

Legislative Action Promoting Fairness at Work



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Introduction

After the last election, the Minnesota Legislature has taken a constructive and affirmative approach to addressing a number of workplace-related issues that have persisted, if not worsened, in the past decade. The two most prominent examples of the Minnesota Legislature's corrective action concern amendments to address the Minnesota Supreme Court's misapplication of the law regarding whistleblowers and employees seeking to recover unpaid compensation. Another important piece of legislation follows in the wake of the Enforcement Guidance issued by the United States Equal Employment Opportunity Commission ("EEOC") as to the use of criminal background checks in making hiring decisions. These and related actions by the Minnesota Legislature this past term provide a solid foundation for promoting further justice at work for all employees.

I. The Enhanced Protection for Whistleblowers

At the end of the last legislative session, Minnesota Governor Mark Dayton signed into law transformative amendments that expand the scope of coverage for whistleblowers by statute.

This is an exceptional development at a time when whistleblowers are increasingly under attack. President Barack Obama has prosecuted more whistleblowers than all other Presidents combined, and the Obama Administration has done so by advancing novel theories to employ little used statutory provisions in extremely aggressive ways.¹

As part of the crackdown, the Obama Administration has also resorted to spying on investigative journalists who are believed to have communicated with whistleblowers. A recent documentary, "War on Whistleblowers," offers a powerful accounting of the troubling dynamic that confronts the nation.

When assessing the role of whistleblowers, it is important to recall the practical reality that employees are often the first to learn about conduct that threatens public safety and the common interest. Allowing employers or others to retaliate against such employees for reporting unsafe or

other unlawful conduct undermines transparency and, therefore, accountability in the public and private sectors alike. Accordingly, the Minnesota Legislature and Governor Dayton did the right thing by correcting the improper limitations on whistleblower protections that the Minnesota Supreme Court had created through a series of opinions.²

Under the recently amended law, both public-sector and private-sector employees are now protected when they in good faith report – verbally or in writing – any actual or apparent violation of a legislatively, administratively, or judicially established standard by the employer or a third party.³ In that regard, good faith reports include anything that is not akin to fraud.⁴

Among other things, this means that employees are protected when making reports even if doing so is part of their job.⁵ Moreover, the amended law protects those who report anticipated violations.⁶ Significantly, an employee needs not be fired or suffer other economic loss to experience adverse action.⁷ Retaliation for purposes of a whistleblower claim is any "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."⁸

An employer who violates the law, as amended, will face a jury award with the possibility for substantial emotional distress and economic damages as well as the potential for punitive damages.⁹ Furthermore, that employer will be ordered to pay any such employee's reasonable attorney's fees and litigation costs – on top of the employer's own attorney's fees and litigation costs.¹⁰ Going forward, then, whistleblowers should be respected and heeded rather than targeted for retaliation and discharge.

II. The Restoration of a Vital Vehicle for Recovering Unpaid Compensation

Governor Dayton also recently signed into law amendments to the Minnesota Payment of Wages Act¹¹ to confirm that the statute enables employees to recover unpaid compensation – as well as

statutory penalties, attorney's fees, and litigation costs – which employees have earned but remain unpaid.

The legislative amendments make clear that the legal obligation to pay, and therefore the ability to recover, is established “by law, including any applicable statute, regulation, rule, ordinance, government resolution or policy, contract, or other legal authority.”¹² Notably, the duty to pay, and the ability to recover, can be demonstrated by contracts to which employees are not parties – such as contracts between employers and the government.¹³

A unanimous Minnesota House of Representatives and a nearly unanimous Minnesota Senate voted in favor of these vital amendments. Such virtual unanimity in times of increasing partisanship is all the more striking because the legislative action effectively overruled a recent opinion issued by 4 Justices of the Minnesota Supreme Court.

