Ratwik, Roszak & Maloney, P.A.

444 Cedar Street, Suite 2100
St. Paul, Minnesota 55101

(612) 339-0060
Fax (612) 339-0038
www.ratwiklaw.com

PUBLIC SECTOR HR BASICS: FOR THOSE NEW TO PUBLIC SECTOR HUMAN RESOURCES

April 9-10, 2025

Ann R. Goering
arg@ratwiklaw.com

Erin E. Benson
eeb@ratwiklaw.com

Timothy A. Sullivan
tas@ratwilaw.com

Ratwik, Roszak & Maloney, P.A.
444 Cedar Street, Suite 2100
St. Paul, Minnesota 55101
(612) 339-0060

PLEASE BE ADVISED THAT THIS DOCUMENT IS INTENDED FOR GENERAL INFORMATION PURPOSES ONLY AND DOES NOT CONSTITUTE LEGAL ADVICE RELATIVE TO A SPECIFIC SITUATION.

TABLE OF CONTENTS

CHAPTER ONE: HIRING

SECTION I:
RECRUITING

I. Collective Bargaining Agreements: Check your language

A. As an employer, the County's goal is to hire the most qualified employee based on job-related factors. Because job preference in selection is an important subject to represented employees, however, some counties have negotiated different types of compromise language addressing selection for promotional and other County jobs:

Example A: **Relative Ability.** The employer retains the right to determine the employee's fitness for the position based on a described set of factors (e.g., relative ability, listing of job-related selection criteria such as education, job experience, job knowledge, attendance, etc.) and, all other factors being equal, greatest amount of seniority determines who gets the job.

Example B: **Sufficient Ability.** The employer negotiates away the option of comparing employees to other applicants, and agrees to a sufficient ability clause in their contracts, i.e., minimally meeting the job's qualifications entitles the most senior employee to the job.

B. A union and county employer may have agreed to some form of posting and bidding for lateral transfers before the vacancy is announced.

II. Appointing Authority: Who Is One?

A. It is important for the County to determine who in the County may exercise the appointment power as an "Appointing Authority." This determination is important so that the County may avoid creating contractual rights, disputes over statutory powers, and potential damages claims.

B. The County Board must designate which, if any, individuals may act as an Appointing Authority. In order to do so, the County Board should **explicitly determine by resolution** which positions have been delegated the power to hire, or otherwise possesses separate legal authority, whether

by rule, resolution or statute, to appoint without the approval of the County Board.

C. Clear delineation of authority to offer jobs will avoid potential claims that an applicant detrimentally relied on the promise of the job and possible damages claims against the County.

> **Example:** "Department Heads shall notify the County Board of position vacancies and must receive authorization prior to filling the vacancy except that a Department Head need not seek authorization to fill a vacancy caused by the termination of a probationary employee."

D. Each job description should identify the relevant Appointing Authority and state that the position will not be filled until final approval by that Authority. Notify all applicants through the written posting of the final Appointing Authority's power. This is important to avoid claims by applicants that the person interviewing them offered the applicant a job. See Application for Personnel Positions at the end of Chapter.

III. Affirmative Action: What You Cannot Do

A. The United States Supreme Court held that employers **cannot make hiring decisions** in favor of protected classes (such as gender, race, or national origin) based upon statistical disparities unless: 1) the employer can show that it actually discriminated against a particular class of individuals in the past; and 2) that the proposed action was narrowly designed to correct that past discrimination. See Ricci v. DeStefano, 557 U.S. 557, 579-80 (2009).

B. **Example A:** County A has no African American employees. Of the five finalists for a position, one is African American. While this candidate is slightly less qualified than two of the other candidates, the County wants to hire him because it will show improvement in racial diversity. The County has no evidence that is has discriminated against any group in the past.

> The County would be in violation of state and federal law if it hired the African American candidate unless the two more qualified candidates first were offered and turned down the job down.

C. **Example B:** Employer A recently was sued for failure to hire women into management positions over the past ten years. The Employer discovered through the litigation process that in fact, the former CEO had

discriminated against women. In response, Employer A decided to implement an aggressive affirmative action plan to hire more women and minorities.

After this new policy was established, Employer A had a vacancy in a management position. An Asian American male applied and was one of the finalists for the position. While this candidate is slightly less qualified than two of the other candidates, Employer A wants to hire him to combat its prior record of discrimination.

> Employer A would be in violation of state and federal law if it hired the Asian American candidate, as there is no evidence that Employer A ever discriminated against Asian Americans. Therefore, the hiring preference was not narrowly tailored to correct the past discrimination and is itself discrimination.

IV. Affirmative Action: What You Can Do

A. Place advertisements/postings in locations which may be more accessible to protected class groups to increase the number of protected class candidates in the applicant pool.

B. Contact local and regional organizations for protected class groups to notify them of vacancies or future opportunities for which their members might be interested.

C. Encourage qualified individuals within your organization to apply for the position, regardless of protected class status.

D. Consider using protected class members in advertising and recruiting materials.

V. Outline Your Selection Process: Make Several Important Determinations Before Reviewing Applications, or Even Posting the Vacancy

A. **Determine criteria** for ranking the applications **prior** to reviewing any of them. Ideally, the criteria for ranking and reviewing applications should be determined even before the position is posted or advertised. **Document the date** on which the criteria were set.

This is important to prevent challenges to the criteria on the grounds that the supervisor reviewed the applications and then set the criteria so that a

friend got the job or another person (with perhaps a surname that indicated national origin) did not.

B. **Determine in advance** the number of individuals who will be interviewed for the position. **Document the date** on which this decision was made.

For the same reasons as stated above, it is preferable to have proof that the number of people selected to be interviewed was determined in advance.

Example: An individual with a Spanish surname ranks 6th. The employer decides to interview five people.

C. **Set forth the criteria in writing** and base it upon the essential and nonessential functions of the job, placing greater weight on the essential functions. Use the job description (which should be current and accurate) as the basis for determining the criteria. Do not include any criteria that are not job-related.

It is important for all employers, and particularly public employers, to be able to set out a rational basis upon which job applications were ranked. This is important to protect against discrimination claims as well as challenges under veterans preference laws.

SECTION II:
POSTINGS AND RECRUITING MATERIALS

I. Postings, Advertisements and Recruiting Methods

You **Should** Include the Following in Job Postings/Advertisements:

A. An EEOC statement should be included.

B. The minimum qualifications for the job should be listed in both the posting and the advertisement and should be identified as such.

C. The advertisement should include the essential functions of the job and a brief overall description of the position. It should also include a statement that the complete job description is available in the personnel or other office. This is important to prevent later claims that the posting or advertisement description is the entire job description.

D. An employer must disclose in each posting the starting salary range, and a general description of all of the benefits and other compensation, including but not limited to any health or retirement benefits. If an employer does not offer a salary range, the employer must list a fixed pay rate. Minn. Stat. § 181.173.

E. Deadline for submission of completed job application.

F. The address and title of person to whom the application should be sent.

G. Name of person and phone number to be called for more information or to have an application mailed out.

H. When applications are mailed**, a copy of the job description should also be sent.** When an applicant comes in to fill out an application, **make it a practice of giving them a copy of the job description to him or her.**

I. **Reasonable Accommodation Notice:** Employers should include a reference in all postings and advertisements regarding where the applicant may call or write if the person needs a reasonable accommodation to complete a job application or attend an interview.

II. You **Should Not** include the following in job advertisements/postings:

1. Job advertisements or postings should not identify any preference, limitation, or specification based on protected class status, including:

   a. Age
   b. Gender (including transgender status)
   c. Marital status
   d. Number of dependents
   e. Religious affiliation or creed
   f. Whether the applicant was or is receiving public assistance
   g. Race or national origin
   h. Sexual orientation or affectional preference
   i. Pregnancy or familial status

   As used in the Human Rights Act, the prohibitions against discrimination on the basis of familial status protect: (1) any person who legally has children living with them, either as parents or guardians or with the permission of the parents or guardians; (2) individuals residing with and caring for others

who lack the ability to meet essential requirements for physical health, safety, or self-care; (3) pregnant women; and (4) any person who is in the process of securing legal custody of a child. Minn. Stat. § 363A.03, subd. 18.

j. Disability

Examples **not** to use:
- Able-bodied
- In good health
- Physically fit
- Recent college graduate

Including language related to any of the above categories could give rise to discrimination claims against the County.

Limited Exceptions:

Employers may use gender specific terms in a job posting if gender is a bona fide occupational qualification (BFOQ) for the position (i.e. a female corrections officer in a women's jail). Similarly, counties may use language related to other protected categories, if a BFOQ exists. This typically occurs in relation to physical ability.

Check with your attorney before making any determination that a BFOQ exists.

2. Do not include statements regarding job security, career opportunities, or permanent employment in any job advertisement or posting.

3. Do not make any statements in the advertisement that are potentially misleading.

4. Do have the posting/advertisement proofread by a second person to screen for errors or ambiguous language.

III. Posting

A. Post everywhere your union contracts require you to post.

B. For positions open to the public, consider posting in high-traffic areas (rather than the employee lunchroom) both within and outside the County

to attract applicants not currently employed by or affiliated with the County.

C. Advertise the job opening in widely-circulated periodicals or professional journals.

D. Ensure that any employment agencies being used are aware of the County's EEOC policy.

IV. Do Not Rely on the Following Recruitment Methods

A. **Word-of-Mouth Recruitment.** A County's reliance on word-of-mouth recruitment to fill job openings may have a disparate impact on a protected class and therefore may constitute discrimination under either Title VII of the Civil Rights Act or the Minnesota Human Rights Act. See Thomas v. Washington Cty. Sch. Bd., 915 F.2d 922, 925–26 (4th Cir. 1990) (holding that a school district's use of word-of-mouth recruiting disproportionately excluded the hiring of minority employees); see also Jenson v. Eveleth Taconite Co., 824 F.Supp. 847, 867 n.46 (D. Minn. 1993).

B. **Word-of-Mouth Referrals.** The recruitment method of word-of-mouth referrals has also been challenged as discriminatory because the applicants are likely to reflect the present workforce. If that workforce is, for example, mostly white males, then word-of-mouth referrals could reinforce the non-diverse nature of the workforce. See, e.g., EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 305 (7th Cir. 1991).

C. **Walk-Ins.** While this is appropriate in addition to newspaper advertisements and public postings, advertising a job opening only at the County's place of business and only accepting applications there may also have a disparate impact on a protected class. Employers should not require the applicant to pick up the application but should timely mail it to the person requesting it.

SECTION III:
VETERANS PREFERENCE IN HIRING

I. Definitions

A. Definition of Veteran

"A citizen of the United States or resident alien who has separated under honorable conditions from any branch of the armed forces of the United States after having served on active duty for 181 consecutive days or by reason of disability incurred while serving on active duty, or who has met the minimum active duty requirement…or who has active military service…certified by the United States Secretary of Defense as active military service and a discharge under honorable conditions must be issued by the secretary." Minn. Stat. § 197.447.

B. Definition of Disabled Veteran

For the purpose of the preference to be used in securing appointment from a competitive open examination, "disabled veteran" means "a person who has a compensable service-connected disability as adjudicated by the United States Veterans Administration, or by the retirement board of one of the several branches of the armed forces, which disability is existing at the time preference is claimed." Minn. Stat. § 197.455, subd. 6. For purposes of the preference to be used in securing appointment from a competitive promotional examination, "disabled veteran" means "a person who, at the time of election to use a promotional preference, is entitled to disability compensation under laws administered by the Veterans Administration for a permanent service connected disability rated at 50 percent or more." Id.

II. Excluded Positions

A. The hiring provisions of the VPA typically only apply to "competitive open" job openings. Minn. Stat. § 197.455, subds. 4, 5, and 6.

In this context, a "competitive open" job opening means that all interested persons are eligible to compete in an examination for the job. Thus, with one small exception, the hiring provisions do not apply to promotional positions or positions which are only posted internally pursuant to a union contract.

Veterans do not typically receive preference for internal-only processes. However, veterans with a disability rating of 50% or greater from injuries that occurred on or as a result of active duty, and received a passing score on the promotional exam, are entitled to five veterans preference points for ***their first promotion only***. Minn. Stat. § 197.455, subd. 5 ("There shall be added to the competitive promotional examination rating of a disabled veteran, who so elects, a credit of five points provided that (1) the veteran obtained a passing rating on the examination without the addition of the credit points; and (2) the veteran is applying for a first promotion after securing public employment."). This provision applies positions that are for internal candidates only.

B. The hiring provisions of the VPA do not apply to certain positions.

The hiring provisions of the VPA do not apply to the following positions: private secretary, superintendent of schools, one chief deputy of any elected official or head of a department, or any person holding a strictly confidential relation to the appointing officer. Minn. Stat. § 197.46(d).

Practice Tip: Minnesota Courts look at multiple factors for determining whether an individual counts as a department head. See, e.g., Schleck v. State, 442 N.W.2d 359, 362 (Minn. App. 1989). Generally speaking, however, department heads are in charge of their own staff, including having the authority to direct staff and make effective recommendations to the governing body regarding discipline and discharge.

C. The hiring provisions of the VPA currently apply to teachers. Minn. Stat. §§ 197.455, subd. 5a and 197.46.

D. The hiring provisions of the VPA do not apply to "occasional or temporary" employment situations. See Crnkovich v. Indep. Sch. Dist. No. 701, Hibbing, 142 N.W.2d 284, 286–87 (Minn. 1966) (holding that an extra carpenter who was hired during the summer months was only a temporary employee and not covered by the VPA); see also Op. Atty. Gen. No. 85-A (Sept. 23, 1964) (same).

Practice Tip: In light of the possible liability for failing to properly follow the Veterans Preference Act, it is important to clearly identify positions that are temporary and sporadic in the job description.

III. Administering the VPA in Hiring

The VPA requires Minnesota counties and other public employers to give veterans a preference that increase their odds of receiving an interview for an open position. The Act does not give veterans an "absolute preference" or require public employers to hire veterans. McAfee v. Dep't of Revenue, 514 N.W.2d 301, 305 (Minn. 1994).

A. The VPA requires public employers to utilize a 100-point system when selecting applicants to interview.

When filling a position by open competitive examination, public employers must use a 100-point system to assure that veterans' preference credit is uniformly implemented. Hall v. City of Champlin, 450 N.W.2d 613, 616 (Minn. App. 1990). The failure to do so may result in a challenge to public employer's the hiring decision, either in court or through the Bureau of Veterans' Affairs.

Exception for Minnesota School Districts Hiring Teachers. Minnesota school districts may choose not to employ a 100-point system for hiring teachers. If they do so, they must grant an interview to any veteran who applies for the teacher position and has the proper license. Minn. Stat. § 197.455, subds. 5a(a) and 5a(b). **This exception is not available to counties or other Minnesota public employers.**

B. Creating a 100-point Scale

The County Board and any designating appointing authority have broad discretion to determine what criteria will be considered in awarding the 100 points. Points may be based entirely on the job application, a written examination, an oral examination, or a combination of factors.

Practice Tip: Although not required by statute, counties should determine and record the minimum passing score and the basis for achieving that score in advance of receiving applications. The failure to do so may result in legal challenge to the hiring decision, either under the VPA, or on the grounds of illegal bias.

Sample Process: A County chooses to award up to 55 points for answers on the job application (up to 20 points for relevant education, up to 20 points for relevant experience, and up to 15 points for answers to other sections on the application). The County also chooses to award up to 25 points for answers on a written test

designed to measure applicable knowledge. The final 20 points are awarded based on applicants' answers in an oral examination designed to test applicants' responses to everyday situations they might encounter in the job. The County decides that a combined score of 85 represents a "passing rating" and that it will interview the five applicants with the highest passing score. The appointing authority documents these determinations, including the date on which they were made.

C. Awarding Veteran's Preference Points

1. A nondisabled veteran who receives a "passing rating" on the examination is entitled to have 10 points added to his or her score, if the veteran elects to do so. Minn. Stat. § 197.455, subd. 4.

2. A disabled veteran who receives a "passing rating" on the examination is entitled to have 15 points added to his or her score, if the disabled veteran elects to do so. Minn. Stat. § 197.455, subd. 5.

3. A disabled veteran who receives a "passing rating" on his examination in a competitive promotional examination may elect to a credit of five points when apply for his or her first promotion after securing public employment. Minn. Stat. § 197.455, subd. 5.

4. Veterans Preference may be used by the surviving spouse of a deceased veteran and by the spouse of a disabled veteran who because of the disability is unable to qualify. Minn. Stat. § 197.455, subd. 7.

Because veterans' preference points are only added to a "passing rating," the VPA does not require counties to interview veterans who do not meet the minimum qualifications established by the County Board or appointing authority.

D. Ranking Applicants

After applying veterans' preference points, a public employer must rank applicants in an eligibility list. A veteran whose score is tied with a nonveteran is placed ahead of the nonveteran on the list. Minn. Stat. § 197.455, subd. 8. However, public employers are not required to hire the highest ranked applicant, even if that applicant is a veteran.

E. Required Notices

1. The VPA requires public employers to notify applicants that, upon receiving a passing score, they are entitled to receive veterans' preference credit points if they meet the definition of a "veteran" or are the eligible spouse of a "veteran." Minn. Stat. § 197.455, subd. 9. This notification should appear on job applications.

2. If the County rejects an eligible veteran who has received veterans' preference points, the VPA also requires the County to notify the veteran that he or she did not get the job, along with the reasons for that decision. Minn. Stat. § 197.455, subd. 10.

SECTION IV: APPLICATIONS AND VERIFICATION

I. Do Not Ask About Any of the Following:

A. Criminal History

1. Minnesota law prohibits public (and private) employers from inquiring about, or requiring disclosure of, an applicant's criminal record or criminal history before the applicant is selected for an interview. If an employer is not conducting interviews, it cannot ask about an applicant's criminal history until it has made a conditional job offer. Minn. Stat. § 364.021.

2. This prohibition does not apply to positions for which an employer has a statutory duty to conduct a criminal history background check or take into account applicants' criminal history. Minn. Stat. § 364.021(b).

3. Minnesota law does not prohibit employers from notifying applicants that they will be subject to a criminal history background check if they are selected for an interview or given a conditional job offer. Minn. Stat. § 364.021(c).

4. An appointing authority may not inquire into or consider or require disclosure of the criminal record or criminal history of an applicant for appointment to multimember agencies, including boards, committees, and councils, on an application form or, until the

applicant has been selected for an interview by the appointing authority or is otherwise selected as a final candidate for appointment. Minn. Stat. § 364.021(d).

Practice Tip: All job postings, advertisements, and applications should notify applicants that they may be subject to a criminal background check upon selection for an interview or being offered a conditional job offer.

B. Date of Birth or Age

C. Gender (Including Gender Identity)

D. Marital Status

E. Number of Dependents

F. Religious Affiliation or Creed

G. Whether the Applicant was or is Receiving Public Assistance

H. Race or National Origin

I. Affectional Preference/Sexual Orientation

J. Health Condition or Disability

The **prohibition** in this area includes inquiries into **alcoholism** or alcohol treatment, the **past use of illegal drugs** or treatment therefore. An employer can, however, ask about traffic convictions, including DWI convictions, for individuals who will be driving County vehicles or driving when on duty.

Note: The employer can and should ask if the applicant needs any accommodation in order to complete the application or attend any interview(s) for the position.

K. Workers' Compensation History

1. The workers' compensation statute prohibits discrimination against a person because she or he had a work-related injury. Minn. Stat. § 176.82. Therefore, to avoid a workers' compensation discrimination claim, employers should not ask about this.

