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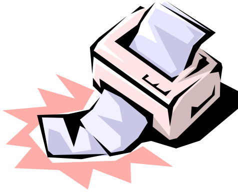

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NEW LAW CLARIFIES JOB REFERENCE PROTECTION FOR EMPLOYERS, BUT ADDS NEW BURDENS

by: Robin N. Kelleher

On August 1, 2004, a new Minnesota law will go into effect which defines additional protections and new obligations for employers who provide truthful job reference information on employees or ex-employees to a prospective new employer. The newly enacted statute provides further details and definition regarding information which can be disclosed, when an employee must authorize such disclosure, when copies of disclosures must also be sent to the employee, and when employers are subject to or immune from liability for disclosures.

Under the new law, an employer may, upon request, provide the following information about an employee or ex-employee to a prospective employer or employment agency:

1) Dates of employment;

2) Pay history;

3) Job description and duties;

4) Training and education provided by the employer; and,

5) Facts related to acts of violence, theft, harassment, or illegal conduct documented in the employee's personnel record if those acts resulted in disciplinary action or resignation, and any written response by the employee.

Disclosure of the employee acts listed in number 5 above must be made in writing and copies must be sent to the employee at the same time as the prospective employer.

The following information may also be provided to the prospective employer (or agency), but only if the employee or ex-employee provides written authorization:

1) Written performance evaluations and employee responses contained in the employee's personnel file;

2) Written disciplinary warnings and actions and the employee's response in the five years prior to the date of authorization contained in the personnel file; and,

3) Written reasons for separation from employment.

For these disclosures, the employer must also mail copies of the information to the employee and identify the recipient of the information.

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Employers who comply with the new law in their disclosures are protected from liability unless an employee or ex-employee can prove that:

1) The disclosed information was false and defamatory; and,

2) The employer knew or should have known the information was false and disclosed it with malicious intent to injure the employee.

The law also prohibits requesting employers or employment agencies from disclosing acquired information to others without the written authorization of the employee. Also, there are separate provisions in the law which apply only to public employers, school districts and charter schools.

Unfortunately, the new law does not add significant new protections from defamation lawsuits for employers and, in fact, it adds requirements for written authorization from employees for the disclosure of certain information which are unprecedented. The most significant advantage of the law for employers is probably the knowing falsity and malice requirements for proof of liability for defamation for covered disclosures. To minimize the risk of liability, prospective employers should require that all applicants provide written authorization for the employer to obtain and/or provide all employment-related information, including performance evaluations, disciplinary warnings and actions, and reasons for separation from employment, as a condition of employment. (The Seaton, Beck, Peters, Bowen & Feuss model Application form includes an advanced version of such an authorization.) Current employers, of course, must also get written authorization prior to releasing the above-described information. Employers who comply with the parameters of the new law will be better able to defend themselves if their actions are challenged, but only if they plan carefully prior to disclosure. Hopefully, the new law will also act as a deterrent to employees who feel they have been wronged simply because an employer passed along truthful, but adverse job reference information when requested by a prospective new employer.

A final word of caution. Do not try to adapt your reference policies based on the statute alone. The law does not provide absolute protection from defamation or other claims when disclosing employment information (even if the employee has authorized disclosure), and expressly states that employers are not shielded from liability if they violate the Minnesota Human Rights Act or other laws. The law also does not address several other strategies employers can utilize for responding to employee references, even apart from improved applications and information releases. Employers must consider these other legal issues when developing a policy on disclosing information. Employers with questions should call one of our attorneys prior to deciding how to respond to requests for job reference information. We would be happy to help with preliminary answers to your questions without obligation and can also assist you with the drafting or revision of applications, information disclosure releases and policy documents.

Our firm has new digs!!!

We've relocated to the building adjacent

to our former office and our new address is:

7300 Metro Boulevard, Suite 500

Minneapolis, MN 55439

Our phone, fax and email remain the same

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Seaton, Beck, Peters, Bowen & Feuss Bids a Fond Farewell to Attorney Barak Babcock

We are pleased to announce that Barak Babcock, an attorney with SBPB&F with whom many of you have worked, has accepted an in-house counsel position in Memphis with our client, Federal Express. In his new role, Barak will be responsible for defending Federal Express in employment litigation in Minnesota and Wisconsin, so we will certainly see a good deal of him as our firm continues to assist FedEx with these cases. We are very sad to lose Barak's experience, good judgment, hard work, zealous defense of clients and straight answers to legal and practical questions, as well as his good humor and consideration for all. We will miss Barak, but we wish our friend and colleague the best of luck in his new position.

Fax, E-mail or "None of the Above?"

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