

Further, in most cases a complainant is entitled to recover damages for misappropriation. "Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret." Minn. Stat. § 325C.03.

An action for misappropriation under the Act "must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered." Minn. Stat. § 325C.06. The statute provides that a "continuing misappropriation constitutes a single claim." *Id.* However, if a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or a willful and malicious misappropriation exists, the court may award reasonable attorneys' fees to the prevailing party. Minn. Stat. § 325C.04.

E. Fiduciary Duty and Other Considerations

Under Minnesota law, an employee owes a common law duty of loyalty to their employer. This includes a common-law duty not to compete with the employee's current employer. *See Eaton Corp. v. Giere*, 971 F.2d 136, 141 (8th Cir. 1992) (interpreting Minnesota law). However, an employee may lawfully prepare to compete with their employer before the employment relationship ends, as long as the employee does not solicit customers until their employment terminates. *Rehabilitation Specialists, Inc. v. Koering*, 404 N.W.2d 301, 304-05 (Minn. Ct. App. 1987). Although the line between permissible preparation and impermissible competition is imprecise at best, Minnesota courts have found that, for example, soliciting pricing information from the employer's suppliers does not amount to a breach of the duty of loyalty. *See, e.g., Signergy Sign Group v. Adam*, 2004 Minn. App. LEXIS 1340, A04-70, A04-147, at *4-5 (Minn. Ct. App. Nov. 30, 2004); *Schlieff v. Nu-Source, Inc.*, 2011 U.S. Dist. LEXIS 44446, Civ. No. 10-4477 (DWF/SER), at * 15-16 (D. Minn. Apr. 25, 2011).

Additionally, as noted above, employees have a common law duty of confidentiality. *Jostens*, 318 N.W.2d at 702.

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Significantly, Minnesota courts hold that “[e]very employment contract encompasses implied duties of honesty and loyalty, which if breached by the employee, results in the employer owing the employee nothing.” *Stiff v. Associated Sewing Supply Co.*, 436 N.W.2d 777, 780 (Minn. 1989). This forfeiture rule is not superseded by Minnesota’s statute prohibiting certain wage deductions. *Id.*

XII. DRUG TESTING LAWS

A. Public Employers

The Minnesota Drug and Alcohol Testing in the Workplace Act (“DATWA”) applies equally to public and private employers, and is discussed in detail below. In addition, public employers’ discretion to implement drug testing is restricted by the Fourth Amendment to the United States Constitution, which generally imposes a reasonableness test balancing the government’s need to test against the employee’s expectation of privacy. See e.g., *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

B. Private Employers

Minn. Stat. §§ 181.950-181.957 sets out the regulations for drug and alcohol testing in the employment context. Its principal components are summarized below.

Employers must use a licensed, accredited, or certified laboratory as defined in the statute to perform alcohol or drug testing. Minn. Stat. § 181.953, Subd. 1.

An employer may not conduct drug or alcohol testing of its own employees and job applicants using laboratories owned or operated by the employer, except that state agencies may test the employees of other agencies. Minn. Stat. § 181.953, Subd. 4. The definition of “employer” includes all entities “doing business in” Minnesota. *Olson v. Push, Inc.*, 2016 WL 690844 (8th Cir.).

Employers are prohibited from conducting any drug or alcohol testing except for in the following circumstances, as specifically authorized by the statute:

Job Applicant Testing – An employer may request a job applicant undergo drug and alcohol testing provided a conditional job offer has been made to the applicant and the same test is required of all applicants for that position. Minn. Stat. § 181.951, Subd. 2.

Routine Physical Examination Testing – An employer may request an employee undergo drug and alcohol testing as part of a routine physical examination provided the test is required no more than once annually and the individual is given written notice of the testing requirement at least two (2) weeks in advance of the examination. Minn. Stat. § 181.951, Subd. 3.

Random Testing – An employer may request only that employees in safety-sensitive positions (or those employed as professional athletes if they are subject to a collective bargaining agreement permitting random testing) undergo drug and alcohol testing on a random selection basis. Minn. Stat. § 181.951, Subd. 4.

