

- **Minnesota Puts a 'Patch' on the Unresolved Issues Surrounding the 2010 Tax Changes**
- **Early Settlement Programs Target Quick Resolution of Divorce/Custody Cases**
- **Team HDBOB Runs for Justice**
- **HDBOB Partners Among Minnesota's Best Lawyers of 2010**

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WORKERS' COMPENSATION

Don't Lose the Statutory Retirement Presumption: Carefully Review Stipulation Language

In *Tambornino v. Health Risk Management, et al.*, No. WC10-5045, 2010 WL 1292497 (W.C.C.A. March 18, 2010), the employee, Shannon Tambornino, sustained a work-related injury during her employment with Health Risk Management. The parties entered into a settlement of the employee's workers' compensation claims in which it was agreed that the employee was permanently and totally disabled as of June 25, 2002. The employer and insurer agreed to pay a lump sum to the employee in settlement of her claims for permanent total disability (PTD) benefits through September 30, 2005. With respect to ongoing PTD benefits, the employer and insurer agreed to "continue to pay to the employee permanent total disability benefits from and after September 30, 2005, as her condition may warrant, and shall continue to reduce said ongoing benefits on a dollar-for-dollar basis, by reason of her receipt of Social Security Disability Insurance benefits."

On January 6, 2010, the employer and insurer filed a Petition to Discontinue Permanent Total Disability Benefits on the basis that the employee had reached the age of 67 years and was presumed retired under Minn. Stat. § 176.101, subd. 4. This statute states that "permanent total disability shall cease at age 67 because the employee is presumed retired from the labor market."

In support of their petition, the employer and insurer argued that since their obligation to pay PTD benefits is governed by Minn. Stat. § 176.101, subd. 4, the settlement agreement implicitly incorporated the presumptive retirement provision of the statute. The employer and insurer also cited *Ruby v. Mueller Pipelines*, No. WC09-182, WC09-187 (W.C.C.A. Nov. 25, 2009). In *Ruby*, a settlement agreement was reached and language was included in the Stipulation stating specifically

CONTINUED ON PAGE 3

EMPLOYMENT LAW

How to Reduce Employer Risks After Termination

This is the third article in a three part series regarding potential employment law ramifications relating to the termination of employees. The Winter 2009 Quarterly discussed whether it was time to terminate; the Spring 2010 Quarterly discussed the termination process; and, this article discusses how employers can reduce risks after termination.

Most employers know there are steps they can take before terminating an employee that will reduce their risk of being sued for wrongful termination. Hopefully, the employer remembered to do the following:

- Document, Document, Document
- Engage in Progressive Discipline
- Avoid Creating Implied Contract Employment
- Apply Policies Equally Across the Board
- Take FMLA and ADA into Consideration Before Terminating

What some employers forget is that what they do after the termination can also affect their risk of a lawsuit. What an employer does and says after termination could give rise to a legal claim where previously the employee had none.

Increasingly, terminated employees are asking their former employers for a written explanation of the reason for their termination and a copy of their personnel records. Such requests are an early indication that trouble may be brewing. An employee who makes these requests usually has talked to a lawyer and is at least considering suing his or her former employer. Employers faced with one of these requests should promptly consult their own attorney.

Requests for the Reason for Termination—Minnesota Statute § 181.933 gives terminated employees the right to demand a written explanation

CONTINUED ON PAGE 3

ESTATE PLANNING & PROBATE

Minnesota Puts a 'Patch' on the Unresolved Issues Surrounding the 2010 Tax Changes

As discussed in the last *Quarterly*, effective January 1, 2010, the federal estate tax and generation-skipping tax were repealed for individuals dying during 2010 and for generation-skipping transfers made in 2010. This repeal left a gap in the tax code that has not been remedied by Congress. Currently the Internal Revenue Code provides that on January 1, 2011, the estate tax and generation-skipping tax will again be effective with rates up to 55% and an exemption amount of \$1,000,000 per individual.

Because Congress has failed to address this gap in the law between January 1, 2010 and December 31, 2010, many states have enacted legislation to deal with the currently non-existent 2010 federal estate and generation-skipping taxes. In Minnesota, this tax gap was filled by Minnesota Statute § 524.2-712, which was signed into law by Governor Pawlenty on May 13, 2010. This new statute provides that for wills and trusts of decedents who die in 2010, estate tax and generation-skipping formulas and provisions are deemed to refer to the tax law in effect on December 31, 2009, unless the will or trust manifests a contrary intent. A personal representative, trustee or other interested person may start a court proceeding to determine whether the decedent intended that a formula or provision be construed with post-2009 tax law. This new law is intended to "fill the gap" until there is either Congressional action during the duration of 2010 or until January 1, 2011 when the estate and generation-skipping taxes will again be effective.