In *Caldas v. Affordable Granite & Stone, Inc.*, the 4-Justice majority essentially held that the Minnesota Payment of Wages Act did not provide

a basis to recover earned, but unpaid, compensation through court action.¹⁴

The 4 Justices reached this conclusion despite the fact that, as the State of Minnesota confirmed on page 5 of its *amicus curiae* submissions to the Minnesota Supreme Court, for nearly a century the Minnesota Payment of Wages Act has “provided employees with an independent cause of action to bring claims to recover unpaid wages.” The 4 Justices also evidently overlooked the submissions of *amicus curiae* business associations, which warned on page 4 of their Minnesota Supreme Court submissions about the adverse impact of not holding the employer in the case accountable: “all other contractors will be forced to choose between abiding by the law or violating it to remain competitive.”

This is an important victory for employees across Minnesota as well as for the integrity of the commercial regime and the rule of law generally.

III. A Second Chance for People with a Criminal Record

For years, people who served time for a crime they committed have had difficulty

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¹¹“Obama indicts Sixth Whistleblower under the Espionage Act,” *Government Accountability Project* (Apr. 5, 2012), <http://www.whistleblower.org/press/press-release-archive/2012/1892-obama-indicts-sixth-whistleblower-under-the-espionage-act>.

¹²See, e.g., *Kidwell v. Sybritic*, 784 N.W.2d 220 (Minn. 2010); *Kratzer v. Welsh Cos., LLC*, 771 N.W.2d 14 (Minn. 2009).

¹³Minn. Stat. § 181.931, Subds. 4, 6, as amended; Minn. Stat. § 181.932, Subd. 1, as amended.

¹⁴Minn. Stat. § 181.931, Subd. 4, as amended.

¹⁵*Id.*; Minn. Stat. § 181.932, Subd. 1, as amended.

¹⁶Minn. Stat. § 181.932, Subd. 1, as amended.

¹⁷Minn. Stat. § 181.931, Subd. 5, as amended.

¹⁸*Id.*

¹⁹Minn. Stat. § 181.935.

²⁰*Id.*

²¹Minn. Stat. §§ 181.13-.14, .171.

²²Minn. Stat. § 181.13(a), as amended; Minn. Stat. § 181.14, Subd. 1(a), as amended.

²³Minn. Stat. § 181.13(a), as amended; Minn. Stat. § 181.14, Subd. 2, as amended.

²⁴820 N.W.2d 826 (2012).

²⁵http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

²⁶The legislative amendments will be codified at Minn. Stat. § 364.021 and are currently accessed at https://www.revisor.mn.gov/bills/text.php?version=latest&session=1s88&number=SF0523&session_year=2013&session_number=0.

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finding steady employment that enables them to reenter society as productive contributors. One of the main ways that a person's criminal record has continued to limit life chances has been the box used, literally or figuratively, in the job-application process whereby an applicant has been compelled to disclose whether he or she has a criminal background.

Relying on an employment applicant's criminal history to make hiring decisions has been problematic for several reasons. First, it assumes that past mistakes indicate future conduct. Second, given the racial disparities at every step of the criminal justice process – as cogently analyzed by Michelle Alexander in *The New Jim Crow: Mass Incarceration In The Age Of Colorblindness* – use of the criminal background box can have a racially discriminatory effect regarding the access to good jobs and related opportunities.

Notably, the EEOC – the agency charged by Congress with interpreting and enforcing Federal employment and civil rights laws – recently issued Enforcement Guidance based on the conclusion that using criminal history as a means of screening out employment applicants can amount to discrimination and, therefore, should be done carefully – if done at all.

More recently, in the last legislative session, the Minnesota Legislature became one of the first States in the nation to enact a relatively comprehensive “Ban the Box” law.

The newly adopted statute prohibits employers from asking job applicants questions about their criminal background until, and only if, the employer is interviewing the applicants and/or making a conditional offer of employment. In taking such action, the Minnesota Legislature seems to have recognized that giving people a second chance is not only the right thing to do, it is also good for our communities and business overall.

CONCLUSION

While much of the judicial landscape has seemed bleak when it comes to employee rights, the Minnesota Legislature has boldly advanced the cause of workplace fairness through a number of statutory amendments and other vital legislative action. This kind of leadership by the Minnesota Legislature is as welcome as it is necessary. ▮

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