Reasonable Suspicion Testing – An employer may request an employee undergo drug and alcohol testing if the employer has reasonable suspicion that the employee, (i) is under the

influence of drugs or alcohol; (ii) has violated written work rules prohibiting the use, possession, sale or transfer of drugs or alcohol provided the work rules are in writing and set forth in the employer's written drug and alcohol testing policy; (iii) has sustained a personal injury, arising out of and in the course of employment, or has caused another employee to sustain a personal injury; or (iv) has caused a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident. Minn. Stat. § 181.951, Subd. 5.

Treatment Program Testing – An employer may request an employee referred for chemical dependency treatment or evaluation to undergo unannounced drug and alcohol testing during such treatment or evaluation period and for up to two (2) years following completion of any treatment program. Minn. Stat. § 181.951, Subd. 6.

Employers must establish chain-of-custody and recordkeeping procedures in accordance with the statute. Minn. Stat. § 181.953, Subd. 5. Before testing, an employee or applicant must have the opportunity to review the employer's written testing policy, and employers must develop a form on which the employee or applicant must acknowledge that he or she has seen the policy. Minn. Stat. § 181.953, Subd. 6.

If an employee or applicant tests positive or negative on an initial screening, he or she must be given written notice of the results and an opportunity to explain the result. Minn. Stat. § 181.953, Subds. 6-7. An employee or applicant may request a confirmatory retest at their own expense. Minn. Stat. § 181.953, Subd. 9.

An employer may not discharge, discipline or discriminate against an employee on the basis of a positive test result from an initial, unverified test result (i.e., an unverified screen). Minn. Stat. § 181.953, Subd. 10. Further, an employee may not be discharged for a first positive result unless the employer has given the employee the opportunity to participate in a rehabilitation program; and either the employee has refused to participate or failed to successfully complete the program or has tested positive after completion of the program. *Id.* An employer may not discharge or discipline an employee on the basis of medical history information. *Id.*

An employer may temporarily suspend or transfer an employee who tests positive, pending the outcome of a confirmatory test, if it is reasonably necessary to protect the health and safety of the employee, co-employees or the public. Minn. Stat. § 181.953, Subd. 10 (2)(c).

The statute makes no distinction between public and private employees, except in the context of confidentiality limitations (and allowing the state to test its own employees). Minn. Stat. § 181.954, subd. 2 states, Test result reports and other information acquired in the drug or alcohol testing process are, with respect to private sector employees and job applicants, private and confidential information, and, with respect to public sector employees and job applicants, private data on individuals as that phrase is defined in the Minnesota Government Data Practices Act.

XIII. STATE ANTI-DISCRIMINATION STATUTE

The Minnesota Human Rights Act ("MHRA"), Minn. Stat. §§ 363A.01 et seq., provides inter alia, that no employer may discriminate based on an individual's race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local [Human Rights] commission, disability, sexual orientation, or age. Minn. Stat. §§ 363A.01 et seq.

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A. Employers/Employees Covered

The express language of the Act states that any “labor organization, employer, or employment agency” is covered by the unfair employment practices provisions of the Act. Minn. Stat. § 363A.08. The MHRA applies to all employers who have at least one employee. Minn. Stat. § 363A.03, Subd. 16.

B. Types of Conduct Prohibited

The Act is divided into individual sections that enumerate types of conduct prohibited in different contexts. In the employment context, the Act provides as follows:

Except when based on a bona fide occupational qualification, it is an unfair employment practice:

(1) For a labor organization, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, familial status, disability, sexual orientation, or age,

(a) to deny full and equal membership rights to a person seeking membership or to a member;

(b) to expel a member from membership;

(c) to discriminate against a person seeking membership or a member with respect to hiring, apprenticeship, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment; or

(d) to fail to classify properly, or refer for employment or otherwise to discriminate against a person or member.