2. Questions about workers' compensation may also elicit information about a disability.

L. Litigation Against any Past or Present Employers

Under the Minnesota Human Rights Act (MHRA), it is considered reprisal to fail to hire someone because they brought a claim or charge of discrimination. Minn. Stat. § 363A.15.

M. Prior Sick Leave Use

Note: Employers may ask about unexcused absences unrelated to the illness of the applicant or his/her immediate family. Employers can also ask about ability to meet attendance standards that are an essential function of the job.

N. Major Life Activities Other than Those Which are Job-Related

Example: You cannot ask if the applicant has trouble walking, sleeping, dressing, etc.

O. Need for Reasonable Accommodation to Perform the Job

Employers **may not** ask applicants whether they will need a reasonable accommodation for the job at the **application stage**.

Note: The employer **may** ask if the person can perform the duties of the position set forth in the job description, with or without accommodation. If this is asked, **it must be asked of all applicants**.

P. Familial Status

II. Do Ask the Following:

A. Require two or more **business-related** references such as former employers, teachers or supervisors of volunteer experiences. Make sure to contact each of the references listed and document that you have done so.

B. Request that the applicant sign a release authorizing former employers to release any and all personnel data, including performance evaluations and complaints against the employee, to the prospective employer. The form should include a release of liability for the former employer for providing the information. This is necessary because many former employers are

unwilling to provide information for fear of a defamation claim. In the case of government employers, a release is necessary because of the Minnesota Government Data Practices Act (MGDPA).

C. Carefully review the applicant's employment and educational history. Request the names and addresses of all previous employers and the dates of all employment, volunteer experiences and dates the applicant acquired any degrees. Verify that the statements are truthful. Look specifically for any unexplained gaps in time.

D. Ask whether the applicant has ever been discharged or forced to resign or "counseled out" from prior employment. If so, ask the person to describe the circumstances.

E. Ask how many days the applicant was inexcusably absent from work during the preceding year(s) other than absences due to illness or injury of the applicant or immediate family.

F. Ask what skills, abilities or work habits the applicant possesses which he or she believes makes him or her exceptionally well suited for the position.

G. Ask why the applicant wants to work for the employer or why the applicant is interested in the position.

H. Ask whether the applicant wishes to claim veteran's preference in hiring.

I. State that an applicant may be subject to a criminal background check and that information regarding whether the applicant was ever **convicted** of a crime will be requested if the applicant is selected for an interview or given a conditional job offer.

J. Include a statement above the applicant's signature attesting to the truth and completeness of the information provided, along with an acknowledgment that false or misleading statements on the application are grounds for future discharge.

K. Include a clear, conspicuous statement regarding the employer's commitment to equal employment opportunity.

L. Other issues an employer may wish to address in an employment application include particular education, experience or licenses relevant to the job, willingness to travel or willingness to be transferred.

M. Include a statement that the applicant understands that no job offer is final until formal approval by the County Board or Appointing Authority. State who the Appointing Authority is in the job description.

N. Do not always take the applicant's or employee's word at face value. Verify their statements.

See Sample Application at the end of this Chapter.

SECTION V:
SCREENING PROCESS

Once the applications have been reviewed, the process of reviewing and ranking then begins.

I. First, screen out those individuals who do not meet the minimum job qualifications and send a prompt, polite rejection letter. State how long, if at all, you will keep their application on file for new vacancies.

Example:

Dear Applicant:

Thank you for taking the time to submit an application. After evaluating your experience and background, it has been determined that the County is presently unable to offer you a position.

(Optional Language)

If any vacancies for the position for which you applied come open within the next sixty (60) days, your application will be reconsidered.

II. For nearly all positions, you will have to screen remaining applicants using the 100-point Veterans Preference system as discussed above.

III. Documentation of Application Process

A. Keep all job applications, ranking sheet, written criteria and interview notes related to a vacancy for **at least eighteen (18) months.** Keep the information related to the successful applicant indefinitely.

B. We recommend that counties also keep a permanent file on each job class with a clean copy of the criteria used for previous vacancies for use in addressing future vacancies.

IV. Criminal Records

Other than those positions for which employers have a statutory duty to consider criminal history in hiring (law enforcement, etc.), employers cannot request information regarding criminal convictions prior to the applicant being selected for an interview or receiving a conditional job offer. Minn. Stat. § 364.021. However, once the County has identified who the finalists are to be interviewed for a position, the County can and should request information as to whether the individual was ever convicted of a crime and the following specific information:

A. The time, nature and number of convictions;

B. The facts surrounding each offense;

C. The job-relatedness surrounding each offense;

D. The length of time between a conviction and the employment decision;

E. The applicant's employment history before and after the conviction;

F. The applicant's efforts at rehabilitation; and

G. The name under which the person was convicted, and the date and jurisdiction of the conviction.

You should gather this information prior to the interview of the applicant, ***but after you have selected the person for interview***, in order to ask any follow up questions during the interview. If necessary, you may request that finalists arrive 15 minutes early to the interview to complete a questionnaire on criminal background.

The Criminal Rehabilitation Act prohibits public employers from disqualifying applicants from consideration on the basis of a past conviction unless the crime or crimes were directly related to the position sought. Minn. Stat. § 364.03, subd. 1. Therefore, exercise caution in how you use information related to a conviction in your hiring decision.

H. **Criminal Charges**. If the job is safety-sensitive or involves any type of access to children, the County may also wish to ask about charges which did not lead to conviction. There are, however, some risks involved in doing so.

Courts have found that the use of arrest or conviction records to exclude job applicants may have a disparate impact on minority applicants and may therefore violate Title VII. See, e.g., Green v. Mo. Pac. R. Co., 523 F.2d 1290, 1293–94 (8th Cir. 1975) (citing Gregory v. Litton Sys., Inc., 472 F.2d 631, 632 (9th Cir. 1972)). Courts will treat the use of arrest records differently than the use of convictions. Further, Minnesota law prohibits public employers from using arrest records not followed by a valid conviction in connection with any application for public employment. Minn. Stat. § 364.04.

If the person will be working with vulnerable adults or children, for example, it may be appropriate to ask about charges as well as convictions in light of the vulnerability of the clients being serviced. Inquire about the charges in order to obtain as much information as possible so you can determine the risks to vulnerable people if you hired the candidate with charges but no conviction.

1. **EEOC Guidelines**

According to the EEOC, neither an arrest nor a criminal conviction cannot be an absolute bar to employment because of the possible adverse impact such a policy may have on minority populations, unless the employment policy is justified by a business necessity. EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, available at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (April 25, 2012); See also Minn. Stat. § 364.03, subd. 1. The EEOC bases this conclusion on statistical evidence that indicates that African-American and others of different national origin are convicted at rates significantly higher than the general population. See EEOC Compliance Manual, Ch. 15 (April 19, 2006); see also EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions, (April 25, 2012). In essence, an employment practice which, although facially neutral, operates to exclude a disproportionate percentage of a protected class violates

Title VII unless an employer can show that such a practice is justified by a business necessity.

Based on evidence of disparate impact, the EEOC guidelines require that employers consider all the job-related circumstances surrounding a conviction or an arrest when determining suitability for employment. EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions. The circumstances to consider include:

a. The nature and gravity of the offense(s). Employers may be able to support their decision not to hire a particular individual if the crime for which he or she was committed was "particularly egregious;"

b. The time that has passed since conviction and/or completion of the sentence(s); and

c. The nature of the job held or sought. Job relatedness is the most important factor in determining whether a conviction record disqualification is justified by a business necessity. If a conviction is not job-related, then barring employment on such a basis may violate Title VII on a disparate impact theory.

   The EEOC takes the position that an employer satisfies Title VII by: (1) considering the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question; and (2) gives the applicant who is excluded by the criminal history screening process an opportunity to show why he or she should not be excluded.

On March 10, 2014, the EEOC and the Federal Trade Commission (FTC) issued a joint document clarifying their position on the use of criminal background checks in the application process. The EEOC reminded employers that it is "illegal to check the background of applicants and employees when that decision is based on [membership in a protected class]." Similarly, the EEOC reminded employers not to use the results of background checks in a manner that violates anti-discrimination law (e.g., only disqualifying applicants of one race for having criminal convictions) and advised them to "take special care when basing employment decisions on

background problems that may be more common among people of a certain [protected class]."

The joint document also clarified the FTC's position regarding background checks subject to the Fair Credit Reporting Act, which generally includes only background checks conducted by a company that is in the business of compiling background information.

This guidance can be found online at: http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm

2. **Arrest Records**

A blanket policy of denying employment on the basis of an applicant's **arrest record** also runs the risk of litigation. As discussed above, the EEOC guidelines prohibit employers from engaging in employment practices that have a disparate impact on protected classes. Employment policies that automatically exclude applicants with an arrest record may have a disproportionate negative impact on minority groups and may discourage minority applicants. See EEOC Compliance Manual, Ch. 15 (April 19, 2006); see also EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions, (April 25, 2012). Further, Minnesota law prohibits public employers from using arrest records not followed by a valid conviction in connection with any application for public employment. Minn. Stat. § 364.04.

The EEOC opines that "[a]lthough an arrest record standing alone may not be used to deny an employment opportunity, an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes." EEOC Enforcement Guidance, Consideration of Arrest and Conviction Records in Employment Decisions, (April 25, 2012).

V. Who Should be Involved in Screening/Have Access to Certain Data

A. Applicant Selector Should Not Investigate Applicant Background. "No document which has date of birth, gender, or race information will be included in the information given to or available to any person who is involved in selecting the person or persons employed other than the

background investigator. No person may act both as background investigator and be involved in the selection of an employee except that the background investigator's report about background may be used in that selection as long as no direct or indirect references are made to the applicant's race, age, or gender." Minn. Stat. § 363A.08, subd 4(a)(1).

B. Who Conducts the Background Check?

1. County employees hired on or after July 1, 2015, who have responsibility for child protection duties or current county employees who are assigned new child protection duties on or after July 1, 2015, are required to undergo a background study. A county may complete these background studies by either: (1) use of the Department of Human Services NETStudy 2.0 system or an alternative process defined by the County. Minn. Stat. § 260E.36, subd. 3(a). County social services agencies must initiate background studies before an individual begins a position allowing direct contact with persons served by the agency. Id. at subd. 3(b).

2. If another statute does not require or authorize a criminal background check, the Sheriff's Office may conduct a criminal history "check" of an individual who is an applicant for employment, current employee, applicant for licensure, or current licensee. Minn. Stat. § 299C.72. subd. 2. Prior to conducting the check, the Sheriff's Office must receive the informed consent of the individual. Id. at subd. 2(b). The Sheriff's Office may disseminate criminal history data to either the hiring or licensing authority of the county or city requesting the check. Id. at subd. 2(c). The Sheriff's Office and the hiring or licensing authority of the county or city must maintain criminal history data securely and act consistently with state law. Id.

3. Counties may also use private companies to conduct background checks. These checks are subject to the Fair Credit Reporting Act.

VI. Using the Internet in the Screening Process

A. Benefits of "E-Due Diligence." Employers can search the internet, including social networking sites, for information regarding potential job applicants. Information about an applicant may be available online that is not otherwise available to the County.

- The Minnesota legislature introduced bills prohibiting employers from requiring employees to disclose their social media passwords every year since 2013, including in February 2019. Although no such bill has been signed into law, it is possible that it will continue to be reintroduced. Many states have adopted or are considering similar laws.

- Requiring applicants to turn over their social media passwords as a condition of employment may also expose the County to litigation under privacy laws or constitutional privacy claims.

B. Potential Concerns of Using the Internet During the Screening Process. Using the internet, particularly social media webpages, to obtain information about applicants increases the risk that the County will learn that an applicant is a member of a protected class (e.g. religion, sexual orientation, disability). This, in turn, increases the risk that the County may be held liable, or have to defend against, a discrimination claim by a rejected candidate.

As discussed above, the person doing an internet search for information cannot also be the person making the selection. The person should also be carefully trained on what can and cannot be considered in a background check, what can and cannot be documented, etc. This should be determined in advance of any search.

C. Reducing Potential Liability. If the County does wish to use the internet as a hiring resource, it should develop and implement a consistent policy regarding the use of social media and/or internet searches in the hiring process. The policy should contain provisions that allow the hiring officials to receive "red flag" information (such as inappropriate comments) while screening out information related to the applicant's membership in a protected class.

Practice Tip: In addition to protected class information, counties should ensure that their screening process prevents the interviewers and hiring officials from accessing applicants' protected First Amendment speech. For example, allowing the hiring officials to learn that an applicant supported an unsuccessful candidate for a County elected position may expose the County to claims that the applicant was not hired because of his/her political views.

SECTION VI:
INTERVIEWING

I. If you **cannot ask it** on the job application or consider it during the screening process **you cannot ask or consider** it during the interview.

A. Interviewers cannot ask questions which are designed or which could reasonably be expected to illicit information regarding age, race, religion, marital status, dependents, disability, receipt of public assistance, national origin, or any of the other categories set forth in Section II.

B. Do not be concerned if a neutral question is responded to with information regarding a prohibited subject. However, do not ask any follow-up questions into the prohibited subject and do not write down any information regarding a protected class such as age, religion, marital status, etc. Depending on the circumstances, you may note that the applicant provided information that was irrelevant, particularly if it was inappropriate for the applicant to volunteer the information based upon the question.

II. Interview Questions

A. Write out the questions in advance and document any additional or follow-up questions which were asked. Write down the applicant's answers, unless it includes illegal information. This helps keep the interview on track. It also ensures that the same questions will be asked of each applicant which will decrease the likelihood of a successful challenge to the hiring process.

B. Answers given by individual applicants will call for follow-up questions which are not applicable to all persons being interviewed. Therefore, the interviewer must be flexible in forming additional questions based on job relevant criteria, experience, training and clarification related thereto. Write down the follow-up questions and the responses to them.

III. Do Not Interview Alone

Do not create a situation where it is your word against the applicant's as to whether an improper question was asked. The second person can act as a witness and can help keep the interview on track in the event that either you or the

applicant begin discussing something which is outside the appropriate scope of the interview. Train the entire team on interview procedures.

IV. Interview Notes

A. Take thorough notes during each interview.

B. Human Rights charges, the kind of action most likely to occur in hiring situations, must be filed within one (1) year after the interview. Therefore, notes on all interviews, as well as the job applications, postings, documentation of the selection process, copies of the interview questions, testing results, and anything else related to the hiring process, should be kept for 12 or more months after the hiring decision is made.

C. Interview notes of the successful applicant should be retained indefinitely in the personnel file.

V. Caution: Avoid "Small Talk"

A. Beware of social conversation before, during, or after the interview. Interviewers should be extremely cautious about subjects that may be raised during informal pre- or post-interview discussions with an applicant. Frequently this is where an interviewer gets into dangerous territory by trying to "break the ice" by asking questions such as:

> So where do you live? Oh, I go to church near there, do you know Reverend Peterson?
>
> My kids went to school near there. Do you have children? How old are they?
>
> What does your husband do?

B. Employers may not **make inquiries** that are likely to illicit medical information or information **about a disability**, including alcoholism. **Inquiries about the ability** to perform job functions **are** permitted.

C. An employer may ask whether applicants can perform any or all job functions, with or without reasonable accommodation, as long as all applicants in the job category are asked this.

SECTION VII:
CONDITIONAL JOB OFFERS

I. When Conditional Job Offers Are Appropriate

A. You have selected the person you want to hire but need to conduct a physical test or examination.

Practice Tip: With the exception of certain psychological exams conducted by law enforcement authorities for peace officer positions, public employers **must** make a conditional job offer before requiring an applicant to submit to a physical examination for purposes of determining whether the applicant is qualified to perform the functions of the job. Minn. Stat. § 363A.20, subd. 8(a)(1)(i). Minnesota law also restricts employers' collection and use of the results of such physical examinations.

B. You need to obtain verification of references, previous employment, education or licensure, but are concerned that the time involved in completing these tasks will result in the applicant taking another job. Under such circumstances, you could make a job offer conditioned upon acceptable results.

C. You want to conduct a criminal background check on the applicant, especially if there were no interviews conducted.

D. You need approval by the County Board or other Appointing Authority and anticipate that it will approve the hiring recommendation. Make certain that the applicant knows that the County Board or other Appointing Authority must approve the hiring.

II. Making a Good Conditional Offer

A. Always make clear to applicants that hiring decisions are subject to final approval by the Board or Appointing Authority. Make sure that all supervisory employees are aware that they have no power to hire.

B. Conditional job offers should be conveyed very carefully, specifying all conditions. A letter confirming the conditional offer, clearly setting forth each condition, should be sent the same day as any oral offer is made. The

letter should clearly state that the offer is conditioned upon approval by the Board or other Appointing Authority.

1. Whenever possible, do not offer anyone a job or state that you will be recommending them for hiring until you have checked their references, employment and educational background, applicable licensure and obtained the results of any criminal background check to be conducted.

2. If an offer has to be made before all information has been received back, make it in writing and refer to it as a recommendation by the Administration. Make clear all of the conditions, including criminal background check results, receipt of applicable transcripts, acceptable reference checks, etc. must be met to the County's satisfaction before the individual will be hired. **Make clear that the recommendation is subject to approval or disapproval by the Board or Appointing Authority at its sole discretion.**

III. Never Let a Conditional Hire Start Work Until All of the Conditions are Satisfied

A. Negligent Hiring

A claim for negligent hiring imposes liability for an employee's intentional torts (such as assault, battery and sexual harassment) when the employer "knew or should have known that the employee was violent or aggressive and might engage in injurious conduct." Johnson v. Peterson, 734 N.W.2d 275, 278 (Minn. App. 2007). The scope of the employer's duty of reasonable care in hiring is largely dependent on the "type of responsibilities associated with the particular job." Yunker v. Honeywell, Inc., 496 N.W. 2d 419, 422 (Minn. App. 1993); see also D.D.N. v. FACE, Festivals and Concert Events, Inc., No. A09-707, 2010 WL 1190137, at *4–*5 (Minn. App. 2010).

Employers are also subject to liability if they place a person with known propensities or propensities that should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posted a threat of injury to others. Ponticas v. K.M.S. Invs., 331 N.W. 2d 907, 912 (Minn. 1983); see also State v. Back, 775 N.W.2d 866, 870 (Minn. 2009), Udofot v. Seven Eights Liquor, No. A10-431, 2010 WL 5071313, at *3 (Minn. App. 2010).

By conducting a thorough pre-employment investigation into every applicant's background before hiring, an employer will be much better equipped to prove that it met its duty to exercise reasonable care in hiring.

In the event that the employer is sued for negligent hiring, it will be necessary to establish what steps were taken to check the employee's references, etc. before hiring. Without written records, this will be difficult to establish, particularly if the supervisor conducting the background check is no longer employed by the public entity.

