

June 12, 2013

## Minnesota Legislature Modifies Whistleblower Statute

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On May 24, 2013, Minnesota Governor Mark Dayton signed into law a bill that the plaintiff's bar is likely to argue expands the scope of whistleblower protections for both public and private sector employees under the Minnesota Whistleblower Act ("MWA"). The bill, originally touted as a narrow expansion of protection afforded to certain state employees, adds new statutory definitions that apply to private employers as well.

Originally passed in 1987, the MWA prohibits employers from discharging, disciplining, threatening, or penalizing an employee in retaliation for making a good faith report of a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer, governmental body, or law enforcement official.<sup>1</sup> It also prohibits retaliation against an employee for participating in an investigation or hearing instigated by a public body, refusing an employer's order to violate the law, or reporting a situation regarding the quality of healthcare services provided by healthcare institutions.<sup>2</sup> If successful under the MWA, a plaintiff can recover damages, including wage loss and emotional distress, as well as attorney's fees and costs.

### Good Faith

The MWA did not previously define the term "good faith," but the Minnesota courts did so through case law setting forth the parameters for what constitutes a good faith report. Prior to the current amendment, courts required that an employee make a good faith report "for the purpose of exposing an illegality."<sup>3</sup> The statute now defines the term "good faith" as "any statements or disclosures" as long as the statements or disclosures are not knowingly false or made in reckless disregard of the truth.<sup>4</sup> It is likely that the plaintiff's bar will argue that this new definition protects any statement, regardless of whether the individual sought to "blow the whistle" on any wrongdoing, as long as the individual believed the statement to be true or the statement was not demonstrably false.

### Penalize

The new law also defines "penalize" as "conduct that might dissuade a reasonable employee from making or supporting a report, including post-termination conduct by an employer or conduct by

1 Minn. Stat. § 181.932, subd. 1(1).

2 Minn. Stat. § 181.932, subd. 1(2-4).

3 *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2002).

4 Minn. Stat. § 181.931, subd. 4.

an employer for the benefit of a third party.”<sup>5</sup> Prior to this amendment, Minnesota courts had held that an adverse employment action required a material change in the terms or conditions of employment, and had not adopted the “dissuade” standard enunciated by the U.S. Supreme Court in *Burlington Northern and Santa Fe Railway Co. v. White*.<sup>6</sup> The new definition of “penalize” appears to adopt the *Burlington Northern* standard and potentially expands adverse actions beyond those that result in a material change in the terms or conditions of employment.

The amendment also added new whistleblower protection for post-employment actions. Minnesota courts had previously held post-employment actions were not covered by the MWA because the statute only protects “employees” as defined in Minn. Stat. § 181.931, subd. 2.

## Report

The new law defines a “report” as any “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.”<sup>7</sup> By adding “planned violation of law,” we expect that the plaintiff’s bar will assert that whistleblower coverage now extends to situations in which the purported wrongdoing has not yet occurred. In addition, new protection may be afforded to employees who report unlawful conduct by anyone, rather than just employer conduct.

Additionally, the MWA now covers reports of suspected violations of common law as protected whistleblower conduct. This appears to be a substantial expansion of the scope of the statute. For example, the report of an alleged breach of a contract may now be considered protected conduct under the MWA.

## Implications for Employers

Plaintiffs will undoubtedly argue that the recent amendments to the MWA effectively overrule decades of Minnesota case law. Whistleblower retaliation cases have increased dramatically in the past decade, and the amendments may lead to even more whistleblower lawsuits. Employers should carefully investigate employee allegations of wrongdoing and document the steps taken in those investigations. Liability will continue to hinge on whether there was a causal connection between the report and the alleged adverse employment action. Strong documentation regarding both the investigation and the reasons for any adverse action against an employee will remain critically important in avoiding whistleblower liability in Minnesota.

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5 Minn. Stat. § 181.931, subd. 5.

6 548 U.S. 53 (2006).

7 Minn. Stat. § 181.931, subd. 6.