(2) For an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, familial status, membership or activity in a local commission, disability, sexual orientation, or age,

(a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or

(b) to discharge an employee; or

(c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

(3) For an employment agency, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, familial status, disability, sexual orientation, or age,

(a) to refuse or fail to accept, register, classify properly, or refer for employment or otherwise to discriminate against a person; or

- (b) to comply with a request from an employer for referral of applicants for employment if the request indicates directly or indirectly that the employer fails to comply with the provisions of this chapter.
- (4) (a) For an employer, employment agency, or labor organization, before a person is employed by an employer or admitted to membership in a labor organization, to
- (1) require or request the person to furnish information that pertains to race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age; or, subject to section 363A.20, to require or request a person to undergo physical examination; unless for the sole and exclusive purpose of national security, information pertaining to national origin is required by the United States, this state or a political subdivision or agency of the United States or this state, or for the sole and exclusive purpose of compliance with the public contracts act or any rule, regulation, or laws of the United States or of this state requiring the information or examination. A law enforcement agency may, after notifying an applicant for a peace officer or part-time peace officer position that the law enforcement agency is commencing the background investigation on the applicant, request the applicant's date of birth, gender, and race on a separate form for the sole and exclusive purpose of conducting a criminal history check, a driver's license check, and fingerprint criminal history inquiry. The form shall include a statement indicating why the data is being collected and what its limited use will be. No document which has date of birth, gender, or race information will be included in the information given to or available to any person who is involved in selecting the person or persons employed other than the background investigator. No person may act both as background investigator and be involved in the selection of an employee except that the background investigator's report about background may be used in that selection as long as no direct or indirect references are made to the applicant's race, age, or gender; or
- (2) seek and obtain for purposes of making a job decision, information from any source that pertains to the person's race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age, unless for the sole and exclusive purpose of compliance with the public contracts act or any rule, regulation, or laws of the United States or of this state requiring the information; or
- (3) cause to be printed or published a notice or advertisement that relates to employment or membership and

discloses a preference, limitation, specification, or discrimination based on race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age.

- (b) Any individual who is required to provide information that is prohibited by this subdivision is an aggrieved party under 363A.06, subdivision 4, and 363A.28, subdivisions 1 to 9.

Minn. Stat. § 363A.08, Subds. 1-4. This section of the Act also discusses the prerequisites and scope of an employer's duty to make "reasonable accommodations" for persons with disabilities. *Id.* The Act broadly prohibits discrimination in employment decisions based on age. Specifically, "[t]he prohibition against unfair employment ... based on age prohibits using a person's age as a basis for a decision if the person is over the age of majority." Minn. Stat. Ann. § 363A.03. As a result, an employer cannot hire older workers simply because of their age. *ACE Elec. Contractors, Inc. v. Int'l Bhd. of Elec. Workers*, 414 F.3d 896 (8th Cir. 2005). Therefore, any decision made based upon a person's age, whether it be old or young, is impermissible.

The ACT also prohibits sexual harassment, which is defined as unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature if:

- (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment, public accommodations or public services, education, or housing;
- (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment, public accommodations or public services, education, or housing; or
- (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.

Minn. Stat. § 363A.03, subds. 13, 43; 363A.08 subd. 2.

C. Administrative Requirements

A person aggrieved under the MHRA need not exhaust any administrative remedies before pursuing a civil claim. Minn. Stat. § 363A.28. Instead, any such person may choose to bring a civil action directly to the district court, or may file a charge with the Commissioner of the Department of Human Rights. Minn. Stat. § 363A.33. An aggrieved person must file a charge or civil action within one year after the occurrence or practice of discrimination takes place. Minn. Stat. § 363A.28, Subd. 3. However, "[t]he running of the one-year limitation period is suspended during the time a potential charging party and respondent are voluntarily engaged in a dispute resolution process involving a claim of unlawful discrimination under this chapter, including arbitration, conciliation, mediation or grievance procedures pursuant to a collective bargaining agreement or statutory, charter, ordinance provisions for a civil service or other employment system." Minn. Stat. Ann. § 363A.28.

If an aggrieved person chooses to file an administrative claim, that person may additionally bring a civil action within 45 days after receipt of notice that the Commissioner has dismissed the charge, or after notice that the Commissioner has reaffirmed the determination of “no probable cause” or, if within 45 days after filing a charge, a hearing has not been held. Minn. Stat. § 363A.33, Subd. 1.

Employees releasing or waiving rights under the MHRA must generally be given 15 days after execution to rescind the release or waiver. Minn. Stat. § 363A.31.