1. **Case Law**

   a. Doe 175 v. Columbia Heights Sch. Dist., No. 02-CV-11-7667, 2014 WL 7781077 (Minn. Dist. Ct. 2014), *aff'd sub. nom Doe 175 ex rel. Doe 175 v. Columbia Heights Sch. Dist.*, 873 N.W.2d 352 (Minn. App. 2016). In the Doe case, a football coach and weight room supervisor sent sexually explicit text messages to and solicited sexual contact from a fifteen-year-old female student. Some of the conduct occurred during work hours and through the use of school district property. Prior to hiring the football coach, the school district conducted a criminal background check, which showed no criminal history, and called references for volunteer positions he held involving children. All of the references attested to his appropriateness with children and trustworthiness. The court held that based upon his clean record and references, his sexually inappropriate behavior with a student was not foreseeable and denied the plaintiff's negligent hiring claim.

   b. D.D.N. v. FACE, Festivals and Concert Events, Inc., No. A09-707, 2010 WL 1190137 (Minn. App. 2010). The D.D.N. case involved a claim brought by a female patron of a two-day music festival who was sexually assaulted by a festival employee at her campsite at the festival. The assault took place in 2006. The employee had an out-of-state criminal conviction for sexual assault in 1993. He also had been treated for drug addiction and been fired from several jobs before applying for the position at the music festival. His job allowed him access to all parts of the festival, including the campground, at all times of day or night, and was given a t-shirt identifying him as a staff. The court concluded that the

festival producer could be held liable for the sexual assault because it had a duty to protect concertgoers from sexual assault, especially due to its awareness that intoxicated patrons were vulnerable. The court found that it breached that duty by placing the employee in a position where he could access campsites at any time of day or night without taking minimum steps to discover the safety risk he posed to the concertgoers.

B. Reliance Claims

Employers need to be cautious about the manner in which conditional offers are conveyed (discussed above) and allowing an applicant to start work before all conditions and final approval by the County Board or other Approving Authority is made, particularly if the applicant is quitting a different job or turning down other offers in reliance upon the employer's statements.

Example: Applicant A is told that he can start work in the Road Crew Department on Monday, June 1. The Board does not have a meeting scheduled to act on the hiring until Tuesday, June 8. The applicant quits his current job and begins work on June 1. The Board receives negative information about Applicant A from a former employer and decides not to hire him.

SECTION VIII: PRE-EMPLOYMENT PHYSICALS AND TESTING

I. **Medical examinations can be administered and medical information can be obtained only after a bona fide conditional job offer has been made**

A. The County **must** make a bona fide or "real" job offer to an applicant before it requires the applicant to undergo a physical examination or test. Minn. Stat. § 363A.20, subd. 8(a)(1)(i); 29 C.F.R. § 1630.14(b). Employers cannot examine or test all applicants.

- There is an exception to this requirement for certain psychological evaluations for job-related abilities set forth by the Board of Peace Officer Standards and Training.

B. A valid conditional job offer must have been made based upon **all** of the non-medical information available to the employer. While a conditional job offer may be made, as discussed in above, based on several conditions, if physicals and/or testing are to be one of the conditions, all other conditions **must have been met before** the physical/mental examination or testing is conducted.

Example: Employer offers a job to Applicant A on the following conditions:

1. Acceptable results of a criminal background check;

2. Acceptable reference checks and verification of past employment and educational history;

3. Proof of a valid applicable license; and

4. An examination or test establishing that the applicant is able to meet the physical or mental requirements of the job.

Conditions 1-4 must be met **before** the physical examination or test is conducted.

II. Physical examinations or tests can be administered only if all entry level employees for that job category are subject to the same requirement, regardless of disability

Under both ADA and the MHRA, an employer is prohibited from selecting which applicants for a particular job category are going to be sent for a physical/mental examination or test. The employer may require the examination or test **only if all** entry employees of the same job category are subject to such an examination, regardless of disability or perceived disability. 42 U.S.C. § 12112(d)(3)(A); Minn. Stat. § 363A.20, subd. 8(a)(1)(iii).

Example: The County has three (3) road maintenance vacancies in the Road Crew Department. After selecting the three (3) individuals to make offers to, the employer continues to have some concerns that one of the candidates may lack the physical strength to handle the position without incurring injuries.

The employer is **prohibited** from administering a physical examination or test to only one of the prospective employees. If it

wishes to conduct a physical examination, it must test all candidates for the position.

Caution: Employers may be tempted in such circumstances to implement a new policy requiring physicals for all three applicants. Such a decision might be challenged, especially if the applicant is ultimately not hired, as a pretext for discriminating against the applicant. Similarly, if the employer later reverts back to its practice of not requiring physicals when vacancies occur in this job category in the future, it could also be challenged on the physical examinations it administered earlier.

A. Employers should **determine in advance** for which job categories physical examinations and/or testing will be required. The employer should document the date of the decisions, legitimate reasons for the decisions, and that they were made in conjunction with a review of the job descriptions.

B. Each job category should be **periodically reviewed** both for the accuracy of the job description and the appropriateness of testing and/or examinations for that position.

C. Procedures should be put in place to ensure that management is implementing the testing/examinations in accordance with the overall policy.

D. In Minnesota, the physical/mental examination or tests or review of the requested medical information must be job-related and consistent with business necessity. Minn. Stat. § 363A.20, subd. 8(a)(3).

E. After the employer has collected medical information from all recipients of a job offer, it may ask specific applicant's physician(s) or other knowledgeable sources for additional medical information **if it is necessary** to determine an applicant's capability to perform essential job functions.

F. **Notice Requirement under the MHRA:** If any medical information adversely affects any hiring or promotional decision, the employer must notify the applicant within ten days of the final decision. Minn. Stat. §363A.20, subd. 8(c).

III. Medical and psychological information, examination data and tests are to be maintained in a secure location separate from the employee's regular

personnel file and accessible to only a few people, for limited purposes. 29 C.F.R. § 1630.14(b)(1); Minn. Stat. § 363A.20, subd. 8(a)(1)(iv).

A discussion of the maintenance and confidentiality of medical, mental health, workers' compensation records is set forth in the Data Practices Section.

SECTION IX:
REFERENCE CHECKS

I. Checking References on Applicants/Finalists

A thorough reference check is a critical step in the hiring process. A reference check of an applicant should be performed before a final job offer is extended to allow the County to obtain additional information on the applicant in order to make a more informed hiring decision. In addition, performing a reference check demonstrates that the County made a "good faith" effort to determine whether there were any problems with the applicant's background that could have been easily discovered.

II. Basic Rule

If you cannot ask something from the applicant, you cannot ask anyone else for the information either. As discussed above, the MHRA and federal law set forth categories into which employers are prohibited from inquiring, either directly of the applicant or from other sources. Therefore, counties cannot ask former employers, references or other sources for information that they cannot ask the applicant directly.

III. Who Counties Should Check

Conduct thorough background checks **on all employees, volunteers or other individuals** working or having contact with or access to individuals through the County. This is particularly necessary for individuals having access to vulnerable adults, children or whose duties create a greater risk of harm to others.

A. If a County employee commits a violent act and it is proven that the County did not exercise reasonable care in hiring the employee, the County could be held liable for **negligent hiring**.

B. By conducting a thorough pre-employment investigation into every applicant's background before hiring, a County will be much better equipped to prove that it met its duty to exercise reasonable care if it is sued for negligent hiring.

IV. Authorization for Reference Checks.

A. Double check the job applications statement which authorizes you to do the reference check and contains a release of liability. Be prepared to mail or fax a copy of the release to the applicant's former employers, as they may request it.

B. **Do not** fax, e-mail or mail the whole job application to the former employer as it contains "private data" under the MGDPA.

V. What to Check

Decide in advance what information you will be requesting from each reference. Write out the questions or categories of information to be discussed in advance. Take good notes and keep them.

A. Determine whether you want to obtain information about prior work experience, knowledge, skills and/or abilities.

Verify an applicant's explanation regarding gaps in employment or educational background by asking first and last date of employment.

B. Limit the inquiry to questions regarding work related attributes of the applicant which are clearly required by the position that the applicant is applying for. The County should ask the reference for information regarding the fitness of the applicant to perform the job. If the former employer volunteers information regarding an improper area of inquiry (such as protected class membership or protected First Amendment speech), **do not ask follow up questions.**

C. Once the County has formulated questions to ask each reference, the County should contact the person who would have the most information about the applicant's work history, such as a former supervisor or manager. The County should tell the reference-giver the position that the applicant is being considered for and the skills and attributes that the position requires. The person conducting the reference check should use the pre-written

questions that were drafted. If a reference gives an opinion, you should ask for facts supporting that opinion.

D. After conducting the reference check, the County should determine whether the references' comments confirm the veracity of the responses on the employment application. The County should also determine whether the information gathered demonstrates that the applicant is qualified for the job.

E. **DOCUMENT** Written verification that the finalist's references, former employers, etc. were all contacted; the responses that were given to the employer, the identity of the person making the calls and the date **should be kept permanently** in the personnel file if the applicant is hired.

In the event that the employer is sued for negligent hiring, it will be necessary to establish what steps were taken to check the employee's references, etc. before hiring. Without written records, this will be difficult to establish, particularly if the supervisor conducting the background check is no longer employed by the County.

VI. Who to Contact

A. Contact **all** former employers (or at least the past ten years) as well as the references specifically listed.

B. **Talk to the Personnel Department or Supervisory employee.** Do not rely on what co-workers have to say about the applicant.

C. In addition, verify the following:

1. **Academic degrees**

The County should ensure that applicants have the academic degrees that they assert that they have, especially where the position requires such a degree. The County should either obtain a copy of the diploma from the applicant or verify that the applicant received such a degree from the awarding institution.

2. **Professional licenses**

The County should verify professional licenses before making an offer of employment. The County should obtain a copy of the

license from the finalist and retain it in the personnel file if the person is hired.

3. **Driving records**

If an applicant will be driving a County vehicle as part of his/her job, the County should obtain the applicant's driving records.

5. **Other facts, as appropriate**

In the D.D.N case discussed above, the employee listed a false address in his employment application. In finding that the festival producer could be held liable, the court noted that this type of deception was "discoverable with minimal inquiry."

VII. How Should Counties Respond When Someone Calls Them for Information

A. **Minnesota Government Data Practices Act (MGDPA)—See Chapter III for a complete discussion.** A County must be careful not to violate the Minnesota Government Data Practices Act, when giving out information to prospective employers.

B. Respond to inquiries with dates of employment, job title and description and gross salary.

C. **Do not** volunteer any other information when someone calls unless they specifically ask for it and it is public. Then provide only what they specifically request, unless they request all public data. Settlement agreements involving employees and former employees are public. However, under the MHRA, it is considered to be reprisal for an employer to "inform another employer that the individual" has filed a discrimination charge, testified or participated in the investigation of or otherwise opposed a discriminatory practice. Minn. Stat. § 363A.15. Therefore, employers should not volunteer anything related to any discrimination or other lawsuit involving the employee unless a specific request for all settlement agreements or all public data is made. Then, only the document itself should be sent, without comment.

D. Keep a written record in the employee's or former employee's personnel file of every written inquiry and the response thereto, including all documents that were sent. Document each telephone call requesting a

reference, the identity of the person responding and what was said. Place the documentation in the personnel file.

E. If your policy (discussed below) allows for letters of recommendation to be provided to the employee, a copy should be retained in the personnel file.

F. Make no off-the-record comments to people calling for references. Under Navarre v. South Washington Cty. Sch. Dist., 652 N.W.2d 9 (Minn. 2002), statements regarding the performance of an employee, which are based upon recorded performance data, are a violation of the MGDPA. This is true even though the person making the statement had not personally reviewed the records, but was told about the employee's performance by others, who had either created or reviewed the records.

G. **Responding to "Would you hire this person again?"** If the response is based upon the former employee's job performance records, the County's answer would be a violation of the MGDPA and should not be given, absent a written release.

Practice Tip: This is another area were avoiding "small talk" will help reduce potential liability.

VIII. Forming a Policy on Providing References

A. Develop a policy which requires all inquiries from prospective employers to be referred to a person who has been trained on how to provide a reference. In counties with personnel departments, all requests should be referred there. This is important to ensure that the County is complying with the MGDPA.

Example: Supervisor A dealt with Employee A's poor performance for several years. The performance evaluations of Employee A show that he was not good at his job and made little effort to improve. Employee A resigned when Supervisor A began closely monitoring his performance and the "writing was on the wall" that discipline would soon follow. Some months later, Supervisor B from the neighboring County calls Supervisor A and asks about Employee A, who has applied for a job.

How tempted might Supervisor A be to tell Supervisor B about Employee A's performance?

Note: Performance evaluations are **private data** under the MGDPA.

B. Having all inquiries referred to a single place/person that is trained on addressing such inquiries will help ensure that no potentially defamatory information is being released.

Example: In the situation above, the MGDPA would have been violated if Supervisor A told Supervisor B about the performance problems. It would not, however, have been defamation because his comments would have been true.

Example: Supervisor A supervises Employee A. Employee A is an excellent employee and his performance evaluations have always been good. Outside of work, Employee A enters into a business deal with Supervisor A's brother-in-law, which goes sour. Soon thereafter, due to the tension at work, Employee A resigns. A week later, Supervisor B from the neighboring County calls Supervisor A and asks about Employee A, who has applied for a job.

If Supervisor A provides negative information regarding Employee A's performance, it may constitute defamation. However, even if he provides neutral or positive information, if Employee A does not get the job he may believe he was defamed and may bring suit. Therefore, it would be better for a neutral person to respond to the inquiry.

IX. Develop a Policy on Providing Letters of Recommendation.

A. Letters of recommendation should generally be given to the employee and not mailed directly to prospective employers. Letters of recommendation should never be sent directly to the prospective employer unless a specific written agreement is entered into with the employee authorizing the release of the content of the letter after the employee has reviewed the letter.

B. A copy of all letters of recommendation must be placed in the employee's personnel file.

C. Individuals' supervisors should not agree to provide letters of recommendation without the approval of the Department Head, who should first review the content.

D. No false or misleading information should be placed in a letter of recommendation. Employers should not agree to untrue statements in such letters as a means of settling employment disputes. Doing so could result in

possible liability against the employer by future employers or other persons who relied upon the statements made in the letter.

SECTION X:
NEW EMPLOYEE ORIENTATION

I. Purpose

A. All new employees should receive orientation not only regarding their own job and the unit in which they work, but also on the overall policies and procedures of the County.

B. The County may have difficulty disciplining employees or establishing that employees are aware of or had the opportunity to access policy that reduce liability unless applicable rules are given and explained to the employee.

C. Proper orientation and training may help to defend the County against potential lawsuits.

II. Techniques for Orientation: County Wide

A. Develop a policy and checklist on new employee orientation. The policy should state who is responsible for overall orientation for the County and that the Department Head is responsible for orientation regarding the specific duties, work location, etc. See Sample Checklists.

B. Inform the new employee that employee suggestions are welcome. Discuss the procedures for making such suggestions. Notify the new employee of who he/she can go to with questions, concerns or problems, both within and outside their department. Document that this has been done.

C. Take advantage of the orientation process to thoroughly familiarize the new employee with the County's policies and procedures. Give the employee all applicable policies and procedures. Document that this has been done.

D. Specifically and separately address the County's discrimination and sexual harassment policies. The employee should be told to report violations immediately and to whom to report violations. The County should tell the employee that he/she is free to complain about any problem without fear of reprisal. Document that this has been done.

E. After reviewing the policies, the employee should be given a form to sign acknowledging that the employee received and reviewed the policies and that the employee is responsible periodically for reviewing them. The signature forms should be kept in the personnel file permanently.

F. Have the employee complete all necessary documents during the orientation process including insurance, tax, and payroll forms.

G. The County must allow an exclusive representative or the representative's agent to meet in person with a newly hired employee within 30 calendars days from the date of hire during new employee orientations. The County must allow the employee and exclusive representative up to 30 minutes to meet and must not charge the employee's pay or leave time during the orientation, or the pay or leave time of an employee acting as an agent of the exclusive representative.

1. An exclusive representative must receive at least ten days' notice of an orientation, but a shorter notice may be provided if there is an urgent need critical to the County's operations that was not reasonably foreseeable.

2. Notice of and attendance at new employee orientations are limited to the employee, the exclusive representative, and any vendor contracted to provide a service for the meeting. The County or its designee may attend *if* mutually agreed upon by the County and the exclusive representative. Minn. Stat. § 179A.07, subd. 9.

III. Techniques for Orientation: Department Wide

A. Develop a policy and checklist on new employee orientation for the Department. See Sample Checklists.

B. Inform the new employee that employee suggestions are welcome and should discuss the procedures for making such suggestions. Notify the new employee of who he/she can go to with questions, concerns or problems.

C. Take advantage of the orientation process to thoroughly familiarize the new employee with the Department's policies and procedures. Give the employee all applicable policies and procedures.

D. The Department orientation should include a discussion of job standards and the County's work rules. In addition, during the orientation process, the new employee should be given a copy of the employee evaluation form so that the employee knows the criteria upon which his or her work will be judged.

E. Discuss specific job duties, immediate supervisor responsibility, punctuality, time sheets, lunch break and paid break periods, where, and by whom the employee will be paid, overtime policy and probationary period. **Go over things slowly** to allow the employee to grasp all of the new information.

F. Give the new employee a tour of the workplace, including the lunchroom and show him/her the locations of the restrooms. Introduce the new employee to everyone.

COUNTY OF _____

APPLICATION FOR PERSONNEL POSITIONS

I. EQUAL EMPLOYMENT OPPORTUNITY

It is the policy of _____ County to provide equal employment opportunity for all, without discrimination on the basis of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age.

II. DATA PRIVACY NOTICE

The information requested on this application is intended to be used by the County in determining suitability for employment for the position which you are currently seeking or may seek in the future. If hired, the information may later be used for consideration for other positions, verification of employment history or disciplinary action in the event that the information provided is not truthful. You are not legally required to provide any of the information on this form at this time. However, failure to provide complete, accurate information may result in the County being unable or unwilling to offer employment to you. With respect to any special accommodations necessary for completing your application or the interview process, the County may be unable to provide the necessary accommodations if you do not provide the information in Section IV. The information on this application which is classified as private data under the Minnesota Government Data Practices Act (MGDPA) will not be released outside the County without your consent except as necessary for tax purposes or as otherwise required by state or federal law. Information which is classified as public data will be released pursuant to the terms of the MGDPA.

III. POSITION DESIRED

Title of position for which you are applying:_____
Date Available to Begin Employment: _____

IV. PERSONAL DATA

Name _____
Last First Middle

Address Home Phone_____
Alternate Phone _____
Street City State Zip

Are you either a U.S. citizen or otherwise legally eligible to hold employment in the United States? Yes _____ No _____
Have you previously worked for the County? Yes _____ No _____
If yes, position held/department: _____
If yes, under what name may your previous employment records be found?_____

If you have any special needs which may necessitate accommodations in the application or interview process, please contact the Human Resources Department to make a request.

List all other names under which you have been employed or under which your employment or educational records may be found:

_____

_____

V. WORK/VOLUNTEER EXPERIENCE

List ***all*** work experience, whether or not relevant to this position, and all relevant volunteer experience, most recent to be listed first.

Employer Name: _____
Employer Address: _____
Job Title: _____
Job Duties: _____

_____

_____

Dates mm/dd/yyyy of Employment/Experience: _____
Reason for Leaving: _____

Employer Name: _____
Employer Address: _____
Job Title: _____
Job Duties: _____

_____

_____

Dates mm/dd/yyyy of Employment/Experience: _____
Reason for Leaving: _____

Employer Name: _____
Employer Address: _____
Job Title: _____
Job Duties: _____

_____

_____

Dates mm/dd/yyyy of Employment/Experience: _____
Reason for Leaving: _____

Employer Name: _____
Employer Address: _____
Job Title: _____
Job Duties: _____

_____

_____

Dates mm/dd/yyyy of Employment/Experience: _____
Reason for Leaving: _____

Employer Name: _____
Employer Address: _____
Job Title: _____
Job Duties: _____
_____
_____
Dates mm/dd/yyyy of Employment/Experience: _____
Reason for Leaving: _____

VI. LICENSURE

List current licenses, registrations, or certificates relevant to the position for which you are applying.