Please contact us if you have any questions regarding how these taxes effect your estate plan.

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FAMILY LAW

Early Settlement Programs Target Quick Resolution of Divorce/Custody Cases

Divorce and custody disputes cause tremendous emotional and financial strains on families. Lengthy and expensive litigation only serves to polarize families as they navigate the difficult hurdles of the court system. Minnesota Family Courts recently implemented new early settlement programs to respond to this problem. These Early Neutral Evaluation Programs (ENEs) were designed to target the early resolution of cases by involving aggressive judicial participation from the initial filing of a case. This has led to a significant decrease in the time and expense families spend on court proceedings.

There are two types of ENEs: Financial Early Neutral Evaluations and Social Early Neutral Evaluations. At the initial hearing for a divorce (referred to as "Initial Case Management Conference") the Judge may refer the parties and their attorneys for a Financial Early Neutral Evaluation (FENE) if the parties have one or more unresolved financial issues. Likewise, the Judge may recommend that the parties and their attorneys attend a Social Early Neutral Evaluation (SENE) for resolution of custody and parenting time matters.

Both evaluations are voluntary and confidential. The parties must agree to submit to the process and meet with an evaluator to gain neutral feedback on their disputes. The cost that each party will pay towards the use of an evaluator is based on their respective incomes.

In a FENE, the parties or their attorneys select the evaluator from a panel of attorneys and accountants who have years of experience dealing with family financial issues. The evaluator will assess the financial issues, help the parties exchange relevant information, and propose potential settlement options.

In a SENE, the parties meet with a team of experienced Family Court Services staff to assess the important custody and parenting time issues in their case. The team then provides prompt feedback about each party's position and proposes settlement options. In both processes, a second meeting may be necessary.

The ENE process must be completed within 60 days from the Judge's referral of the case to the ENE program. If a full or partial settlement is reached during this process, the evaluators will communicate with the Judge for this limited purpose. Many judges support the use of these programs as a way to get to the heart of disputed issues without lengthy and expensive litigation.

Please feel free to contact us to discuss Financial and Social Early Neutral Evaluations, as well as other family law issues.



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Team HDBOB Runs for Justice

The Eighth Annual Race for Justice took place on April 25, 2010 and again Team HDBOB was there in full force. Although it was a rainy day, the weather did not stop Team HDBOB from enjoying the morning run around beautiful Nicollet Island in Minneapolis.

Proceeds from the Eighth Annual Race For Justice benefit law graduates through the Loan Repayment Assistance Program (LRAP) of Minnesota. By subsidizing education debts for dedicated, low-paid public interest attorneys, LRAP helps meet the legal needs of low-income Minnesotans across the state. (www.raceforjustice.org)

Congrats to Team HDBOB and all race participants and supporters!



EMPLOYMENT LAW CONTINUED FROM PAGE 1

of the truthful reason for their termination. The former employee must make the request in writing within 15 working days of the termination. The employer must respond to a proper request within 10 working days of receipt.

This request poses several risks for the employer. On one hand, the employer that does not respond may be liable for damages, a fine of up to \$750, and the former employee's attorney's fees if he or she prevails in a lawsuit under the statute. On the other hand, the employer's response could have unforeseen consequences. For example, if the former employee later sues for wrongful termination, an employer that listed only one reason for terminating may have a difficult time credibly bringing up other incidents or performance problems that contributed to the decision to terminate. Therefore, the decision of whether to comply with the request, as well as what to say in the response, should be carefully discussed with legal counsel.

Requests for Personnel Records—Minnesota Statute § 181.961 gives former employees the right to receive a copy of their personnel record. The former employee must make the request in writing and may request a copy once each year after separation from employment for as long as the employer maintains the employee's personnel record. The statute requires that the employer provide a free copy of the record within seven working days of receiving the request, or within 14 working days if the record is kept outside the state.

An employer that fails to provide a requested personnel record may be liable for damages, a fine of up to \$5,000, and the former employee's attorney's fees if he or she prevails in a lawsuit under the statute. Also, the employer may be barred from using the omitted personnel record as evidence at a trial or hearing involving the former employee.