D. Remedies Available

An employer found to have violated MHRA can be assessed a civil penalty by the Commissioner, *Giuliani v. Stuart Corp.*, 512 N.W.2d 589 (D. Minn. 1994), or may be liable to the plaintiff for damages in a civil action. Minn. Stat. Ann. § 363A.29, Subd. 4. Civil damages may be trebled under the MHRA, and compensatory damages are uncapped *Id.* Punitive damages are also available, but are capped at \$25,000.

Additionally, in any action or proceeding brought pursuant to § 363A.33, the court, in its discretion, may allow the prevailing party its reasonable attorneys’ fee as part of costs. In any case brought by the Department, the court shall order a respondent who is determined to have engaged in an unfair discriminatory practice to reimburse the Department and the Minnesota Attorney General (which prosecutes cases brought in the Department’s name) for all appropriate litigation and court costs expended in preparing for and conducting a hearing, unless payment of the costs would impose a financial hardship on the respondent. Appropriate costs include, but are not limited to, the costs of services rendered by the Attorney General, private attorneys if engaged by the Department, court costs, court reporters, and expert witnesses as well as the costs of transcripts and other necessary supplies and materials. Minn. Stat. § 363A.33, Subd. 7.

E. The Women’s Economic Security Act (“WESA”).

WESA is a comprehensive employee protection law designed to protect and promote opportunities for women in the workplace. WESA amended certain aspects of the MHRA, as well as other state laws. Specifically, WESA amended the MHRA to add “familial status” as a protected class. Minn. Stat. § 363A.08. Additionally, WESA amended the MHRA to require employers (1) with 40 or more employees, and (2) that seeks state contracts of over \$500,000, to file an equal pay certificate, certifying

- (1) that the business is in compliance with Title VII of the Civil Rights Act of 1964, Equal Pay Act of 1963, Minnesota Human Rights Act, and Minnesota Equal Pay for Equal Work Law;
- (2) that the average compensation for its female employees is not consistently below the average compensation for its male employees within each of the major job categories in the EEO-1 employee information report for which an employee is expected to perform work under the contract, taking into account factors such as length of service, requirements of specific jobs, experience, skill, effort, responsibility, working conditions of the job, or other mitigating factors;
- (3) that the business does not restrict employees of one sex to certain job classifications and makes retention and promotion decisions without regard to sex;
- (4) that wage and benefit disparities are corrected when identified to ensure compliance with the laws cited in clause (1) and with clause (2); and

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- (5) how often wages and benefits are evaluated to ensure compliance with the laws cited in clause (1) and with clause (2).

Minn. Stat. § 363A.44. Covered employers are also required to identify its method in setting compensation and benefits for employees. *Id.*

WESA also created a private cause of action for injunctive relief damages and attorney fees, Minn. Stat. §181.944, for employees against their employer for violations of the following new or amended provisions of Minnesota law, among others: Nursing Mothers, Minn. Stat. §181.939; Pregnancy Accommodations, Minn. Stat. §181.9414; Pregnancy and Parental leave, Minn. Stat. §181.941; and Wage Disclosure Protection, Minn. Stat. § 181.172.

XIV. STATE LEAVE LAWS

Note that Minneapolis, St. Paul and Duluth have passed municipal leave laws that may augment leave rights for applicable employees.

A. Jury/Witness Duty

No employee may be discharged because that employee receives a summons, serves as a juror, or attends court for prospective jury service. Minn. Stat. § 593.50, subd. 1. An employer who violates this provision is guilty of criminal contempt and upon conviction may be fined not more than \$700 or imprisoned not more than six months, or both. *Id.*, subd. 2. If an employer discharges an employee in violation of this provision, the employee may bring a civil action within 30 days for recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee. Damages recoverable shall not exceed lost wages for six weeks. An employee who prevails shall be allowed a reasonable attorney's fee fixed by the court. *Id.*, subd. 3.