License/No.	Issued By	Date	Expiration

All applicable licenses or certifications must be received in the Personnel Office prior to employment commencing. If hired, you remain responsible for ensuring that all applicable licenses remain in effect.

VII. EDUCATION

Include high school and/or institution issuing GED and any additional education/courses taken. *Do not list dates of attendance for high school*. List most recent first.

Name of School: _____
Address of School: _____
Degree/Diploma Received: _____
Major/Minor: _____
Dates mm/dd/yyyy of Attendance: _____

Name of School: _____
Address of School: _____
Degree/Diploma Received: _____
Major/Minor: _____
Dates mm/dd/yyyy of Attendance: _____

Name of School: _____
Address of School: _____
Degree/Diploma Received: _____
Major/Minor: _____
Dates mm/dd/yyyy of Attendance: _____

Name of School: _____
Address of School: _____
Degree/Diploma Received: _____
Major/Minor: _____
Dates mm/dd/yyyy of Attendance: _____

List/describe any other training and/or experience relevant to the position for which you are applying: _____
_____
_____

VIII. REFERENCES: These should be people in a position to discuss your qualifications for the position you seek. Include especially managers, directors, or heads of departments under whom you have worked. Indicate any who are related you. The County reserves the right to contact all prior employers, educational institutions or institutions where you have volunteered in addition to references listed below.

Name of Reference: _____
Address: _____
Phone Number: _____ Title: _____

Name of Reference: _____
Address: _____
Phone Number: _____ Title: _____

Name of Reference: _____
Address: _____
Phone Number: _____ Title: _____

IX. CRIMINAL BACKGROUND INFORMATION

The County will request information regarding criminal history in the event that you become a finalist for the position which you are applying. For certain positions, criminal background information will be requested during the application stage. Further, the County may conduct a criminal background check on individuals upon making a contingent job offer. Please refer to the job description for this position to determine if such a check will be conducted. If the job description or other application material states that a criminal check will be conducted, no offer of employment shall become final until receipt of the results of the criminal background check from the BCA, the content of which is acceptable to the County, and formal approval by the appointing authority.

X. VETERAN STATUS

Are you an honorably discharged veteran of the armed forces of the United States or are you otherwise eligible to claim Veteran's Preference Points? Yes _____ No _____

Are you the spouse of deceased honorably discharged veteran or disabled veteran who is unable to work due to such disability? Yes _____ No _____

Do you wish to claim Veteran's Preference Points? Yes _____ No _____

If you are a disabled veteran and wish to claim additional points, please check here. _____

Proof of applicable military status/eligibility, such as a DD214 form, will be required in order to claim credits. Please attach DD218 form or forward it within five (5) business days.
If you receive a passing score, you will be shown your score upon request.

XI. PRIOR EMPLOYMENT

Have you ever been discharged or forced to resign from prior employment, other than in relation to a human rights charge or lawsuit in which you were the claimant/plaintiff? Yes___ No___
If so, identify the employer and describe the circumstances:

_____
_____

XII. PERSONAL STATEMENT

Please indicate why you are interested in the position and what you hope to accomplish if you are selected:

_____
_____

XIII. UNEXCUSED ABSENCE FROM WORK

How many days were you inexcusably absent from work during the preceding three (3) years other than absences due to illness or injury of you or your immediate family? _____

XIV. CERTIFICATION, ACKNOWLEDGMENT AND RELEASE

I certify that the answers I have given on this application are true and correct to the best of my knowledge. I understand that any false or misleading information provided, or any omission or concealment of facts, will disqualify me from consideration for employment, and constitutes grounds for my immediate dismissal should I be employed by the County.

I understand, acknowledge and agree that no offer of employment is valid or binding until formal approval by the County Board or the appointing authority referenced in the job description and that until such approval that the County shall not be liable for any reliance on any oral or written offers of employment made to me.

In connection with this application **I hereby authorize** any and all current and former employers, organizations where I have volunteered ("volunteer organizations") and references named in this application, or any agent of such a former employer or volunteer organizations, to release to the County and its agents any and all information regarding my job performance and fitness/qualifications to perform the position I am presently seeking and any other employment or related information, both public and private, in their possession. I understand that the County will use this information to determine my fitness/qualifications for the position I am seeking. This authorization expires one year from the date of my signature, below.

I hereby release the County and all former employers, volunteer organizations and references listed herein and any and all agents acting on behalf of said County, former employers, volunteer organizations or references, for any and all liability of whatever nature by reason of requesting or providing such information.

Date _____ Signature_____

(Do Not Print)

CONSENT FOR RELEASE OF EMPLOYMENT AND APPLICANT RECORDS AND RELEASE OF LIABILITY

In connection with this application I hereby authorize any and all current and former employers, organizations where I have volunteered ("volunteer organizations") and references named in this application, or any agent of such a former employer or volunteer organizations, to release to the [County] and its agents any and all information regarding my job performance and fitness/qualifications to perform the position I am presently seeking and any other employment or related information, both public and private, other than "consumer reports," as that term is defined in the United States Fair Credit Reporting Act, in their possession. I understand that the [County] will use this information to determine my fitness/qualifications for the position I am seeking. This authorization expires one year from the date of my signature, below.

I hereby release the [County] and all former employers, volunteer organizations and references listed herein and any and all agents acting on behalf of said [County], former employers, volunteer organizations or references, for any and all liability of whatever nature by reason of requesting or providing such information.

Date: _____ _____

Signature

County of _____ Minnesota

(agency where I am applying).

This information is needed for the purpose of determining by qualifications and fitness for employment. I was employed by _____ (former or current employer) from _____ to _____ or applied for employment on or about _____. Records may be found under the following additional names: _____.

I specifically agree and authorize the release of private data about myself, as that term is defined under Minnesota Statutes Chapter 13, and all other information on me, other than "consumer reports," as that term is defined in the United States Fair Credit Reporting Act.

In connection with this authorization for release of information, I hereby release _____ (former or current employer) and all of its current and former employees, officers, Board members, agents or representatives from any and all manner of liability of whatever nature by reason of requesting or providing such information.

I understand that I am not legally required to sign this authorization and that I may revoke my consent in writing at any time. I understand that the failure to authorize the release of this information may adversely impact my application for employment. The information gathered may be shared with individuals involved in the hiring decision or other individuals within the organization in the event that I am hired, for employment related purposes. The information may also become public pursuant to the provisions of Minn. Stat. § 13.43.

I understand that this authorization shall continue in full force unless specific written revocation is sent to the Personnel Department of my current or former employer, listed above, by certified mail. A photocopy of this authorization is to be treated in the same manner as the original

Date: _____ _____

Signature

GENERAL AUTHORIZATION AND RELEASE OF LIABILITY

I, _____[printed name], pursuant to the Minnesota Government Data Practices Act (Minn. Stat. Ch. 13) and all other applicable laws, both statutory and common law, hereby authorize _____ and its employees, agents and representatives, to disclose to, release and discuss with _____ **County Minnesota** and its employees, agents, and representatives, any and all data in its possession which in any way relate to me, other than "consumer reports," as that term is defined in the United States Fair Credit Reporting Act.

I specifically agree and authorize the release of private data about myself, as that term is defined under Minnesota Statutes Chapter 13.

In connection with this authorization for release of information, I hereby release _____ and all of its current and former employees, officers, Board members, agents or representatives from any and all manner of liability of whatever nature by reason of requesting or providing such information.

I understand that I am not legally required to sign this authorization and that I may revoke my consent in writing at any time. I understand that the failure to authorize the release of this information may adversely impact my application for employment. The information gathered may be shared with individuals involved in the hiring decision or other individuals within the organization in the event that I am hired, for employment related purposes. The information may also become public pursuant to the provisions of Minn. Stat. § 13.43.

I understand that this authorization shall continue in full force and effect following the date of my signature unless specific written revocation is sent to _____ by certified mail. A photocopy of this authorization is to be treated in the same manner as the original.

Date: _____ _____
Signature

Employee Name: _____	Date of Orientation _____
Job Title: _____	Department _____

EMPLOYEE ORIENTATION FORM

The following information was given to and discussed with the employee:

Wages/Salary (pay periods) _____

W-4 Form _____

Child Support Disclosure Form _____

Employment Eligibility Verification _____

Public Employee Retirement Association Information _____

Health Insurance Enrollment Form & Packet (including COBRA) _____

Dental Insurance Enrollment Form and Information _____

Life Insurance Enrollment Form _____

Direct Deposit Form _____

Deferred Compensation Plan(s) Information _____

Section 125/Pre-Tax Form _____

Union Contract (if applicable) _____

County Personnel Policies _____

Data Practices Training _____

Offensive Conduct, Harassment and Violence Policy _____

The information included in this packet is the most current information that is available for distribution by the employer at this meeting and supersede and rescinds all prior versions of any policies provided or available. It is the responsibility of the employee to notify the employer of any changes in status that may affect the employee's benefits.

_____ _____

Signature of Employee Signature of Individual Conducting Orientation

DEPARTMENT ORIENTATION CHECKLIST

Employee Name: _____ Date: _____

Job Title: _____ Supervisor: _____

The following information was given to and discussed with the new employee:

Job Description _____

Reporting Relationships (dept. organizational chart) _____

Map of the Department and other Offices (as needed) _____

Telephone Numbers for Co-Workers and Others as Needed _____

Department Protocol/Operations (hours of work, dress code. . .) _____

Overview of Training Schedule _____

Data Practices Training _____

Glossary of Department Jargon _____

Forms _____

Acknowledgments and Agreements _____

Vacation and Sick Leave Request process _____

_____ _____

Signature of Employee Signature of Individual Conducting Orientation

cc: Personnel file

PERSONAL INFORMATION

Date of Hire: _____
Name: _____

Address:_____
County: _____ State: _____ Zip:_____
Personal email address * _____
Telephone No. *_____
Social Security Number: _____
Employee Number (if applicable):_____

Job Title: _____

Pursuant to the Minnesota Government Data Practices Act, personal cell phone numbers and email addresses must be shared with the Union if the information is provided to the employer. Employees are not required to provide this information.

PERSON TO CONTACT IN AN EMERGENCY
Employees are not required to provide this information. It is being requested for use in an emergency. There is no consequence to providing or not providing the information other than that the employer will not have a contact person to call in the event of an emergency.

Emergency Contact Name: _____

Telephone No._____

Alternate Emergency Contac Name: _____
Telephone No. _____

_____
Employee Signature/Date

cc: Personnel File

CHAPTER TWO:
DATA AND MEETINGS

SECTION I:
THE MINNESOTA GOVERNMENT DATA PRACTICES ACT

I. Definitions: Public, Private, and Confidential Data

The Minnesota Government Data Practices Act ("MGDPA" or "the Act"), Minn. Stat. § 13.01, et seq., applies to all state agencies, political subdivisions and statewide systems and regulates the collection, creation, storage, maintenance, dissemination and access to government data. The public policy behind the Act is to provide the public with access to data that is the basis for, and the product of governmental decisions. Accordingly, government data is presumed to be accessible by the public for inspection and copying unless it falls within an exception to the Act created by state or federal law or regulation. Minn. Stat. § 13.01; see also Minn. Stat. § 13.03, subd. 1.

A. Government Data in General

1. Government data is defined as all data collected, created, received, maintained or disseminated by any state agency, political subdivision, or statewide system regardless of its physical form, storage media, or conditions of use. Some of the classifications are not public data, data not on individuals, protected nonpublic data, nonpublic data, and summary data. Minn. Stat. § 13.02.

2. In order to be a government record under Minnesota Statutes, section 138.17, subdivision 1(b)(1), the data or information must be created or received in connection with the transaction of public business.

3. In order to be data under MGDPA, the information must be recorded in some form. Unrecorded mental impressions of a public employee are not government data. Keezer v. Spickard, 493 N.W.2d 614, 617–18 (Minn. App. 1992); see also Minn. Rules, Part 1205.0200, subp. 4.

B. Public, Private and Confidential Data

1. **"Private data on individuals"** is defined as data as to which the public is denied access by a state or federal law or regulation, but which is accessible to the subject of the data. Minn. Stat. § 13.02, subd. 12.

   a. Data on individuals is all government data in which an individual is or can be identified as the subject of that data, unless the appearance of the data can be clearly shown to be incidental. See KSTP-TV v. Ramsey Cty., 787 N.W.2d 198 (Minn. App. 2010).

2. **"Confidential data on individuals"** is defined as data made not public by state or federal law and as to which the subject of the data is also denied access. See Minn. Stat. § 13.02, subd. 3; see also Minn. Rules, Part 1205.0200, subp. 3.

3. **"Public data on individuals"** is defined as data which the public may access because no state or federal law or regulation denies such access. See Minn. Stat. § 13.02, subp. 10.

II. Types of Data

There are numerous definitions of particular types of data under the Government Data Practices Act. Data must be categorized so that it can be determined whether it is public, private or confidential. Most data issues arising in the County human resources context involve personnel data and civil investigative data.

A. Personnel Data is government data on individuals maintained because the individual is or was an employee of or an applicant for employment by, performs services on a voluntary basis for, or acts as an independent contractor with a government entity. Minn. Stat. § 13.43, subd. 1. The determination of the reason the entity maintains the data must be made at the time of a data request. KSTP-TV v. Metropolitan Council, 884 N.W.2d 342 (Minn. 2016). In order for government data to be personnel data, the County must retain the data *solely* because the individual is or was an employee, applicant, volunteer, or independent contractor for the County. Id.

B. Public Personnel Data

All personnel data that are not specifically classified as public is **private or confidential.** Therefore, if it is not listed in one of the categories listed below, a municipality may not release information.

Many forms of employee information are public data. Minn. Stat. § 13.43. Public data are data that are readily accessible to the public. The following categories of personnel data are public:[1]

1. **Personal Information:** name, education and training background, and previous work experience.

2. **Compensation-related Information:** actual gross salary, salary range, contract fees, actual gross pension, value and nature of employer paid fringe benefits, the basis for and the amount of any added remuneration, in addition to salary, and payroll time sheets or other comparable data that are only used to account for the employee's work time for payroll purposes, except to the extent that the release of time sheets would reveal the employee's reasons for use of sick or other medical leave or other non-public data[2]

3. **Work and Performance Information:** job title, job description, bargaining unit, date of first and last employment, work-related continuing education, existence and status of any complaints or charges against the employee, whether or not the complaint or charge resulted in disciplinary action. (**Note:** This only means that the municipality can state that a complaint or charge has been made. It does not mean that it can state what the complaint was about), the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the employer, the terms of any agreement settling any dispute arising out of the employment relationship including a buyout agreement. (**Note**: If the agreement includes the payment of more than $10,000.00 of public money, the agreement must specify

[1] All personnel data relating to an individual employed, or applicant for employment, as an undercover law enforcement officer are private data. Minn. Stat. § 13.43, subd. 5. Once such an individual is no longer assigned to an undercover position, the data described in this section becomes public unless the law enforcement agency determines that revealing the data would threaten the safety of the officer or jeopardize an active investigation. Id.

[2] Medical data is classified as private data, as are most forms of data not specifically classified as public.

the reason for the agreement), work location, work telephone number, badge number and honors and awards received.

- Data regarding complaints and discipline actions involving "public officials" also become public if the official resigns while a complaint or discipline is pending or if claims are released as part of a resignation agreement. Most relevant to counties, the term "public official" includes the chief administrative officer of the County and all employees required to be identified under Section 471.701 (three highest paid employees in a County having more than 15,000 residents).

4. **Employment Applicant Data:** veteran status, relevant test scores, rank on eligible list, job history, education and training, work availability, and names of "finalist" applicants (one who has been selected to be interviewed for the opening).

C. Private Personnel Data

All data not specifically listed as public data under Section 13.43 which are maintained because an individual is or was an employee of a governmental entity are private data. This includes:

1. **Workers' Compensation Data:** Workers' compensation information in the hands of a public employer is private data and should be handled as such. See Minn. Stat. § 176.138.[3] Much of the information can also be characterized as medical or health data. Many governmental entities maintain a separate file strictly for information relative to workers' compensation claims.

2. **Testing Information**

   a. **Pre-employment Testing (Non-Physical)**

   It is common to require certain employees to submit to pre-employment testing in the form of civil service or merit

[3] Although workers' compensation data should be classified as private, once data becomes a part of the record of a workers' compensation hearing it becomes public data which is accessible to the public by making a request to the Office of Administrative Hearings or the Department of Labor and Industry. Minn. Stat. § 176.391; Minn. Department of Administration Opinion No. 95-033 (July 27, 1995). In addition, workers' compensation hearings themselves are open to the public. Minn. Stat. § 176.401.

testing. The law provides that relevant test scores and rank on an eligible list are public data. Additional pre-employment testing data should be treated as protected under the law. See Minn. Stat. § 13.43.

Completed versions of the personnel examinations themselves shall be accessible to the individual who completed the examination unless the municipality determines that access would compromise the objectivity, fairness or integrity of the examination process. A municipality cannot be required to provide copies of the completed examinations or answer keys to an individual who has completed an examination. See Minn. Stat. § 13.34.

b. **Drug and Alcohol Testing: Minnesota Law**

In Minnesota, drug and alcohol testing is regulated by Minnesota Statutes sections 181.950- 181.957. Although drug and alcohol testing and cannabis testing data must be maintained as private information, the law does provide certain circumstances in which release of the data is permissible. These circumstances are as follows:

i. disclosure in grievance arbitrations, administrative hearings and judicial proceedings;

ii. release to the federal government as required by federal law or compliance requirements of a federal government contract; and

iii. disclosure to a substance abuse treatment facility for purposes of the evaluation or treatment of the employee.

Drug and alcohol testing or cannabis testing data may not be used as evidence in a criminal action against an employee or an applicant. See Minn. Stat. § 181.954.

3. **Performance Evaluations:** A performance evaluation is private data on an employee. See Minn. Stat. § 13.43, subd. 4.

4. **Disciplinary Data:** Disciplinary data must be dealt with very carefully by the governmental entity. The Act is very specific about its treatment.

Public personnel data under the Act includes information relating to the existence and status of any complaints or charges against the employee, regardless of whether the complaint or charge resulted in a disciplinary action. The meaning of "existence" and "status" is interpreted very strictly. "Existence" and 'status" does not permit the release of any information regarding the nature of an employee's misconduct or the type of discipline imposed. It is not until disciplinary action reaches "final disposition," that the result of the action, together with the specified reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the public body, becomes public data. With multiple layers of appeal, however, it is often difficult to determine when a disciplinary action has been finalized.

According to the Act, "final disposition" occurs when the governmental body makes its final decision about the disciplinary action, regardless of the possibility of any later proceedings or court proceedings. Only a few exceptions modify this general rule, namely that: (1) unionized employees with the right to grieve the action through arbitration do not face final disposition until the conclusion of arbitration proceedings or their failure to elect arbitration within the contract's timelines; (2) a resignation by the employee after the final decision of the governmental body or arbitrator triggers final disposition; and (3) "public officials"[4] reach "final disposition" upon completion of an investigation of a complaint or charge against them. Further, if such a public official resigns or is terminated from employment while the complaint or charge is pending, all data relative to the complaint or charge are public, unless access to the data would jeopardize an active investigation or reveal confidential sources. Minn. Stat. § 13.43; See Communities United Against Police Brutality v. City of Minneapolis, No. A09-1972, 2010 WL 2035961 (Minn. App. May

[4] A "public official" includes: the chief administrative officer, or the individual acting in an equivalent position, in all political subdivisions, the three highest paid employees of a city or county with a population of more than 15,000 and in a city with a population of more than 7,500 or a county with a population of more than 5,000: managers; chiefs; heads or directors of departments, divisions, bureaus, or boards; and any equivalent position. Minn. Stat. § 13.43, subd. 2(e).

