

## **EMPLOYERS BEWARE: NEW WHISTLEBLOWER PROTECTION FOR EMPLOYEES**

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In the wake of the Enron and other corporate misconduct scandals, Congress passed the Sarbanes-Oxley Act in July of 2002. This statute, among other changes to financial, accounting and securities law requirements, provides protection for employees of publicly traded companies who "blow the whistle" on employers. The Act makes it unlawful for an employer, including the employer's officers, employees and agents, to take adverse employment action (retaliation) against any employee who provides information or participates in any investigation relating to conduct which the employee reasonably believes constitutes financial fraud or a violation of SEC rules by his/her employer.

### **Minnesota Whistleblower Update**

The Act also makes it a federal crime for public and private employers to retaliate against an employee for providing truthful information to a law enforcement officer which relates to any federal law violation or suspected violation. Employers, including supervisors responsible for employment actions, should be aware of these new civil and criminal causes of action and take appropriate action to comply with the new requirements and to manage their increase/risk of whistleblower claims.

In addition to the new federal law changes, and partly in response to the same scandals, state law "whistleblower" protections are expanding throughout the country. For example, the Minnesota Supreme Court has recently broadened protection for employees under the Minnesota Whistleblower Statute. That law makes it unlawful for an employer to take adverse employment action against an employee who, in good faith, reports a violation or a suspected violation of law to his employer, or to any governmental body or law enforcement official. Minn. Stat. § 181.932.

Although there is no explicit language in the Minnesota statute requiring that the violation or suspected violation of law be one that implicates public policy, Minnesota appellate courts have, in the past, consistently read that requirement into the law. For example, in *Vonch v. Carlson Cos.*, 439 N.W.2d 406 (Minn. App.) *rev. denied* (Minn. July 12, 1989), the Minnesota Court of

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Appeals concluded that the Whistleblower Statute did not protect an employee who reported alleged travel and expense improprieties because the alleged violation of law did not affect the general public.

The Supreme Court of Minnesota has now changed course on this issue. In *Anderson-Johanningmeier v. Mid-Minnesota Women's Center, Inc.*, 637 N.W.2d 270 (Minn. 2002), the court determined that, since the Whistleblower Statute did not contain an express public policy requirement, the court would not imply one by law. In *Anderson-Johanningmeier*, the employee reported to the DOL that her employer had unlawfully refused to pay another employee for vacation time. The court determined, even though public policy was not implicated, that the plaintiffs were entitled to protection under the statute.

While it seems clear that *Anderson-Johanningmeier* encourages Minnesota plaintiffs to bring whistleblower claims, there are still some "brakes" on such claims. The *Anderson* court noted that the statute still contains a requirement that the reported violation of law be made in "good faith." The court stated that the "good faith" requirement should serve "to limit the nature of actionable claims" against employers.

The risks for employers under state and federal whistleblower law, however, are considerable. The "good faith" requirements mean that a well intentioned employee can still bring claims even when no actual law violation is ever determined to exist. In addition, there are now, under the federal statute, possible criminal penalties for retaliation against an employee who asserts any violation of federal law (federal statutory and regulatory law fills several bookshelves!). Managers must be very careful to respond to any employee complaints which state or imply law violations with investigation, analysis and "appropriate action," just as in the case of discrimination and harassment complaints. Failure to do so may create liability where none otherwise would be found. To compound the risks, some employees try to assert "whistleblower" complaints in response to disciplinary action/performance review. In such cases, the employer must be careful to separate the disciplinary and complaint processes, so that they are neither paralyzed by false whistleblower complaints into withholding appropriate discipline or performance management, nor found liable because they appeared to ignore such complaints.

If you face employee complaints that may imply "whistleblower" claims, call us for help in responding, to minimize risks.

## Upcoming Seminars

- ▶ **October 9 & 10: *State and Federal Personnel Laws in Minnesota***, Bloomington, MN, contact Lorman Education Services at 715-833-3959 or us at 952-896-1700.
- ▶ **October 17** in Des Moines, IA; **November 7** in St. Cloud, MN; and **November 14** in Eau Claire, WI: ***Beyond HR 101: Advanced Human Resources Strategies***. Contact us at 952-896-1700.
- ▶ **October 24: *Basic Employment Law 2002***, St. Paul, MN, contact All District Legal at 651-228-0882 or us at 952-896-1700.
- ▶ **October 29: *Minnesota Personnel Law Update 2002***, [MN location to be determined], contact Council on Education in Management at 800-972-4494 or us at 952-896-1700.
- ▶ **November 12: *Family and Medical Leave Act in Minnesota***, Bloomington, MN, contact Lorman Education Services at 715-833-3959 or us at 952-896-1700

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