An employer must allow a victim of or witness to a crime, who is subpoenaed or requested by the prosecutor to attend court for the purpose of giving testimony, reasonable time off from work to attend those proceedings, and must also allow a victim of a violent crime, as well as his or her spouse or immediate family member, reasonable time off from work to attend criminal proceedings related to the victim's case. Minn. Stat. § 611A.036. Employers may not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment, because the employee took reasonable time off from work to attend a criminal proceeding pursuant to this section.

B. Voting

All employees must be given time off without loss of pay to appear at their polling place, cast a ballot and return to work on the day of a regularly scheduled state primary or general election, an election to fill the vacancy in the office of a United States Senator, United States Representative, State Senator or State Representative, or a Presidential Primary. Minn. Stat. § 204C.04.

C. Family/Medical Leave

The Minnesota Parental Leave Law provides that an employer with 21 or more employees must grant an unpaid leave of absence to an employee who is a natural or adoptive parent in conjunction with the birth or adoption, prenatal care, or incapacity due to pregnancy, childbirth, or related health conditions.

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The length of the leave shall be determined by the employee, but may not exceed twelve weeks, unless agreed to by the employer. Minn. Stat. §181.941.

An employee returning from a leave of absence under section 181.941 is entitled to return to employment in the employee's former position or in a position of comparable duties, number of hours, and pay. Minn. Stat. § 181.942.

The Minnesota Sick Leave Benefits - Care of Relatives law provides that an employee may use personal sick leave benefits provided by the employer for absences due to an illness of or injury to the employee's child (defined as biological child, stepchild, or foster child), adult child, spouse, sibling, parent, grandparent, stepparent, mother-in-law, father-in-law, or grandchild for such reasonable periods as the employee's attendance may be necessary, on the same terms the employee is able to use sick leave benefits for the employee's own illness or injury. Minn. Stat. § 181.9413. An employee may also use personal sick leave benefits for "safety leave," which is leave for the purpose of providing or receiving assistance because of sexual assault, domestic abuse, or stalking. An employer may limit the use of an employee's safety leave and/or personal sick leave benefits for relatives to no less than 160 hours in any 12-month period, but this limit does not apply to absences due to the illness or injury of a child. The law does not require that employers provide employees sick leave benefits, either paid or unpaid, but if they do, they must permit employees to use their benefits in accord with the law.

An employer with 20 or more employees shall grant up to 40 hours of paid leave to an employee who seeks to donate an organ or bone marrow, and may not retaliate against an employee for requesting or obtaining an organ or bone marrow donation leave. Minn. Stat. §§ 181.945, 181.9456.

An employer with one or more employee must provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child. Minn. Stat. § 181.939. The break time must, if possible, run concurrently with any break time already provided to the employee. The employer must make reasonable efforts to provide a room or other location, in close proximity to the work area, other than a toilet stall, where the employee can express milk in privacy.

An employer with 21 or more employees must grant an employee leave of up to a total of 16 hours during any 12-month period to attend school conferences or school-related activities related to the employee's child, provided the conferences or school-related activities cannot be scheduled during non-work hours. Minn. Stat. § 181.9412. The employer is not required to pay the employee during the leave, but the employee may substitute any accrued vacation leave or other appropriate paid leave for any part of the leave.

D. Pregnancy/Maternity/Paternity Leave

See "Family/Medical Leave" above. Additionally, employers must provide reasonable accommodations to employees for health conditions related to pregnancy or childbirth unless doing so would constitute an undue hardship. Minn. Stat. § 181.9414. The following accommodations cannot be excused by an undue hardship: more frequent restroom, food, and water breaks; seating; and limits on lifting over 20 pounds.

E. Day of Rest Statutes

Section 168.275 of the Minnesota Statutes prohibits any person from carrying on or engaging in the business of buying, selling, exchanging, dealing in, or trading in new or used motor vehicles on Sunday.

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F. Military Leave

No employee may be discharged because of membership in the military services, or be hindered or prevented from performing any military service that the employee may be called upon to perform by proper authority, or be dissuaded from enlistment in the military service. Minn. Stat. § 192.34.

Section 192.261 of the Minnesota Statutes provides for a leave of absence without pay for public employees who are called to military duty, and also addresses their reinstatement rights.