25, 2010); see also Navarre v. South Washington Cty. Schools, 652 N.W.2d 9 (Minn. 2002); Deli v. Hasselmo, 542 N.W.2d 649 (Minn. App. 1996); Unke v. ISD 147, Dilworth, 510 N.W.2d 271 (Minn. App. 1994).

5. **Health and Medical Data:** Other statutes also affect the manner in which personnel health and medical data is maintained. The Minnesota Human Rights Act (MHRA) requires that information obtained regarding the medical condition or history of a job applicant or employee be maintained in separate files and treated as a "confidential" medical record. Minn. Stat. § 363A.20, subd. 8. A similar requirement is found in the Americans with Disabilities Act (ADA), 29 CFR § 1630.14(c). This use of the word "confidential" should not be understood in the same manner as under the MGDPA. Under the MGDPA, confidential data is not even accessible by the subject of the data. It does not appear that the MHRA or the ADA intended to prevent access to health and medical data by the subject of the data. Therefore, such data is best treated as private data under the MGDPA.

6. **Employee Assistance Data/Peer counseling debriefing:** All data created, collected, or maintained to administer an employee assistance program are private. In addition, all "peer counseling debriefing" data are private. "Peer counseling debriefing" is defined as a group process debriefing session for public safety emergency employees (firefighters, police officers, etc.) to help an employee who has suffered an occupation-related traumatic event. See Minn. Stat. § 13.43, subds. 7 and 9.

   - Hypothetical: An employee has gone through peer counseling. Members of the peer counseling debriefing go back to the department and discuss with other co-workers how the employee is coping with the traumatic situation. Is this a violation of the MGDPA?

7. **Harassment Data:** When allegations of harassment (sexual or otherwise) are made against an employee, the employer may exercise its discretion to restrict access to harassment data. Specifically, the accused employee is not entitled to have access to data that would identify the complainant or other witnesses if the municipality determines that access would:

   a. threaten the personal safety of the complainant or witness, or

b. subject the complainant or witness to harassment.

If a disciplinary proceeding is initiated against the accused employee, data on the complainant and the witnesses shall be made available to the employee as may be necessary for the accused employee to prepare for the proceeding. See Minn. Stat. § 13.43, subd. 8.

D. Civil Investigative Data

Data gathered for the purpose of the commencement or defense of a pending civil legal action, or which are retained in anticipation of a pending civil legal action, are classified as protected nonpublic data in the case of data not on individuals and as confidential information in the case of data on individuals. See Minn. Stat. § 13.39; see also Westrom v. Minn. Dept. of Labor and Industry, 686 N.W.2d 27, (Minn. 2004); see also St. Peter Herald v. City of St. Peter, 496 N.W.2d 812 (Minn. 1993).

E. Other Types of Data

Although personnel data and civil investigative data are the two types of data most likely to become an issue in the human resources context, counties should be aware that the MGDPA contains specific provisions regarding other types of data, including:

1. General nonpublic data (Minn. Stat. § 13.37);

   - This category includes labor relations information (management positions on economic and noneconomic items) that has not been presented during a collective bargaining process. Such data are private.

   - This also includes trade secret information (private data on individuals), and data which, if disclosed, could substantially jeopardize the security of information, possessions, individuals, or property against theft, tampering, improper use, attempted escape, illegal disclosure, trespass, or physical injury (private security information).

2. Health data (Minn. Stat. § 13.3805);

3. Library data (Minn. Stat. § 13.40);

4. Medical data (Minn. Stat. § 13.384);

5. Welfare data (Minn. Stat. § 13.46);

6. Comprehensive law enforcement data (Minn. Stat. § 13.82);

7. Medical examiner data (Minn. Stat. § 13.83);

8. Court services data (Minn. Stat. § 13.84); and

9. Corrections and detention data (Minn. Stat. § 13.85)

Practice Tip: Whether data is public, private, or confidential depends on the content of the data and, the purpose or reason for which it was collected or received by the County. If you have any doubts as to whether certain data can be disclosed to a particular individual, we recommend that you consult with your County Attorney **before** releasing the data.

III. Collecting and Access to Data

A. The Responsible Authority

1. Current requirements for the appointment of a responsible authority.

   a. Defined: "[T]he individual designated by the governing body…as the individual responsible for the collection, use, and dissemination of any set of data on individuals, government data, or summary data…" Minn. Stat. § 13.02, subd. 16(b).

   b. The obligation to establish and publish procedures for responding to requests for access to data (Minn. Stat. § 13.03, subd. 2), for actually responding to requests for access to data (Minn. Stat. § 13.03, subd. 3) and for responding to challenges to the accuracy or completeness of data (Minn. Stat. § 13.04, subd. 4) has been statutorily assigned to the responsible authority or his/her designee.

   c. **Restrictive Procedures.** Minn. Stat. § 13.05, subd. 5 requires the responsible authority to establish "procedures for ensuring that data that are not public are only accessible to persons whose work assignment reasonably requires access to the data and is only being accessed by those persons for purposes described in the procedure."

d. **Policy Required.** The section was also amended to add that the responsible authority must "develop a policy incorporating these procedures, which may include a model policy governing access to the data if sharing of the data with other government entities is authorized by law."

e. Each municipality is required to appoint a responsible authority. See Minn. Rule 1205.1000.

Practice Tip: The Office of Administrative Hearings has opined that merely designating a position to act as the responsible authority is insufficient. Instead, the County should identify the particular individual who acts as the responsible authority by name, position, and (work) address. If the County wishes to have different responsible authorities for different types of data requests, each individual should be identified, including the types of data requests for which each is responsible.

B. Data Practices Compliance Official—Minn. Stat. § 13.05, subd. 13

1. Every responsible authority is required to appoint or designate an employee to serve as its data practices compliance official.

2. This person is designated as the representative to whom persons may direct questions or concerns regarding obtaining access to data or other data practices problems.

3. The Responsible Authority may also be designated as the Data Practices Compliance Official.

C. Data on Individuals.

All individuals have the right to know what kind of data an agency maintains regarding them, and have the right to access the data and contest its accuracy or completeness. See Minn. Stat. § 13.04.

1. The definition of "individual" includes a parent or guardian, or one acting as a parent or guardian in the absence of a parent or guardian, where the subject of the data is a minor or a person adjudged mentally incompetent. This means that the parent of a minor shares with the minor his/her right of access to all government data concerning the minor. See Minn. Stat. § 13.02, subd. 8.

2. The Minnesota Supreme Court held that employees have the right to contest the accuracy or completeness of data about them that is contained in a performance evaluation. In Schwanke v. Minnesota Dep't of Admin., the Court held that the employee was permitted to challenge the accuracy and completeness of his performance evaluation under the MGDPA. 851 N.W.2d 591 (Minn. 2014). The Court reasoned that some the employee's challenges to his performance evaluation contested the accuracy or completeness of falsifiable statements, which were open to challenge under the MGDPA. Id. The Court did assert that "mere dissatisfaction with a subjective judgment or opinion cannot support a challenge under the Data Practices Act." Id. at 595. However, if an opinion is based on specific examples, an individual is allowed to challenge the facts and circumstances of those examples. Id.

3. The Minnesota Supreme Court has also opined that an individual data subject's right to access data extends to government data that have multiple data subjects. In Burks v. Metropolitan Council, a passenger sued Met Council under the MGDPA after it denied him access to surveillance footage depicting a heated exchange between him and the bus driver. 884 N.W.2d 338 (Minn. 2016). Met Council argued that the surveillance footage was private personnel data on the bus driver that could not be revealed to members of the public. Id. The Minnesota Supreme Court rejected the Met Council's argument. It held that the MGDPA confers a right of access to stored private or public data on an individual if he or she is or can be identified as the subject of the data and that this **right of access extends even if the data in question identifies other individuals**. Id.

D. "Data" Must be "Recorded" in Some Format for it to Become Government Data. In Keezer v. Spickard, 493 N.W.2d 614 (Minn. App. 1992), a plaintiff sued a county for releasing private data about him. He did not recover on his claim because the information had never actually been recorded and so never became government data. The mere fact that government employees had heard or were aware of the information did not cause it to become government data.

1. Once recorded, however, data becomes government data regardless of its physical form, storage media or the conditions of its use. See Minn. Stat. § 13.02, subd. 7; see also Minn. Rules, Part 1205.0200, subp. 4.

2. The Minnesota Supreme Court recognized the Keezer holding in Navarre v. South Washington County Schools, 652 N.W.2d 9 (Minn.

2002), finding that "[b]ecause an individual's mental impressions cannot be inspected or copied, it follows that they do not constitute government data." Id. at 25. However, the Court also held that "…the disclosure of mental impressions derived directly from personnel data recorded in some physical form or storage media, or derived directly from complaints or charges against the employee, is private data on individuals." Id.

3. In order to be a government record under Minn. Stat. § 138.17, (the Records Retention Act) the data or information must be created or received in connection with the transaction of public business.

E. Limitations on Collection and Use of Data.

1. Private or confidential data may be used and disseminated to individuals or agencies specifically authorized access to that data by state, local, or federal law. Minn. Rule 1205.0400 provides that such data may be accessed by those within the entity whose work assignments reasonably require access.

2. Private or confidential data on an individual may not be collected, stored, used, or disseminated by political subdivisions for any purposes except those stated to the individual at the time of collection, in accordance with Section 13.04, with certain limited exceptions.

3. **Tennessen Warning or Right to Know.**

Section 13.04, subdivision 2 provides that a person asked to provide a political subdivision with private or confidential data must be informed of the following at the time of or prior to the collection of the data:

a. The purpose and intended use of the data requested;

b. Whether the individual may refuse to supply or is legally obligated to supply the data;

c. Any known consequence of supplying or not supplying the data; and

d. The identity of other persons or entities authorized by state or federal law to receive the data. See discussion below at 4, regarding Tennessen Warnings to employees.

4. **Case Law on Tennessen Warnings.**

At one time, it was thought by attorneys representing government entities that Tennessen warnings needed to be given to employees under any and all circumstances when they were being interviewed. Case law over the last two decades has changed that viewpoint, and made it questionable the circumstances under which such warnings need to be given. In Edina Educ. Ass'n v. Board of Indep. Sch. Dist. No. 273, 562 N.W.2d 306 (Minn. App. 1997), the Court held that a Tennessen warning was unnecessary during an investigation, as a public employee's description of an incident that occurred during the course and scope of employment was not private data. See also Washington v. Indep. Sch. Dist. No. 625, 590 N.W.2d 655 (Minn. App. 1999); Kobluk v. University of Minnesota, 613 N.W.2d 425 (Minn. App. 2000).

Best Practice: Even though it may not be mandatory to issue a Tennessen Warning during investigations, it is still the best practice to do so. Administering a Tennessen Warning cuts down on potential arguments in the event that the discipline is challenged or that the employee/union brings a collateral claim alleging violation of the employee's MGDPA rights.

Practice Tip: As discussed above, we now also recommend that County personnel policies include a comprehensive Tennessen Warning detailing the broad categories of uses to which data collected by employees may be put. Including such language cuts down on the potential for challenges to the County's attempts to verify information for purposes of administering leave policies, conducting employment reviews, or other business activities that require input from individual County employees.

5. Private or confidential data on an individual may be discussed at a meeting open to the public to the extent provided in Section 13D.05 of the Open Meeting Law.

F. Right to Access by an Individual who is the Subject of Government Data

An individual has the right to be informed whether he/she is the subject of stored data on individuals and whether the data are classified as public, private or confidential. The subject of the data also has the right to be shown the stored public or private data and to be informed of its meaning, upon request. See Minn. Stat. § 13.04, subd. 3. Upon request, the individual subject has a right to receive copies of the data from the responsible authority.

1. A municipality may charge for actual costs for making and certifying copies. See Minn. Stat. § 13.04, subd. 3.

2. Compliance with such a request is to be immediate, although it may be extended up to ten days, excluding Saturdays, Sundays and legal holidays, if immediate compliance is not possible. See Minn. Stat. § 13.04, subd. 3.

3. Data maintained in a computer storage medium must be provided in an electronic form if so requested. However, there is no requirement that data be provided in a format or program different from the format or program in which it is maintained by the government entity. Minn. Stat. § 13.03, subd. 3(e). See Minn. Dep't Admin. Advisory Op. No. 01-027 (Feb. 15, 2011).

G. Accessing Private Data on Individuals

1. Consent.

   If the individual subject of data gives prior informed consent, the responsible authority may make access to the private data available to members of the public. See Minn. Stat. § 13.05, subd. 4.

2. Court order.

   A party seeking access to government data may bring before a presiding judicial officer, arbitrator, or administrative law judge an action to compel discovery. See Minn. Stat. § 13.03, subd. 6.

H. Access of Data by Labor Organization, Bureau of Mediation Services, and Public Employment Relations Board

1. Upon request from an employee's exclusive representative, personnel data must be disseminated to labor organizations and the Public Employment Relations Board ("PERB") to the extent necessary to conduct elections, investigate and process grievances, and implement the provisions of PELRA. Minn. Stat. § 13.43, subd. 6(a).

2. Personnel data shall be disseminated to labor organizations, the PERB, and Bureau of Mediation Services ("BMS") to the extent the dissemination is ordered or authorized by the commissioner of BMS or the PERB, or its employees or agents. *Id.* subd. 6(b).

4. An employee's name, job title, worksite location, home address, work telephone number, home and personal cell phone number on file with the County, date of hire, and work email address and personal email address on file with the County must be provided by the County to the unit's exclusive representative or its affiliate within 20 day calendar days after a bargaining unit employee is hired. *Id.* subd. 6(c); Minn. Stat. § 179A.07, subd. 8.

   The County must continue to provide this information to a bargaining unit's exclusive representative every 120 calendar days. Minn. Stat. § 179A.07, subd. 8.

   Moreover, if a County employee separates from employment or transfers out of a bargaining unit, the County must notify the employee's exclusive representative within 20 calendar days after the separation or transfer, including whether the unit departure was due to a transfer, promotion, demotion, discharge, resignation or retirement. *Id.*

5. The home addresses, nonemployer issued phone numbers and email addresses, dates of birth, and emails or other communications between exclusive representatives and their members, prospective members, and nonmembers are **private** data on individuals. Minn. Stat. § 13.43, subd. 6(e).

I. Accessing Public Data

1. Section 13.03, subdivision 3, provides that a responsible authority shall allow persons to inspect and copy public government data at reasonable times and places. Responses to requests for public data are to be made within a reasonable amount of time, which will vary under the circumstances. There are several advisory opinions of the Office of Administration that deal with this issue. The main theme of those opinions could be stated as follows:

    a. The entity should respond promptly with a time estimate as to when the data will be ready;

    b. The entity should give the individual requesting the data the opportunity to review data when some, but not all, is ready; and

    c. The time for responding must reasonably relate to the amount of data requested.

2. Except where specifically authorized by statute, a municipality may not require persons to identify themselves, state a reason for or justify a request for access to public data. See Minn. Stat. § 13.05, subd. 12.

    a. Identifying data or clarifying information can only be requested in order to facilitate access to the requested data.

    b. This provision does not limit a municipality's power to require identification as a precondition to examining private data.

3. If a person requests copies of data, or electronic transmittal of the data, the responsible authority may require the requesting person to pay **the actual costs** of searching for and retrieving government data, including the cost of employee time, and for making, certifying, and electronically transmitting the copies of the data or the data.

    a. For 100 or fewer pages of black and white, letter or legal size paper copies the entity may charge no more than 25 cents for each page copied, regardless of the amount of time spent on the request or the costs associated making the copies; The cost of materials, including paper, used to provide the copies;

b. For electronic transmissions or copies over 100 pages, the government entity may charge

- the cost of labor required to prepare the copies, but that should charge the rate of the lowest paid employee able to perform the task;
- Any schedule of standard copying charges as established by the agency in its normal course of operation; and
- Actual mailing costs.

See Minn. Stat. § 13.03, subd. 3; see also Minn. R. 1205.0300, subp. 4. A person may not be charged a fee for inspecting government data. Minn. Stat. § 13.03, subd. 3. A fee may only be charged if the person requests copies of data. See id.

4. A municipality may not charge for the cost of separating private from public data.

J. Accessing data held by private entities.

1. Section 13.05, subdivision 11, provides that if a government entity enters into a contract with a private person to perform any of its functions, that the government entity is to include in the contract terms that make it clear that all of the data created, collected, received, stored, maintained or disseminated by the private person in performing those functions is subject to the requirements of Chapter 13, and that the private person must comply with those requirements as if it were a government entity.

2. The remedies in Section 13.08 apply to the private person under this section. When the government entity does not have data maintained by the private person in performing the functions that are the subject of the contract, the private person may have a duty to provide access to public data to the same extent that the government entity would if the data were held by the government entity. See WDSI, Inc. v. County of Steele, 672 N.W.2d 617 (Minn. App. 2003), for a discussion of the operation of this provision of the statute.

IV. Liability for Improper Distribution of Government Data

A. Under Section 13.08, subdivision 1, a political subdivision, statewide system and/or responsible authority is liable to a person who suffers any damages due to a violation of the MGDPA. That liability covers damages sustained, plus costs and reasonable attorneys' fees. See Navarre v. South Washington County Schools, 652 N.W.2d 9 (Minn. 2002). A "willful violation" can result in punitive damages of from $1,000.00 to $15,000.00 for each violation. An individual may bring an action against the entity to compel compliance with the MGDPA and recover the cost of doing so.

1. A willful violation of the MGDPA constitutes a criminal misdemeanor. A willful violation of the MGDPA by any public employee also constitutes just cause for suspension without pay or dismissal of the public employee. Minn. Stat. § 13.09.

2. The statute does not mandate an award of attorney's fees. A district court has discretion. Star Tribune v. City of St. Paul, 660 N.W.2d 821 (Minn. App. 2003).

3. See Clearwater v. Indep. Sch. Dist. No. 166, 2001 WL 1155706 (Minn. App.) for a discussion of proof of damages "as a result of the violation" as an element of the claim.

4. See Walker v. Scott County, 518 N.W.2d 76 (Minn. App. 1994) for a discussion of what constitutes data, and a consideration of whether the wrongful release of information will always be actionable against the municipality.

B. Minnesota has recognized a common law action for invasion of privacy. See Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998). One variety of this tort is referred to as "publication of private facts." Id. at 233.

Publication of private facts is an invasion of privacy when one gives publicity to a matter concerning the private life of another if the matter publicized is of a kind that would be highly offensive to a reasonable person, and is not of legitimate concern to the public. Id.

C. **Disclosing Data with Multiple Data Classifications.** The Minnesota Supreme Court held that public disclosure of the results of an employment investigation resulting in a psychiatrist's termination did not violate the MGDPA, despite that the data disclosed were "duplicative" of confidential data contained in a maltreatment investigation report. Harlow v. State of Minn. Dep't of Hum. Servs., 883 N.W.2d 561 (Minn. 2016). The Court "acknowledged that it may seem anomalous to have data classified as

public for one purpose, and confidential for another purpose. But we see nothing in the text of the MGDPA that prohibits this outcome." Id. at 568.

D. **Disclosure of Breach in Security—Minn. Stat. § 13.055**

1. **Broad Application.** Minn. Stat. § 13.055 was amended to broaden the application of this provision on security breaches to all government entities, rather than just state agencies. This provision's reporting obligations now apply to counties, municipalities, and school districts.