Many employers mistakenly think that all they have to do to comply with a personnel record request is send the former employee a copy of his or her personnel file. The law requires that the employer provide a copy of the "personnel record," which is different from a "personnel file" and may include documents that were not kept in the employee's personnel file.

Minnesota law defines "personnel record" as:

any application for employment; wage or salary history; notices of commendation, warning, discipline, or termination; authorization for deduction or withholding of pay; fringe benefit information; leave records; and employment history with the employer, including salary and compensation history, job titles, dates of promotions, transfers, and other changes, attendance records, performance evaluations, and retirement record.

The statute contains only 10 exceptions to the definition of a "personnel record." If a document relating to a former employee does not fit within one of these exceptions, the employer may be required to provide the document to the former employee. The employer should review the exceptions with its attorney before responding to a current or former employee's request for their personnel record.

Silence is Golden—Another source of post-employment trouble, and frequently litigation, is employee references. Defamation lawsuits over the years have led many employers to stop or sharply curtail giving references. Also, there has been an emergence of fraudulent and negligent reference lawsuits brought by new employers against old employers claiming they relied on misleading and/or incomplete references and hired a bad employee.

As a general rule, employers should adopt a policy for responding to

WORKERS' COMP CONTINUED FROM PAGE 1

that the employee "shall be paid permanent total disability benefits pursuant to Minn. Stat. § 176.101, subd. 4." When the employer and insurer petitioned to discontinue benefits based upon the employee turning 67 years of age, the court in *Ruby* allowed the discontinuance because the parties had expressly incorporated the statutory retirement language into the Stipulation.

In *Tambornino*, however, the parties did not specifically incorporate the statutory retirement provisions of Minn. Stat. § 176.101, subd. 4 into the settlement agreement. The court found that the parties had waived the retirement presumption under Minn. Stat. § 176.101, subd. 4 by assenting to an alternate agreement in the Stipulation. The *Tambornino* Stipulation language provided that the employer and insurer would pay PTD benefits as the employee's condition warranted. The *Tambornino* case was distinguished from the *Ruby* case based upon this fact. Therefore, the court ruled that because the employer and insurer had contracted around the statutory protection provided to them under Minn. Stat. § 176.101, subd. 4, they were not allowed to discontinue PTD benefits to the employee based upon her reaching the age of 67.

Tambornino illustrates the importance of including an express reservation of rights under Minn. Stat. § 176.101, subd. 4 when drafting a Stipulation for Settlement in a claim for permanent total disability benefits. The Stipulation can certainly continue to contain language that allows a discontinuance of benefits sooner than age 67 based upon the employee's change in physical condition; however, specific language expressly reserving all rights under Minn. Stat. § 176.101, subd. 4 should be included. Including this language will secure the protection provided by the statutory retirement presumption.



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EMPLOYMENT LAW CONTINUED FROM PAGE 3

requests for information about current and former employees. The policy should prohibit employees from disclosing information about current or former employees and require that all inquiries be directed to a specific person within the company. In addition, as a general rule, the employer should not provide information about current or former employees unless the subject of the information request first signs a form authorizing the employer to provide the information and releasing the employer from liability for providing it.

Risk management does not end with the termination of employment. An employer that remains vigilant after termination can minimize many of its legal risks.



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HDBOB Partners Among Minnesota's Best Lawyers of 2010



Dave Odlaug



Bill Bratt



Mark Catron



Craig Nichols

With over 100 years of combined experience, three HDBOB partners—Dave Odlaug, Bill Bratt, and Craig Nichols were recognized for excellence in defending workers' compensation claims within The Best Lawyers in America publication. In addition, partners Bill Bratt and Mark Catron were also recognized for excellence in defending personal injury and product liability claims. Their selection was based upon voting by their peers. Who better to get a referral from than other lawyers? The voting attorneys were asked a simple question: "If you had a close friend or relative who needed a lawyer, and you couldn't handle the case yourself—for reasons of conflict of interest or time—to whom would you refer them?"

All four recognized HDBOB attorneys have devoted their careers to select areas of law, providing clients with knowledge and expertise. Their extensive experience allows them to quickly and accurately evaluate claims, identify possible third party claims, and provide powerful representation in negotiations or at trial.

Congratulations Dave, Bill, Mark and Craig!