An employer shall grant a leave of absence without pay to an employee for time spent rendering service as a member of the civil air patrol on the request and under the authority of the state or any of its political subdivisions unless the leave would unduly disrupt the operations of the employer. Minn. Stat. § 181.946.

An employer must provide up to 10 working days of an unpaid leave of absence for an employee whose immediate family member, as a member of the U.S. armed forces, has been injured or killed while engage in active service. Minn. Stat. § 181.947.

An employer may not discharge or otherwise take adverse action against any employee because of the membership of that employee's spouse, parent, or child in the military services. Minn. Stat. § 192.325. An employer also may not discharge, take adverse employment action against, or otherwise hinder an employee from attending the following kinds of events relating to the military service of the employee's spouse, parent, or child, to which the employee is invited or otherwise called on to attend by military authorities: (1) departure or return ceremonies for deploying or returning military personnel or units; (2) family training or readiness events sponsored or conducted by the military; or (3) events held as part of official military reintegration programs. The employer must not compel, but may allow, the employee to use accumulated unused vacation for such events.

XV. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage in State

With limited exceptions, Minnesota's minimum wage, effective January 1, 2021, is \$8.21 an hour for small employers and \$10.08 an hour for large employers. A large employer is defined as any enterprise whose annual gross volume of sales made or business done is not less than \$500,000. Minn. Stat. § 177.24, subd. 1(1). A small employer is defined as any enterprise whose annual gross volume of sales made or business done is less than \$500,000. *Id.*, subd. 1(2).

Minneapolis has adopted a local minimum wage ordinance that applies to employees who work at least two hours per week within city limits. Effective July 1, 2021, employers of more than 100 employees must pay \$14.25 per hour and employers of 100 or fewer employees must pay \$12.50 per hour. The number of employees is calculated based on all locations, not just those within Minneapolis boundaries.

The city of St. Paul has also adopted a local minimum wage ordinance. Like its Minneapolis counterpart, it applies to employees who work at least two hours per week within city limits. Effective July 1, 2021, employers with more than 10,000 employees must pay \$12.50 per hour; employers with anywhere between 101 and 10,000 employees must pay \$12.50 per hour; employers between 6 and 100 employees must pay \$11.00 per hour; and employers with 5 or fewer employees must pay \$10.00 per hour. These rates increase over time depending on the size of the employer.

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B. Deductions from Pay

Minnesota employers may not make deductions from wages except as authorized by statute. Minn. Stat. § 177.24, subd. 4. With written authorization, employers may deduct the following: union dues; certain insurance premiums; group annuities; and certain contributions. Minn. Stat. § 181.06 subd. 2. In most cases, an employer also may deduct uniform and equipment expenses up to \$50.00 (to the extent the deduction does not reduce the employee's wages below the minimum wage). Minn. Stat. § 177.24, subd. 4.

Employers may not deduct for the value of lost, stolen or damaged property, or for most other claimed debts without an authorization completed after the debt has occurred. Minn. Stat. § 181.79. The only exceptions to this rule are (1) a collective bargaining provision to the contrary exists, (2) a disciplinary rule for commissioned salespersons premised on errors or omissions in job performance, and (3) a voluntary authorization for loan installment payments. *Id.*

C. Overtime Rules

With certain, narrow exceptions, no employer may employ an employee for a workweek longer than 48 hours, unless the employee receives compensation for employment in excess of 48 hours in a workweek at a rate of at least 1-1/2 times the regular rate at which the employee is employed. Minn. Stat. § 177.25. Given that overtime under the federal Fair Labor Standards Act (FLSA) applies to hours beyond 40 in a workweek, Minnesota's overtime requirement only impacts employees not covered by the FLSA.