2. **Breach of Security.**

a. A breach of security of the data means an unauthorized acquisition of data maintained by a government entity that compromises the security and classification of the data.

b. An unauthorized acquisition occurs when a person obtains, access, or views government data without the informed consent of the individuals who are the subjects of the data or without statutory authority and ***with the intent*** to use the data for nongovernmental purposes.

3. **Good Faith Exception.** A good faith acquisition or access of government data by an employee, contractor, or agent for the purposes of the entity is not a breach of the security of the data.

4. **Written Notice Required.** A government entity must disclose any breach of the security of the data following discovery or notification of the breach. The disclosure must be in writing to the individual who is the subject of the data and whose private or confidential data was, or is reasonably believed to have been, acquired by an unauthorized person. **Be aware that this notice may be deemed an admission so review with legal counsel first.**

5. **Contents of Notice.** The notice must inform the individual that a report will be prepared and how the individual may obtain access to the report, and that the individual may request delivery of the report by mail or email.

6. **Report Required.** A report must be completed after an investigation into any breach in the security of data and final disposition of any disciplinary action taken, including exhaustion of all rights of

appeal. If the breach involves unauthorized access to or acquisition of data by an employee, contractor, or agent of the government, the report must at minimum include:

a. A description of the type of data that were accessed or acquired;

b. The number of individuals whose data was improperly accessed or acquired;

c. If there has been a final disposition of disciplinary action for purposes of Section 13.43, the name of each employee determined to be responsible for the unauthorized access or acquisition; and

d. The final disposition of any disciplinary action taken against each employee in response.

7. **Timing of Notice.** The disclosure must be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement or any measures necessary to determine the scope of the breach and restore reasonable security of the data.

8. **Big Data Breaches.** If the government entity discovers circumstances requiring notification of more than 1,000 individuals at one time, the government entity must also notify all consumer reporting agencies that compile and maintain files on consumers on a nationwide basis.

9. **Annual Security Assessments.** At least annually, each government entity shall conduct a comprehensive security assessment of any personal information maintained by the government entity. The Minnesota Court of Appeals has recognized a possible cause of action under the MGDPA for failure to establish appropriate security safeguards. Smallwood v. Dep't of Hum. Servs., 966 N.W.2d 257, 264 (Minn. Ct. App. 2021), review denied (Nov. 16, 2021).

10. **Discipline for Willful Violations of MGDPA**. "Willful violation of this chapter, including any action subject to criminal penalty…, by any public employee constitutes just cause for suspension without pay or dismissal of the public employee." Minn. Stat. § 13.09.

SECTION II:
RECORDS RETENTION AND ELECTRONIC DATA

I. Accessing Data: Notice to Employees of Lack of Privacy

Are employees clearly on notice that you can search their computers and electronic files, including their emails and voicemail? What about other electronic files such as thumb drives, text messages on County cell phones and tablets, such as iPads?

A. Electronic Communications Privacy Act, 18 U.S.C. § 2510, *et seq.*

The Electronic Communications Privacy Act ("ECPA") addresses electronic surveillance of communications. The ECPA exempts from liability entities that provide the service, such as employers providing internet or email. However, employers should be aware that employees may be accessing their private email accounts via the internet. While some courts have held that the fact that employees are using the employer provided service constitutes implied consent to monitoring of use of the service, when this use extends beyond the employer email account to personal email, the policy should be made clear. One court held that "knowledge of the capability of monitoring alone cannot be considered implied consent." Deal v. Spears, 980 F.2d 1153, 1157 (8th Cir. 1992) (quoting Watkins v. L.M. Berry & Co., 704 F.2d 577, 581 (11th Cir. 1983)). Accordingly, for an employer to ensure the presence of actual consent, it should prepare a carefully worded email Policy Statement which explains a broad scope of employer monitoring.

B. Internet and Computer Use Policy

Most employers have adopted internet and computer use policies. These policies address acceptable use of the internet and address issues of harassment. In many cases employees were advised that they did not have an expectation of privacy with respect to their use of County equipment. However, many of these policies are limited to the internet and do not address other forms of electronic communications. Employees should be aware that the county may review without notice, information stored on:

- Voicemail;
- Both County and personal email accounts accessed via the County server;
- Text messages received on County issued cell phones, tablets and Blackberry device (***caveat:*** if the employee pays for any portion of the cell phone bill you may not be able to access such records) ;
- All data stored on thumb drives, mass storage devices, tablets and laptops issued by the County;
- All government data stored on any device including any personal computers if such data was collected or created in the course or scope of employment;
- Computer hard drives; and
- Internet server.

C. Policies for Mobile Devices

1. Counties should make sure that there are appropriate policies in place governing appropriate use of mobile devices, including cell phones, tablets, and laptops. Counties should consider adding language regarding the following:

    a. Users are expected to adhere to the same security protocols when connected to non-County equipment as with the County equipment.

    b. Written authorization from the County IT Director is required before any user will be authorized to connect to the County system using a mobile device.

    c. Employees must implement a security PIN to use their smartphone or tablet computer.

    d. Passwords that are obvious, such as nicknames, dates of birth, names of family members or pets, or hobbies shall not be used.

    e. Passwords and other confidential, private, and non-public data are not to be stored on mobile devices.

    f. Employees must agree not to disclose their PIN or passwords to anyone. The only exception should be for testing by IT staff to resolve problems. If a password is shared for this

purpose, it shall be changed by the employee when the testing is completed.

g. Devices with access to County information must employ reasonable security measures.

h. Users shall report all lost or stolen devices with access to or containing County information to their Department Head and the County IT Director within one business day.

i. Employees, contractors, and temporary staff will follow all County-sanctioned data removal procedures, including physical wiping, to permanently erase County data from such devices once their use is no longer required or they are no longer employed or working for the County.

j. Language that makes clear that violations of the policy may result in discipline up to and including suspension or dismissal, and that violations may subject the violator to criminal prosecution under federal and/or state criminal and civil liability.

k. In addition, the County should reserve the right to limit or remove any user's access to the County's information technology systems at any time for any reason.

D. Consider providing notice to employees annually of their obligations to ensure data security, to respond to requests for data, the County's right to review and inspect pursuant to its policies.

II. Internal Communications – Privacy Concerns

A. Communications with Your Board

1. Private and Confidential Data

Most communications between administrators and Board Members are public data and must be released upon request. Each document or email should be reviewed to ensure that there is no private or confidential data included before it is released.

Administrators and Board Members should consider "single subject" emails when addressing private or confidential data. This minimizes

the need to redact data. Similarly, when replying to emails, the reply should be limited to that subject only.

2. Email Information Must Be Made Available at Board Meeting

The Department of Administration opines that an email from a City Manager to Council Members the week prior to a meeting should have been printed and made available to the public at the open meeting pursuant to Section 13D.01, subdivision 6, as this was "printed material relating to the agenda" and had been distributed to all the members before the meeting. Minn. Dep't Admin. Advisory Op. No. 08-015 (Jul. 9, 2008). The information in the email did not contain private data.

B. Communications Amongst Staff

1. All government data is presumed to be public and may be subject to a MGDPA request. Assume the data may be read by the subject of the data or the public.

2. Determine who should be included in email messages.

3. Consider who should be included in replies and review who is in fact included.

4. Begin a new email when the subject changes.

5. Determine how to store the data if it needs to be retained, either electronically or in printed form.

6. Ensure that communications with legal counsel are protected.

III. Records Retention Schedule

A. Requirement to Develop Schedule

It shall be the duty of the head of…the governing body of each county, municipality, and other subdivision of government to establish and maintain an active, continuing program for the economical and efficient management of the records of each agency, county, municipality, or other subdivision of government. Public officials shall prepare an inclusive inventory of records in their custody, to which shall be attached a schedule, approved by the head of the governmental unit or agency having custody of

the records, ***establishing a time period for the retention or disposal of each series of records.***

When the schedule is unanimously approved by the records disposition panel, the head of the governmental unit or agency having custody of the records may dispose of the type of records listed in the schedule at a time and in a manner prescribed in the schedule for particular records which were created after the approval. A list of records disposed of pursuant to this subdivision shall be maintained by the governmental unit or agency. When records containing not public data as defined in Section 13.02, subdivision 8a, are being disposed of under this subdivision, the records must be destroyed in a way that prevents their contents from being determined.

See Minn. Stat. § 138.17, subd. 7.

B. Records Disposition Panel

1. While the State does have a model records retention schedule for Counties, each County may modify the model policy or develop its own policy.

2. Counties must formally adopt a records retention schedule. The schedule must be approved by the Records Disposition Panel, which is comprised of the attorney general, legislative auditor in the case of state records, state auditor in the case of local records, and the director of the Minnesota Historical Society.

C. Email Messages

Under most record retention schedules, email is considered a "correspondence" and must be retained for a minimum of three years. However, if the content of a particular email or its attachments causes the email to fall under another category or subcategory on a record retention schedule, a county may be required to retain the email for longer than three years.

D. Voicemail Messages

1. Absent a specific reference in the records retention schedule, data is to be maintained and accessed by the classification of the data, rather than the storage media. Therefore, if a voicemail message is private personnel data on Mary Smith, the content of that data would be

subject to Section 13.43. There is no requirement that it be kept in electronic voicemail format, however. Therefore, if the content is personnel data, it may be turned into a paper format.

2. There is no requirement that voicemails be kept in electronic voicemail format, however. If the content is personnel data, it may be turned into a paper format.

3. A county may make an amendment to its records retention schedule to address voicemail messages to allow them to be deleted after they are reviewed.

E. Electronic Calendars, Task Lists, Cell Phones, Tablets

1. Electronic calendars, task lists, cell phones, and tablets, such as iPads, are not specifically referenced in the model record retention schedule for counties. Again, absent a specific reference in a record retention schedule, data is to be maintained and accessed by the classification of the data, rather than the storage media.

2. The Minnesota Department of Administration has opined that data in an employee's appointment calendar is classified as private personnel data. See Minn. Dep't Admin. Advisory Opinion No. 96-055 (Dec. 11, 1996). That data would, therefore, be subject to Minnesota Statutes section 13.43 (personnel data). However, not all data in an employee's appointment calendar is personnel data. In Advisory Opinion No. 02-003, the Department of Administration opined that a city had to provide public data contained in an employee's electronic appointment calendar, i.e., data that documented public business, even if those data were commingled with not public data. In that case, the public data concerned discussions between a library director and a contractor about a possible library expansion project, which the employee had noted in his appointment calendar.

IV. Litigation Discovery Hold

A. Steps to Take Upon Notice of Litigation

When you receive notice of a Human Rights charge or notice of a lawsuit, what steps are you taking to preserve electronic records and other data?

1. **First Step- Discussion with IT Department**

Upon notice of a lawsuit or charge, there is an obligation to preserve all data that may relate to the litigants, be it an employee or other individual. This obligation exists despite the existence of the records retention policy or any periodic or automatic document or data destruction practices the County may have in place. For example, if emails are automatically deleted on a specific schedule, the County must, upon notice of litigation, take immediate steps to prevent any deletion of emails related to the litigant(s). No data involving the litigant(s) may be deleted from any laptops, PCs, cell phones, tablets, servers, cell phones, backup tapes or other storage devices. No voicemail messages related to the litigant(s) may be deleted or lost due to automatic deletion due to storage capacity limits or a specific date being reached. The County must take affirmative steps to preserve all data. Therefore, the first step is to contact the IT department for assistance.

2. **Litigation Hold Notice**

The second step is to send a "hold notice" to everyone who may have any data, whether it be documents, emails, text messages, voicemail, data on thumb drives, entries on paper or electronic calendars, handwritten notes, reports, drafts of documents or any other data of any kind. The hold notice informs the individuals – including board members and consultants, that all of this information must be saved in the original format and that they must take steps to preserve the data. The hold notice should be sent by the County Attorney.

B. Termination of Employee

When an employee leaves under circumstances where further proceedings may be likely, a County should not wait until notice of a Human Rights charge or lawsuit before taking action to preserve records. The computer of the terminated employee should immediately be reviewed by the IT department and a mirror image copy of the hard drive and email account of that employee should be secured.

C. Why Printing Data is Not Enough - MetaData

1. Metadata is "information about the information." Metadata may include a file's name, size and creation/deletion date. It may also

include the source of the data, its author, the time it took to create the file, whether others have viewed the file, printed it, etc.

2. Printing hard copies of electronic data is not good enough once there is a litigation hold. The metadata information is also important with respect to any type of concern regarding employee email usage.

3. Metadata in email shows the creation date, who it was sent to, including bcc recipients, when, how often it was accessed afterwards, replies, attachments, etc.

4. In created documents, metadata shows when the document was originally created, changes, how often accessed and when, modifications, redlines, comments that were added and deleted. When a dispute arises over the authenticity of a document, this data is vital.

SECTION III: THE FEDERAL DRIVER'S PRIVACY PROTECTION ACT

I. What is the Driver's Privacy Protection Act and What Conduct Does it Prohibit?

A. The Driver's Privacy Protection Act ("DPPA") is set forth in federal law at 18 U.S.C. §§ 2721 through 2725. Section 2721 prohibits a "State department of motor vehicles, and any officer, employee, or contractor thereof" from knowingly disclosing or otherwise making available to any person or entity "personal information" or "highly restricted personal information" about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the individual to whom such information applies, except in certain circumstances set forth in the statute. 18 U.S.C. § 2721(a).

1. For purposes of the DPPA, the term "person" is defined as "an individual, organization or entity, but does not include a State or agency thereof." 18 U.S.C. § 2725(2).

2. The DPPA defines "personal information" as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not

the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725(3).

3. The term "highly restricted personal information" is defined as "an individual's photograph or image, social security number, medical or disability information." 18 U.S.C. § 2725(4).

B. The DPPA lists fourteen categories of "permissible uses" of personal information. See 18 U.S.C. § 2721(b). One such category is "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State or local agency in carrying out its functions." 18 U.S.C. § 2721(b)(1). It is not appropriate for County employees to access driver's license information to satisfy their own personal curiosities regarding family members, friends, neighbors, or acquaintances.

C. Section 2722 of the DPPA states that, "[i]t shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under [Section 2721(b)]." 18 U.S.C. § 2722(a).

D. The costs of violating the DPPA can be extremely high. In civil lawsuits where a violation of the DPPA is found to have occurred, a court may award a variety of damages. Specifically, Section 2724(b) of the DPPA states that, "[t]he court may award:

1. Actual damages, but not less than liquidated damages in the amount of $2,500.00;

2. Punitive damages upon proof of willful or reckless disregard of the law;

3. Reasonable attorneys' fees and other litigation costs reasonably incurred; and

4. Such other preliminary and equitable relied as the court determines to be appropriate.

II. What Steps Should Counties Take to Minimize Potential Liability Under the DPPA?

A. Train employees about the DPPA and its requirements.

B. Take steps to appropriately monitor employee use of systems such as the Minnesota Driver and Vehicle Services ("DVS") database. Supervisors should take steps to ensure that employees are not obtaining, using, or disclosing any personal information from a motor vehicle record for a purpose not permitted under the DPPA.

C. Employees who have access to motor vehicle records should be required to sign a use agreement, acknowledging that they understand the requirements of the DPPA and the potential damages for violation of the Act. Employees should also acknowledge that they can be personally held liable for violations of the DPPA, and that such liability includes both civil and criminal penalties.

D. Ensure DVS access is cut off for any employee who leaves employment or no longer is in a position which reasonably requires access to DVS.

CHAPTER THREE:
PUBLIC EMPLOYMENT LABOR RELATIONS ACT (PELRA)

SECTION I:
DEFINITIONS

I. Definitions

A. Public Employee: means any person appointed or employed by a public employer except:

(1) elected public officials (they not employees but can in some instances be appointed to fill out the terms of elected officials who have left office);

(2) election officers;

(3) commissioned or enlisted personnel of the Minnesota National Guard;

(4) emergency employees who are employed for emergency work caused by natural disaster;

(5) part-time employees whose service does not exceed the lesser of 14 hours per week or 35 percent of the normal work week in the employee's appropriate unit;

(6) employees whose positions are basically temporary or seasonal in character and: (i*) are not for more than 67 working days in any calendar year;* or (ii) are not for more than 100 working days in any calendar year and the employees are under the age of 22, are full-time students enrolled in a nonprofit or public educational institution prior to being hired by the employer, and have indicated, either in an application for employment or by being enrolled at an educational institution for the next academic year or term, an intention to continue as students during or after their temporary employment;

***

An employee hired for a position under paragraph (a), clause (6), item (i), if that same position has already been filled under paragraph (a), clause

(6), item (i), in the same calendar year and the cumulative number of days worked in that same position by all employees exceeds 67 calendar days in that year. For the purpose of this paragraph, "same position" includes a substantially equivalent position if it is not the same position solely due to a change in the classification or title of the position. Minn. Stat. § 179A.03, subd. 13.

B. **Confidential employee** means an employee who as part of the employee's job duties:

(1) is required to access and use labor relations information as that term is defined in Minnesota Statutes, section 13.37, subdivision 1, paragraph (c); or

(2) actively participates in the meeting and negotiating on behalf of the public employer. Minn. Stat. § 179A.03, subd. 4

C. **Exclusive representative** means an employee organization which has been certified by the commissioner under section 179A.12 to meet and negotiate with the employer on behalf of all employees in the appropriate unit. Minn. Stat. § 179A.03, subd. 8

D. **Supervisory employee** means a person who has the authority to undertake a majority of the following supervisory functions in the interests of the employer: hiring, transfer, suspension, promotion, discharge, assignment, reward, or discipline of other employees, direction of the work of other employees, or adjustment of other employees' grievances on behalf of the employer. To be included as a supervisory function which the person has authority to undertake, the exercise of the authority by the person may not be merely routine or clerical in nature but must require the use of independent judgment. An employee, other than an essential employee, who has authority to effectively recommend a supervisory function, is deemed to have authority to undertake that supervisory function for the purposes of this subdivision. The administrative head of a municipality, municipal utility, or police or fire department, and the administrative head's assistant, are always considered supervisory employees. Minn. Stat. § 179A.03, subd. 17.

E. **Essential employee** means firefighters, peace officers subject to licensure under Minnesota Statues, sections 626.84 to 626.863, 911 system and police and fire department public safety dispatchers, guards at correctional facilities, confidential employees, supervisory employees, assistant county attorneys, assistant city attorneys, principals, and assistant principals. Minn. Stat. § 179A.03, subd. 7.

F. **Appropriate Unit.** Appropriate unit is a group of employees placed together for collective bargaining purposes because of similar working conditions, personnel practices, work skills, work location and community of interest. Minn. Stat. §§ 179A.03, subd. 2 and 179A.09.

E. **Terms and conditions of employment** means the hours of employment, the compensation therefor including fringe benefits except retirement contributions or benefits other than employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay, staffing ratios, and the employer's personnel policies affecting the working conditions of the employees. Minn. Stat. § 179A.03, subd. 19.

SECTION II:
DUTY TO NEGOTIATE

I. Duty to Meet and Bargain in Good Faith

A public employer has an obligation to meet and negotiate in good faith with the exclusive representative of public employees in an appropriate unit regarding grievance procedures and the terms and conditions of employment, but this obligation does not compel the public employer or its representative to agree to a proposal or require the making of a concession. Minn. Stat. § 179A.07, subd. 2.

A. PELRA defines "terms and conditions of employment" as follows: "'Terms and conditions of employment' means the hours of employment, the compensation therefore including fringe benefits except retirement contributions or benefits other than employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay, staffing ratios, and the employer's personnel policies affecting the working conditions of the employees. In the case of professional employees the terms does not mean educational policies of the school district. 'Terms and conditions of employment' is subject to section 179A.07." Minn. Stat. §179A.03, subd. 19.

B. A public employer is not required to meet and negotiate concerning matters of "inherent managerial policy" defined as follows: "Matters of inherent managerial policy include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget,

utilization of technology, the organizational structure, selection of personnel, and direction of personnel …" Minn. Stat. §179A.07, subd. 1.

C. A failure or refusal to bargain over terms and conditions of employment is an unfair labor practice. Minn. Stat. §179A.13, subd. 2(5). Also, a unilateral change in terms and conditions by an employer without first negotiating to an impasse is presumed to be an unfair labor practice.

D. The obligation to meet and negotiate "does not compel the public employer or its representative to agree to a proposal or require the making of a concession." Minn. Stat. § 179A.07, subd. 2.

E. Inherent managerial rights are permissive subjects of bargaining, meaning that, although public employers are not required to meet and negotiate requiring these topics, they may choose to do so. Once an employer has chosen to negotiate regarding an inherent managerial right, however, it is unlikely that it will ever be able to avoid negotiating regarding that topic in future collective bargaining agreements.

C. Subjects of Bargaining Specifically Addressed by PELRA

1. **Dues Checkoff.** Minn. Stat. § 179A.06, subd. 6 provides that public employees may request payroll deduction for the exclusive representative that represents the employee's position and its associated political fund. If no exclusive representative represents an employee's position, the public employee may request payroll deduction for the organization of the employee's choice. A public employer must provide payroll deduction according to any public employee's request under this subdivision.

2. **Written Contract.** Minn. Stat. § 179A.20, subd. 1 provides that collective bargaining agreements shall be in writing.

3. **Grievance Procedure.** Minn. Stat. § 179A.20, subd. 4 requires that all agreements have a grievance procedure providing for compulsory binding arbitration of grievances, including all written disciplinary actions. If the parties cannot agree on the grievance procedure, they are subject to the grievance procedure adopted by the Commissioner of the Bureau of Mediation Services. (**Never agree to this, it is terrible!**)

4. **Former Employee Benefits.** Minn. Stat. § 179A.20, subd. 2a provides that a contract may not obligate an employer to fund all or

part of the cost of health care benefits for a former employee beyond the duration of the contract, subject to Minesota Statutes, section 179A.20, subd. 6.

5. **Duration.** No contract shall exceed three years. Minn. Stat. § 179A.20, subd. 3.

D. Obligation of Employer to "Meet and Confer" with Professional Employees

1. Meet and confers are only required with professional employees, to discuss policies and other matters relating to their employment which are not terms and conditions of employment. Such meet and confer sessions occur every four months at a location determined by the employer.

2. Discussions do not involve contract language proposals.

3. Public employer may choose, but do not have to, meet and confer with employees who are not professionals and if they do, it does not have to be on a routine basis.

SECTION III: UNFAIR LABOR PRACTICES

I. Unfair Labor Practices by Employers. Public employers, their agents and representatives are prohibited from:

A. interfering, restraining, or coercing employees in the exercise of the rights guaranteed in [PELRA]

B. dominating or interfering with the formation, existence, or administration of any employee organization or contributing other support to it;

C. discriminating in regard to hire or tenure to encourage or discourage membership in an employee organization;

D. discharging or otherwise discriminating against an employee because the employee has signed or filed an affidavit, petition, or complaint or given information or testimony under [PELRA];

E. refusing to meet and negotiate in good faith with the exclusive representative of its employees in an appropriate unit;

F. refusing to comply with grievance procedures contained in an agreement;

G. distributing or circulating a blacklist of individuals exercising a legal right or of members of a labor organization for the purpose of preventing blacklisted individuals from obtaining or retaining employment;

H. violating rules established by the commissioner regulating the conduct of representation elections;

I. refusing to comply with a valid decision of a binding arbitration panel or arbitrator;

J. violating or refusing to comply with any lawful order or decision issued by the commissioner or the board [of the Bureau of Mediation Services];

K. refusing to provide, upon the request of the exclusive representative, all information pertaining to the public employer's budget both present and proposed, revenues, and other financing information;

L. granting or offering to grant the status of permanent replacement employee to a person for performing bargaining unit work for the employer during a lockout of employees in an employee organization or during a strike authorized by an employee organization that is an exclusive representative;

M. failing or refusing to provide information that is relevant to enforcement or negotiation of a contract as soon as reasonable after receiving a request by an exclusive representative, not to exceed 30 days for information relevant to contract enforcement or 60 days for information relevant to contract negotiation absent mutual agreement by the parties, provided that a state agency may request and the commissioner may extend these timelines based upon estimated need and after consultation with the exclusive representative; or

N. refusing to reassign a position after the commissioner [of the Bureau of Mediation Services] has determined the position was not placed into the correct bargaining unit.

Minn. Stat. § 179A.13, subd. 2.

II. Unfair Labor Practices by Employees and Employee Organizations. Employee organizations, their agents or representatives, and public employees are prohibited from:

A. restraining or coercing employees in the exercise of rights provided in [PELRA];

B. restraining or coercing a public employer in the election of representatives to be employed to meet and negotiate or to adjust grievances;

C. refusing to meet and negotiate in good faith with a public employer, if the employee organization is the exclusive representative of employees in an appropriate unit;

D. violating rules established by the commissioner [of the Bureau of Mediation Services] regulating the conduct of representation elections;

E. refusing to comply with a valid decision of an arbitration panel or arbitrator;

F. calling, instituting, maintaining, or conducting a strike or boycott against any public employer on account of any jurisdictional controversy;

G. coercing or restraining any person with the effect to:

1. force or require any public employer to cease dealing or doing business with any other person;

2. force or require a public employer to recognize for representation purposes an employee organization not certified by the commissioner;

3. refuse to handle goods or perform services; or

4. prevent an employee from providing services to the employer;

H. committing any act designed to damage or actually damaging physical property or endangering the safety of persons while engaging in a strike;

I. forcing or requiring any employer to assign particular work to employees in a particular employee organization or in a particular trade, craft, or class rather than to employees in another employee organization or in another trade, craft, or class;

J. causing or attempting to cause a public employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed;

K. engaging in an unlawful strike;

L. picketing which has an unlawful purpose such as secondary boycott;

M. picketing which unreasonably interferes with the ingress and egress to facilities of the public employer;

N. seizing or occupying or destroying property of the employer;

O. violating or refusing to comply with any lawful order or decision issued by the commissioner or the board.

Minn. Stat. § 179A.13, subd. 3.

SECTION IV: WORKING WITH PUBLIC SECTOR UNIONS DAY TO DAY

I. Get to Know Your Collective Bargaining Agreements

A. Not all of the County's CBAs are the same.

B. When in doubt, pull it out and check. Not all provisions are in the place in the contract where you think it should be.

II. Personnel Policies Do Not Trump the CBA: It's the Other Way Around

The CBA is a contract between the County Board and the Union representing an identified class of employees (whether or not a specific person is paying dues). The personnel policies are of general application and do not apply where there is a conflict with the CBA.

III. Concept of "Past Practice"

How contract language is understood, interpreted by the parties and applied over years is called "past practice." The past practice of how the CBA has been

interpreted and applied cannot be changed without either agreement of the parties or termination of the practice when the contract is open with notice to the other party.

IV. Familiarize Yourself with Past Grievances and Settlements

When an issue of either discipline or the interpretation of contract language comes up, it is important to see how the issue has been addressed in the past. It is critical to see if there have been any prior grievances, arbitration decisions or settlements on the same contract language or similar disciplinary issues.

V. Right to Union Representation: When They Have It and When They Don't

A. **Weingarten Rights:** An employee is entitled to union representation when ***all*** of the following conditions are met: The employee must be questioned in connection with an investigation; The employee must reasonably believe he or she may be disciplined as a result of the answers; and. The employee must request representation.

- Unions frequently propose contact language attempting to place the burden on the employer to notify union members of their right to union representation. It is ill advised for employers to do so, as there are many instances where an employer may ask a question which it does not know may lead to an answer that can elicit information that may result in discipline. The employee should retain the burden of asking for representation.

- Employees do not "reasonably believe" that they will be disciplined when meeting with HR regarding an FMLA or ADA request, for example and therefore do not have the right to union representation.

- Employers can clarify that an employee witness is not under investigation for misconduct and not the subject of the investigation and therefore not entitled to representation. The employer should not grant blanket immunity for information gathered, as the employee may then confess to misconduct .

- Employees do not have the right to union representation during performance evaluations, or routine meetings with supervisors.

- Union presence does not change the data privacy rights of others. The union is not entitled to view or access private data on individuals other than the member that they are representing.

- Employees do not have the right to the union representative of their choice. That being said, the employer should be reasonable in scheduling meetings with the employee to have their union representative present for any significant disciplinary investigation meetings.

B. Union Role in Investigative Meetings

- The union representative does not have the right to run the meeting

- The role of the union is to clarify *questions.*

- The union does not have the right to answer for the employee or interrupt the employee's answer.

- The Employer can admonish the union representative to limit their comments to clarification of questions.

C. Grievances: Dispute over the application of a term of the collective bargaining agreement.

1. **Language grievance**: How language in the contract is interpreted or applied.

   - Past practice

   - Intent of the parties when negotiated (review negotiations files, talk to people who were at the table)

   - Reasonable interpretation. Is the language clear?

   - Be careful not to settle just to settle. It will be a "past practice" going forward.

2. **Discipline grievance**: Employee has been disciplined and the grievance is over whether there was just cause for the discipline imposed.

CHAPTER FOUR:
DUE PROCESS

SECTION I:
INVESTIGATIONS

I. Before the Investigation

A. Document the Discovery. Whoever brought the complaint to your attention and/or discovers the alleged misconduct should create a written statement that describes everything the person knows about that conduct, including the names of potential witnesses, the identity of the alleged wrongdoer (if known), the date that the misconduct occurred or was discovered, and any other potentially relevant information.

B. Before Investigating, Some Up-Front Reporting May Be Necessary

1. **Report any suspected crimes to law enforcement.** Examples of crimes that should be reported to law enforcement include, but are not limited to, theft, embezzlement, possession of child pornography, etc.

2. **Report to law enforcement and the State Auditor, under certain circumstances.** Minnesota law requires public employees and officers to "promptly" report to law enforcement and the State Auditor whenever the employee "discovers evidence of theft, embezzlement, unlawful use of public funds or property, or misuse of public funds" by anyone who is "authorized to expend public funds." Minn. Stat. § 609.456, subd. 1.

    a. Note that the reporting requirement is triggered by the discovery of "evidence." Rumor is not enough. However, because these reports must be made "promptly," a County may wish to make them before conducting its own internal investigation. The State Auditor may make adverse findings against the County if the report is not prompt.

b. The written report to the State Auditor must contain a detailed description of the alleged incident. The report must include all relevant data, including data classified as not public under the Minnesota Government Data Practices Act.

c. Even if you are not required to report an incident, the State Auditor may still investigate it if you provide a voluntary report.

d. The State Auditor's office typically only investigates issues it considers to represent a "violation of a state law, rule, or an accounting standard."

3. **When should you notify MCIT?**

C. Determine Whether an Investigation is Necessary. To determine whether an investigation is necessary, the County should consider the following:

1. Does the behavior complained of violate the law or the County's policies?

   Each County should look to its own policies. Contact counsel with any questions regarding the law.

2. Is an investigation required by policy?

   Some Counties require an investigation upon the discovery of evidence of certain violations. It is important to be aware of these policies and conduct an investigation in accordance with them.

3. Does the conduct in question involve a pattern of prohibited behavior?

4. Could the conduct result in liability to the County?

5. Did the alleged wrongdoer admit to the conduct?

6. Even if a complainant or alleged wrongdoer is no longer an employee of the County, the County may still have an obligation to investigate. Such an investigation could pose a logistical problem because, for instance, employers cannot compel non-employees to

participate in investigations. Any refusal to participate should be documented.

D. Determine Whether the Alleged Employee Wrongdoer Should be Placed on Administrative/Investigatory Leave Pending the Outcome of the Investigation. Depending on the nature of the alleged misconduct, the employee's duties, and the duration of the planned investigation, it may be appropriate or necessary to immediately place the alleged wrongdoer on administrative leave pending the outcome of the investigation. When making such a decision, the County should consider the following factors:

1. Whether the employee has the ability to destroy relevant information;

2. Whether a secret investigation may adduce more relevant evidence; and

3. Whether placing the employee on administrative leave is necessary to limit the employer's potential exposure to losses and/or negative publicity.

4. Depending on the specific situation, employers may wish to issue specific directives to employees placed on paid leave. Such directives typically include: (1) prohibiting the employee from doing any work for the County; (2) requiring the employee to turn in all County property, including electronic files; (3) directing the employee to appear for an interview; and (4) ordering the employee to not access any of the County's electronic resources during the investigation.

E. Act Promptly. If the County decides to conduct an investigation (or is mandated to conduct one pursuant to County policy), even minimal delays may result in lost evidence or provide the alleged wrongdoer with an opportunity to conceal the truth or come up with a "story."

F. Choosing an Investigator. The County should decide whether it will investigate alleged misconduct internally or whether it will hire a third-party investigator. In making this determination, the County should consider the following:

1. The potential ramifications of the problem, both practical and legal;

2. Whether an internal investigator will be viewed as biased because of his/her position with the employer;

3. The long-term impact of using an internal investigator, including the future work relationship, if any, between the investigator and the subject of the investigation;

4. The ability of an internal investigator to efficiently conduct the investigation in a thorough, objective, and timely manner; and

5. The likelihood of the investigator having to testify at a grievance arbitration, litigation, or other matter related to the investigation and subsequent discipline.

II. Data Practices Considerations in Investigations

A. Tennessen Warnings

1. **Legal Requirements.** The Minnesota Government Data Practices Act ("MGDPA") states that an individual who is asked to provide any private or confidential data concerning the individual shall be informed of the following: (Minn. Stat. § 13.04, subd. 2)

   a. The purpose and intended use of the requested data;

   b. Whether the individual may refuse or is legally required to supply the requested data;

   c. Any known consequences arising out of supplying or refusing to provide the private or confidential data; and

   d. The identity of other persons or entities authorized by state or federal law to receive the data.

2. **Best Practices.**

   a. **Give Tennessen Warnings at the Start of <u>All</u> Investigation Interviews.** Although several decisions from the Minnesota Court of Appeals suggest that public employers do not need to give a Tennessen Warning when seeking information arising out of an employee's employment for use in the

employment context, the best practice is to administer a Tennessen Warning at the start of all investigation interviews, especially when interviewing the subject of the investigation.

The failure to administer a Tennessen Warning may result in the County's inability to use, store, or disseminate the collected data.

b. **Tennessen Warnings should be in Writing.** The MGDPA does not require written Tennessen Warnings. However, in order to avoid issues of proof, the best practice is to give written Tennessen Warnings, signed by the individual being interviewed. Above the space for the individual's signature, the warning should contain language to the following effect: "By signing below you acknowledge that you have read this notice prior to being interviewed. A copy will be provided to you upon request."

c. **Broadly Drafted.** The Tennessen Warning should broadly address the legal components discussed above. Counties should not limit themselves to overly specific uses of the data or omit any person or entity that may have a right to access the collected data.

B. Garrity Warnings

1. **When Administered.** Public employers must administer a Garrity Warning when requiring employees to provide information as a condition of maintaining employment. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

2. **Consequences of Garrity Warning.** If a public employer directs an employee to answer interview questions upon penalty of discipline, the information obtained by that employer and any subsequent information obtained as a result of the compelled statement cannot be used in subsequent criminal proceedings against the employee.

3. **Language.** Like a Tennessen Warning, a Garrity Warning should explain the interview subject's rights under the MGDPA. Unlike a Tennessen, however, the Garrity Warning should: (1) direct the subject to answer the interviewer's questions accurately and truthfully under penalty of discipline for insubordination; and (2) inform the interview subject that the information he/she provides and

any information resulting from the interview may not be used against them in criminal proceedings. The Garrity Warning should also stress that any information obtained independently by law enforcement or prosecuting authorities may be used in any criminal proceeding.

4. **Coordination with Law Enforcement.** If law enforcement officials are also investigating the conduct in question, it may be a good idea to contact the investigating officer before administering a Garrity Warning.

III. Determine the Scope and Strategy of the Investigation

A. Most investigations follow the same pattern: (1) receive complaint and/or interview complainant; (2) interview fact witnesses; and (3) interview alleged wrongdoer. At each stage of this process, Counties should reevaluate whether additional investigation is warranted or needed and who should be interviewed next.

B. It is beneficial to review any applicable County policies prior to conducting the investigation.

C. **Identify Fact Witnesses.** When considering which fact witnesses to interview, the investigator should take the following into consideration:

1. Does the complaint list witnesses to the alleged misconduct?

2. Does the complaint leave out individuals who may have important information relevant to the investigation?

3. Who was present for the alleged misconduct?

4. Who received the initial complaint?

5. Who can provide necessary background information?

Keep in mind that additional witnesses are often identified through both the interview process and a review of relevant documents or other evidence.

D. **Determine Who Will be Present at Each Interview**

1. Depending on the circumstances, it may be beneficial to have more than one County representative present.

2. Upon request, an employee who is in a union has a right to have a union representative present if it appears that the interview may result in discipline. Some union contracts provide this right even if there is not a request by the employee.

E. **Prepare a Response to Common Distractions.** Before conducting any interview, the investigator should decide how he/she will respond to the following types of complications:

1. The interview subject, complainant, or other individual interviewed demands that the interview be taped;

2. The interview subject, complainant, or other individual interviewed requests that a friend, co-worker, or attorney be present during the interview;

3. The interview subject's union representative repeatedly interjects or tries to help the interview subject frame his or her answers;

4. The interview subject refuses to answer questions;

5. The interview subject, complainant, or other individual interviewed asks who else you have interviewed or plan to interview;

6. The alleged wrongdoer asks whether the employer is going to discipline him or her; and

7. The alleged wrongdoer or his/her union representative asks for a written list of questions or asks to be allowed to submit written answers to questions in lieu of a face-to-face interview.

IV. Interview Basics

A. **Explain the Purpose of the Interview.** Do not make any comments that could be perceived as minimizing the complaint.

B. **Define your Role in the Investigation.** Regardless of your other roles, make it clear that you are there as an impartial investigator. Do not take sides.

C. **Explain the Investigation Process.** Explain that the County will follow up on information it receives. Ask the interviewee to report any contact from

the alleged wrongdoer or any retaliation (from whatever source) immediately.

D. **Do *Not* Promise Confidentiality.** Information received during the scope of an investigation is subject to the MGDPA and must be released in accordance with its provisions.

E. **Ask Specific Questions.** Who, what, when, where, why, how? Get as detailed of information as possible. Do not allow an interview subject to make generalizations or to offer conclusions as opposed to facts.

F. **Ask the Tough Questions.** Even if the subject matter is uncomfortable.

G. **Ask for Documents.** Ask each interviewee if he/she has any tangible evidence that corroborates his/her recollection of events. Documents such as e-mail correspondences, notes, diary entries, time sheets, or calendars, might all contain relevant and valuable information. Recordings of voice mail messages might also contain helpful information.

H. **Ask Each Interview Subject to Identify Other Witnesses to the Misconduct.**

I. **Do *Not* Guarantee Results.** Investigators should not expressly or implicitly guarantee any particular outcome of the investigation. Nor should they suggest or imply that disciplinary action will be taken against the alleged wrongdoer.

V. General Tips for Interviewing Complainants and Fact Witnesses

A. **Ask Short, Open-Ended Questions.** The goal is to have the witness talk more than the investigator. Investigators should avoid "leading" questions. This is not a time for cross examination.