D. Time for Payment Upon Termination

Employers must pay terminated employees all unpaid wages within 24 hours of a demand. Minn. Stat. § 181.13. Employees who resign must be paid all unpaid wages on the next regularly scheduled payday, unless (1) the next payday is less than five calendar days after the employee's last day, the employer may pay on the following regularly scheduled payday so long as the total post-employment period does not exceed 20 days, or (2) a collective bargaining period dictates a different result. Minn. Stat. § 181.14.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in Workplace

Minnesota's Clean Indoor Act prohibits smoking in virtually all places of employment. The ban covers "any indoor area at which two or more individuals perform any type of a service" for payment and includes hallways, restrooms, elevators, lounges, auditoriums, employee cafeterias, and other shared office areas (e.g. areas containing photocopying equipment). The ban also includes vehicles used in whole or in part for work purposes during hours of operation if more than one person is present, and private residences if used "exclusively and regularly" as a place of business with one or more on-site employees, or if the homeowner uses the area "exclusively and regularly" to meet with patients, clients, or customers. The statute was amended in 2014 to regulate use of electronic cigarettes in certain government buildings or those licensed by the commissioners of health or human services, and allows private businesses to regulate their use.

Employers are required to make the following "reasonable efforts" to prevent smoking in their places of employment: post appropriate signs; ask persons who smoke in prohibited areas to refrain from

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smoking and to leave if they refuse to do so; use lawful methods consistent with handling disorderly persons or trespassers for any person who refuses to comply after being asked to leave the premises; refrain from providing ashtrays and other smoking equipment; and refuse to serve noncompliant persons. Minn. Stat. Sec. 144.413 *et seq.*

B. Health Benefit Mandates for Employers

There is no state law requiring employers to offer group healthcare insurance to their employees, but if any health insurance is offered, Minnesota's insurance laws require policies to provide a minimum level of benefits, cover certain benefits (mandated benefits are found at Minn. Stat. Secs. 62A and 62Q), and give employees the right to continue group coverage or to convert to an individual policy if the employee leaves the group. Minnesota's mandated benefits, continuation, and conversion provisions do not apply to health plans in which the employer pays all benefits without the proceeds of any insurance policy.

C. Immigration Laws

Contractors or subcontractors of the State who are awarded contracts exceeding \$50,000 are required to use the federal E-Verify system to verify employee work eligibility. Minn. Stat. Sec. 16C.075.

D. Right to Work Laws

Minnesota does not have a "Right to Work" law.

E. Lawful Off-duty Conduct (including lawful marijuana use)

The Minnesota Lawful Consumable Products Act prohibits employers from refusing to hire an applicant or from disciplining an employee because that person engages in the use or enjoyment of lawful consumable products (including tobacco) off the employer's premises during non-working hours. An employer may, however, restrict the use of lawful consumable products by employees during non-working hours if the restriction relates to a bona fide occupational requirement, is necessary to avoid a conflict or an apparent conflict of interest with any of the employee's job responsibilities, or is part of a chemical dependency or treatment program. Employers may also make distinctions between employees as to cost of insurance or health coverage based upon the employee's use of lawful consumable products, so long as the difference in costs reflects the actual cost difference to the employer. Minn. Stat. § 181.938, Subd. 2-3.

Minnesota's THC Therapeutic Research Act ("TTRA") was amended in 2014 to provide general state criminal and civil protections to patients enrolled in a state registry program to use or possess medical marijuana, and registered caregivers who possess marijuana. Registry participation requires certification by a health care practitioner that a patient has been diagnosed with one of nine qualifying medical conditions, or another medical condition or treatment approved by the Minnesota commissioner of health. Only marijuana use delivered via liquids, pills or a vaporized delivery method using liquid or oil is protected. Minn. Stat. Secs. 152.22–152.37

With a few exceptions, the Act directly prohibits employers from discriminating against program participants. It prohibits employers from discriminating against or penalizing a person with respect to hiring or terms and conditions of employment based on (a) status as a patient enrolled in the state registry, or (b) "a patient's positive drug test" unless the patient used, possessed, or was impaired by medical marijuana

on employer premises or during hours of employment - unless a failure to take adverse action would violate a federal law or regulation or cause an employer to lose a monetary or licensing benefit under federal law or regulation. Minn. Stat. Sec. 152.32, Subd. 3(c).

The Act also provides that an employee who is required to undergo employer drug testing pursuant to Minnesota's workplace drug testing law can present verification of enrollment in the patient registry as part of the employee's explanation of a positive test result. Minn. Stat. Sec. 152.32, Subd. 3(d).

F. Gender/Transgender Expression

The Minnesota Human Rights Act, Minn. Stat. Sec. 363A.03, discussed above, includes gender expression in the definition of sexual orientation. The statute provides: "Sexual orientation' means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness. 'Sexual orientation' does not include a physical or sexual attachment to children by an adult." Minn. Stat. Sec. 363A.03, Subd. 44 (emphasis added). Therefore, Minnesota prohibits discrimination on the basis of gender expression.

G. Other Key State Statutes

1. No physician, nurse, or other person shall be discharged, suspended, demoted, or otherwise prejudiced or damaged by a hospital for refusing to perform or assist in the performance of an abortion. Minn. Stat. Sec. 145.42, Subd. 2.
2. No employee may be discharged or threatened with discharge for seeking workers' compensation benefits, and any employer engaging in such conduct, obstructing workers' compensation benefits, or refusing to offer continued employment consistent with an employee's physical limitations is subject to liability. Minn. Stat. Sec. 176.82.
3. Among numerous employer unfair labor practices, some of which may be preempted by federal law, no employee may be discharged or discriminated against for (1) union activity; (2) signing or filing an affidavit, petition, or complaint; or (3) giving testimony under the Minnesota Labor Management Relations Act. Minn. Stat. Sec. 179.12.
4. No employer may discharge or interfere with an employee's employment for participating in a strike. Minn. Stat. Sec. 181.52.
5. No employee may be discharged based on age (18-70) under Minnesota's restrictions on mandatory retirement age. Minn. Stat. Sec. 181.81, Subd. 1.
6. No employee may be discharged, disciplined, threatened, discriminated against, or penalized for (1) reporting in good faith a violation, suspected violation, or planned violation of a statute, regulation or common law; (2) participating in an investigation, inquiry or hearing of a public body; or (3) refusing to participate in an activity objectively believed to be illegal, if the employee informs the employer

- the order is refused for that reason. Specific provisions apply also to health care and public employees. Minn. Stat. Sec. 181.932, Subd. 1.
7. No employer shall engage in any reprisal against an employee for declining to participate in contributions or donations to charities or community organizations, including contributions to the employer itself. Minn. Stat. Sec. 181.937.
 8. Employees have a right to review or obtain copies of their personnel files, and may submit responses to documents contained in that file. Minn. Stat. Sec. 181.960 *et seq.*
 9. No employee may be retaliated against for requesting a review of their personnel records. Minn. Stat. Sec. 181.964.
 10. No employee may be discharged or discriminated against for filing a complaint, instituting an inspection or proceeding, or testifying in a proceeding under the state Occupational Safety and Health Law ("OSHA"). Minn. Stat. Sec. 182.654, subd. 9.
 11. An employee who gives at least 10 days' written notice must be allowed unpaid absence from work to attend any meeting of the state central committee or executive committee of a major political party if the employee is a member of the committee, or to attend any convention of major political party delegates (including meetings of official convention committees) if the employee is a delegate or alternate delegate to that convention. No penalty or deduction from salary or wages other than for the actual time of absence is allowed, and a violation of this section by an employer is a misdemeanor. Minn. Stat. Sec. 202A.135.
 12. Employers may not inquire into or consider an applicant's criminal history until the applicant has either been selected for an interview or received a conditional offer. The prohibition applies both to criminal background checks and to inquiries of the applicant regarding criminal history. This statute does not apply to applicants required by state or federal law to be pre-screened via criminal background checks. Minn. Stat. Sec. 364.021.
 13. No employer may discharge or otherwise discipline an employee as a result of an earnings garnishment. Minn. Stat. § 571.927, Subd. 1.
 14. Any employee who is required to report child abuse may not be retaliated against if the employee, acting in good faith, reports such abuse. The statute creates a rebuttable presumption that any adverse action taken within 90 days of a covered report is retaliatory. Minn. Stat. Sec. 626.556, Subd. 4a.
 15. Employers must provide each employee with a written notice at the start of the employment. The notice must include employment status, employment term, exemption from minimum wage or over time, scheduled pay days, days in pay period, date of first payment, pay rate, allowances, PTO, deductions, and the

employer's legal and operating name, address, and phone number. Minn. Stat. Sec. 181.032, Subd. b.