B. **Always Cover the Who, What, When, Where, Why and How Questions.** Follow each line of questioning to its logical conclusion based on the witness's *personal knowledge*, as opposed to what he or she has heard from others. Get the details.

C. **Assume that the Investigator will Defend the Interview Questions in Court.** Be impartial and thorough. Keep in mind that the investigator's notes *may* become discoverable evidence at some point.

D. **Observe Witness Demeanor.** Document those observations in the investigation notes.

E. **Follow Up.** If a witness answers "I don't know" or "I can't recall," break the question down and/or rephrase it to determine whether the witness does not have the information or is being evasive. If you believe the witness is being evasive, circle around and come back to the question at other points in the interview. If you have an objective reason to believe that the witness would know or remember particular information, do not hesitate to express surprise when the witness answers "I don't know" or "I don't remember."

F. **Visual Representations.** If you believe it would be helpful, have the witness draw a picture of the alleged misconduct or the location at which it occurred. It may also be helpful to have the witness take you to the site of the alleged misconduct for a personal inspection.

G. **Disclose as Little as Possible.** Use your judgment as to how much to tell the witness about the complaint.

H. **Ask the Complainant if Extent of Complaint Has Been Covered.** In order to safeguard against the Complainant later coming up with additional complaints/accusations the County has never been informed of and then saying that the County did not respond appropriately to those complaints/accusations, it is important to ask the Complainant whether what they have stated is everything that forms the basis of his/her complaint.

I. **Ask that the Witness not Discuss the Process with Anyone Else.** Witnesses should not talk about the allegations, the content of their individual interviews, or the fact that there is an investigation being conducted.

J. **Impact.** Inquire about the impact of the alleged conduct.

K. **Understand the Complainant's Concerns.** Remember the complainant may be embarrassed or fear retaliation.

L. **Complainant's Desired Outcome.** Inquire as to what the complainant would like to see happen, but do not make any promises.

M. **Take Appropriate Action.** If the complainant expresses a desire that you do not do anything with the information he/she tells you, explain that the County must take appropriate action and why.

N. **Do Not Make Promises.** Do not make any promises about who will be interviewed or when the investigation will be completed. Do not disclose the identity of witnesses.

O. **Retaliation.** Ask the complainant to bring any retaliation to your attention and explain what that means.

VI. Interviewing the Alleged Wrongdoer

A. **Union Representation for Employee Subjects.** If applicable, the investigator may wish to determine whether a union representative will be available for the interview in the event that the subject requests such representation at the start of, or during, the interview itself. The U.S. Supreme Court has held that individual employees have a right to refuse to participate in an investigation without union representation if they reasonably believe that discipline may result from the investigation. N.L.R.B. v. Weingarten, 420 U.S. 251 (1975). Consequently, if the alleged wrongdoer requests union representation, the employer might have to reschedule the investigation until such time as representation is available.

B. **Opening Remarks.** Prior to asking any questions, the investigator should explain the following to the alleged wrongdoer and his/her union representative:

1. The role of the investigator as a fact finder;

2. The Tennessen warning, which the investigation subject should be asked to sign prior to asking any questions;

3. Ground rules for the interview, such as not interrupting each other and professional conduct; and

4. The alleged wrongdoer should be expressly informed that this interview may be his/her only opportunity to tell his/her side of the story before a decision is reached.

C. **Refusals to Answer.** The investigator should decide in advance how to respond to the alleged wrongdoer's refusal to voluntarily answer questions. Typically, an individual will voluntarily cooperate if he/she knows that the interview may be his/her only chance to tell his/her side of the story prior to a Loudermill hearing. A typical Tennessen warning contains language to that effect. If the individual being questioned is an employee and he/she

decides not to answer anyway, the investigator should consider whether he/she is willing or able to issue a Garrity warning to compel answers.

D. **Follow-up Questions.** Be prepared to ask appropriate follow-up questions in order to obtain the full response to each allegation. In addition to the general considerations discussed above, the following tips may help an investigator get the full response from an alleged wrongdoer:

1. **Be Blunt.** Do not dance around delicate topics. Ask the question directly.

2. **Ask Why.** If the alleged wrongdoer admits to any particular action, ask what his/her intent was.

3. **Check Credibility.** If the alleged wrongdoer denies the allegations, ask whether he/she believes anyone would have a reason to fabricate the allegations.

E. **Closing Remarks.** Before ending the interview, the investigator should:

1. Ask for any other information that may be helpful, or other information that the alleged wrongdoer would like to provide;

2. Explain that retaliation will not be tolerated. Direct the alleged wrongdoer not to take any action that could reasonably be perceived as an attempt to retaliate against any person who may have participated in the investigation. Stress that the term "retaliation" will be considered as broadly as possible;

3. Direct the alleged wrongdoer not to take any action that could give the appearance of attempting to influence the testimony of other witnesses; and

4. Direct the alleged wrongdoer employee not to discuss the investigation or the allegations with anyone other than his/her union representative and attorney.

F. **Additional Tips for Interviewing the Alleged Wrongdoer**

1. Be prepared for anger and defensiveness on the part of the alleged actor.

2. Insist on details of the alleged wrongdoer's version of the facts. Do not settle for a general denial.

3. Do not merely state the complainant's allegations and ask the alleged actor to simply verify or deny.

4. Do not threaten.

5. Do not describe what disciplinary action might be taken. Advise the alleged wrongdoer that any decisions regarding disciplinary action will be made at the conclusion of the investigation.

6. Do not make any promises about when the investigation will be completed or who will be interviewed.

7. Do not reveal the names/identities of witnesses.

8. Emphasize that the alleged wrongdoer will be subject to discipline for retaliation.

VII. Assessing Credibility

A. **Credibility Clues.** When interviewing each witness and subject of the investigation, the investigator should look for credibility clues.

1. Eye contact;

2. Unnatural or inconsistent hesitancies;

3. Change in skin coloration (i.e. face turning red or white);

4. Change in pitch of voice;

5. Change in affect over the course of the interview;

6. Subtle or direct attempts to influence the outcome of the investigation through inducement or threat;

7. Statements reflecting a skewed view of reality.

B. **Consistency.** When assessing credibility, consider the consistency of the witness/subject statements.

1. Are there other witnesses or documents that support or refute the interviewee's testimony?

2. Is the conduct of the parties consistent with their description of the overall environment?

3. Does the chronology make sense from a practical standpoint?

4. Is the described behavior consistent with what came before and afterward?

5. Are there unexplainable lapses in recollection or periods of time that are not accounted for?

VIII. Preserving Electronic Evidence

A. **Computer Evidence.** Counties should take steps to preserve any evidence of wrongdoing that may exist on County computers. For example:

1. Secure the employee's computer by physically removing it from the employee's office or work area.

   a. Involve IT where necessary.

2. Disable the employee's password and ability to access the employer's computer system.

3. Allow only a knowledgeable computer technician, technical coordinator, or computer forensic specialist to access the computer. Do not hesitate to hire an outside computer forensic specialist when necessary.

4. Preserve the chain of custody. You should be able to identify everyone who touched the computer from the time it was removed from the employee's work area or office.

5. Before searching the computer, verify that the County's computer use policy states that the computer is the sole property of the County and that the computer and any data stored or processed on it is subject to monitoring at any time without notice. Such language will defeat a claim that the employee had a reasonable expectation of privacy in the data stored on the computer.

B. **Video Surveillance.** Preserve any surveillance video footage.

C. **Bank Accounts.** Disable the employee's access to County bank accounts, where applicable.

D. **Utilizing Social Media in Investigations**

1. Public social media sites. At least two courts have held that individuals have no expectation of privacy with respect to information posted to a completely public social media site. See Moreno v. Hartford Sentinel, 172 Cal.App.4th 1125 (Cal. App. 5, 2009) (no reasonable expectation of privacy regarding Myspace writings open to public view); see also U.S. v. Charbonneau, 979 F.Supp. 1177 (S.D. Ohio 1997) (no reasonable expectation of privacy regarding posting in a public "chatroom").

2. Private pages on social networking sites. At least one court has held that individuals do not have a reasonable expectation of privacy in material posted on a "private" social media page. Romano v. SteelCase Inc., 30 Misc.3d 426 (N.Y. Sup. Ct. 2010). The court's decision was based on the nature of social media as a tool for mass dissemination of information, a fact that users are well aware of. The court specifically noted that hundreds of people may be able to access a "private" social media page and held that, "in this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking." *Id*. at 434 (citing Dana L. Fleming and Joseph M. Herlihy, Department Heads Up: What Happens when the College Rumor Mill Goes Online? Privacy, Defamation and Online Social Networking Sites, 53 B.B.J. 16 (Jan./Feb. 2009)).

IX. What Information, If Any, Can Be Shared With a Complainant Following Completion of an Investigation?

A. The answer to the above question is *very little*.

B. The MGDPA prohibits the release of private personnel data such that the County may be left with very little it can tell a complainant after conclusion of an investigation into his/her complaint.

1. Cannot release whether allegations were substantiated or not.

2. Cannot release whether discipline will be or was imposed. Remember, a subject employee has the right to grieve such discipline (a process which can take a very long time), and non-final disciplinary action is not public.

3. Can tell complainant what you are doing for him or her, as long as you do not name any other employees involved or release any private data about others.

4. Can tell complainant that an investigation was conducted and has now been completed. Can also tell the complainant that the County "has taken all appropriate action."

CHAPTER FIVE: INCOMPETENCE

SECTION I
PERFORMANCE EVALUATION 101

I. Standards and Expectations

A. The employer has the right to set the performance standards for a position in the same manner that it may set the job duties. Employers should be careful, however, to apply those performance standards to all similarly situated employees.

B. Employment standards and expectations should be shared with the employee upon hiring, at evaluations, and whenever it becomes apparent that the employee is not meeting those expectations.

C. Probationary employees should have more than one formal observation/evaluation during the probationary period. For newer employees, after probation has been passed, we recommend that evaluations be conducted at least one per year, preferably twice. For more experienced employees, annual evaluations are recommended, with one every two years considered minimal.

II. Performance Evaluations: The Basics

A. **Prepare for the Evaluation**

1. During the course of the year you should keep notes of the performance of the employee, including examples. This includes both positive and negative issues as may be the case.

2. Review the documentation, the employee's files, etc. in preparation for the evaluation as appropriate to the position. Consult with other supervisors as appropriate.

3. Be accurate and truthful. Make sure that the examples given are fact based and verified. Keep the documentation (electronically scan) in the event of a challenge under Schwanke.

B. Be candid and direct in your appraisal. Do not hesitate to tell the employee where their performance needs improvement, where it is unacceptable and where it is adequate, good or excellent. Tell the truth. Do not exaggerate good qualities of employees in their evaluations.

C. Document the performance evaluation and the date on which the information was shared with the employee. Place a copy in the personnel file and give a copy to the employee.

D. If you are having the employee do a self-evaluation, clearly delineate which evaluation is the employer's and which is the employee's.

E. Evaluation is an ongoing process. For problem employees, informal evaluations should be held much more frequently and should be documented. The employee should receive a copy of the documentation and a copy should be placed in the personnel file. If improvement does not occur, a written performance improvement plan (PIP) should be given to the employee outlining the problem(s) and the expectations you have for the employee to improve, including a time frame for doing so.

F. Be careful not to praise the employee for an improvement in performance immediately following a disciplinary incident or poor evaluation. Wait to see of the problem has corrected itself over a period of time before noting the improvement in writing.

G. Check your collective bargaining agreement for provisions regarding providing information to the union and evaluations.

H. Employees may under certain circumstances be able to challenge evaluations that are inaccurate.

III. Basic Rules to Follow In Documenting Performance Problems

A. Document Everything: be Detailed, Specific, *Objective* in Written Documents.

B. Conduct Numerous Observations and Evaluations.

C. Address Previous Problems and Deficiencies.

D. Be Careful about Making Positive Comments Not Clearly Warranted or Soon After Poor Performance or Misconduct.

E. There is really no such thing as a "supervisor's file."

Everything you have regarding an employee related to their performance and conduct, ***unless privileged***, is generally available to the employee. All documentation should be fact based and verified. If you do not want to keep hard copies, scan the documents into an electronic file that can be accessed by employee name.

F. Timely Share Information with the Employee.

When problems arise, address them with the employee in a timely manner. Do not save up information for the evaluation, particularly specific complaints. Discuss issues as they arise and summarize them, with examples, at the evaluation.

IV. Investigation and Due Process: Addressing Performance Issues with an Employee Based Upon a Complaint

When receiving complaints from the public, other departments or co-workers regarding the performance of an employee, the employer should meet as soon as possible with the employee to discuss the incident. Get the employee's side of the story.

Do not simply wait until the performance evaluation and tell the employee that you have gotten a lot of complaints about him/her. This is simply not fair to the employee and will be subject to challenge in the event the employee is ultimately disciplined.

Example: A citizen calls to complain that employee was rude.

Response: Get as much information from the caller. Obtain the name of the person or description, date of the incident, time, who was present, what occurred, whether this has happened before, etc. Talk to other employees who may have been present. Then meet with the employee and discuss that a complaint has been received and the nature of the complaint. Ask for a response or explanation. If the employee is determined to have performance problems, schedule a second meeting, at which a written improvement plan and directives should be given to the employee outlining the problem and the expectations you have for the employee to improve, including a time period for doing so. A copy of all documentation should be placed in the personnel file. The document should clearly state that failure

to make the improvements cited and to comply with the directives may result in discipline or discharge.

SECTION II: DRAFTING A PERFORMANCE IMROVEMENT PLAN

I. Performance Improvement Plan

A. When to Issue a Performance Improvement Plan

1. If performance evaluation notations have been unsuccessful;

2. If the problem is of a nature that it cannot be addressed properly in a performance evaluation;

3. If the problem is serious and needs immediate attention; or

4. If the problem is longstanding.

B. What a Performance Improvement Plan Should Contain

1. **Specific Problems and Examples**

   a. Describe what the employee does wrong. Do not, however, list other individuals' names.

   b. Explain why the employee's conduct is not acceptable. Be careful to make sure you are not holding this employee to a different standard than other employees, unless there is a clear reason why (i.e. 10 years of experience versus a probationary employee).

2. **Specific Areas of Improvement**

   Describe each area in which improvement must be made. Whenever possible, explain what the employee should do differently.

3. **Directives**

a. Be very clear in the directives you give. You want to be able to state, if possible, that the employee is insubordinate if he or she fails to comply.

b. Be fair and reasonable in the directives you give. You do not, however, have to limit directives to those you require of other employees if you can establish a good reason for a different requirement.

4. **Offer of Assistance**

5. **Steps to Follow**

a. Documentation

b. Meeting with the Employee

c. Signature of the Employee

C. **After a Performance Improvement Plan Has Been Issued**

1. **Observations and Evaluations**

2. **Determining if Deficiencies have been Corrected**

Be careful not to issue letters or evaluations which state or document that the deficiency has been corrected until a reasonable amount of time has passed. Employees generally will show an improvement immediately following a notice of deficiency, but may revert to old behaviors after a few months. Documentation that the problem has been corrected will result in having to start from scratch with a new notice of deficiency.

3. **Additional Action if Improvement does not Occur**

II. Guidelines for Drafting Directives:

Decide how you want to classify the County's response to an incident of misconduct or incompetence. If you want the response to constitute "discipline," clearly state that to be the case: "You are hereby disciplined for doing/failing to

'A'." You may, however, issue directives to improve performance without characterizing it as discipline.

A. **Be brutally honest.** If something is important enough to warrant a written directive, arbitrators and the courts expect the employer to tell the employee exactly what he or she is or is not to do. This is the best defense against any later lawsuit by the employee.

B. Offer alternative behaviors or the proper way to do something.

C. **If the directive is simply to stop doing something, say so:** "You are directed to immediately stop X"

D. Do not use qualifiers, such as "normally," "generally," etc. Instead, use the following format: "You shall not do 'C' in the future. The only exceptions to this directive are 'D' and 'E'."

E. If you use words such as "necessary" or "inappropriate," assume that an outsider will interpret them from the employee's perspective.

F. State in the written document that you will assume the employee understands the directives unless he or she seeks clarification from you.

G. Warn the employee that he or she will be subject to discipline, up to and including discharge, if the directives are not followed.

H. Respond meaningfully every time the employee seeks clarification.

I. Make sure that all clarifications do not contradict the written directives.

J. Send a follow-up memo to the employee memorializing any verbal clarifications.

SECTION III:
DUE PROCESS IN
EMPLOYEE CONDUCT ISSUES

I. Due Process in the Disciplinary Process

A. Notice of Rules, Policies and Expectations

Document notice to employees regarding expectations and specific areas of misconduct which could lead to discipline, such as sexual harassment, misuse of the internet or e-mail, drug or alcohol use or possession of property, threats, insubordination, theft, etc.

B. Investigation

When you become aware of possible misconduct by an employee, an investigation should be conducted into the circumstances surrounding the allegations, including possible interview of witnesses. The employee accused of the misconduct should also be met with and given an opportunity to respond. Do not reach a conclusion or impose discipline prior to getting the employee's side of the story, unless the employee chooses not to respond.

In general, when conducting a workplace investigation, employers do not want witnesses or subjects of the investigation discussing the investigation or its underlying facts. Such discussion tends to taint the evidence gathered during the investigation. However, under PELRA, public employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Minn. Stat. § 179A.06, subd. 7. This could be construed as a prohibition on an employer directing employees not to discuss the investigation, which would limit the employees ability to engage in concerted activity for mutual aid and protection. Employers should choose their words very carefully when directing employees not to discuss confidential information.

See supra Chapter 4, Section I (enumerating specific practice points for conducting an investigation).

C. Garrity Warning:

If you are interviewing an employee concerning a disciplinary matter that could involve criminal charges and you intend to require the employee to

answer all of your questions on pain of an insubordination charge, a Garrity Warning must be given.

1. In Garrity v. State of New Jersey, 385 U.S. 493 (1967), the U.S. Supreme Court ruled public employees cannot be forced to choose between admitting to criminal activity and forfeiting their jobs.

2. If the employee admits to the commission of a crime, the admission cannot be used as evidence against the employee in criminal proceedings, but it can be used in employment disciplinary proceedings.

Three Elements of a Garrity Warning

1. Direct/order employee to answer questions.

2. Inform employee that failure to answer will result in discipline.

3. Inform employee that the employee's statements are subject to immunity. Neither the statements nor the fruits of the statements may be used against the employee in any criminal proceeding.

D. Representation Issues

Employees represented by labor unions have the right to have a representative present at all meetings which could lead to disciplinary action. The union does not have any right to take an active role in the investigatory interview. The union representative may, however, attempt to clarify facts.

E. Peace Officer Discipline Procedures Act, Minn. Stat. § 626.89

In the event that you are interviewing a peace officer regarding potential misconduct, the provisions of the Peace Officer Discipline Procedures Act, must be followed. It requires that a written complaint be on file when taking a formal recorded statement, and other specific procedures. This statute should be reviewed prior to interviewing a peace officer.

It should also be noted that in 2020 the Minnesota Legislature enacted new requirements for the arbitration of grievances regarding peace officer discipline. Minn. Stat. § 626.892. The statute requires that "[t]he grievance procedure for all collective bargaining agreements covering

peace officers negotiated on or after July 24, 2020, must include the arbitrator selection procedure established in this section." Id. at subd. 2(b).

F. Six Part Test of Substantive and Procedural Due Process

If misconduct is determined to have occurred, it is important to impose discipline which is commensurate with the nature of the offense, as well as the employee's prior discipline history. Progressive discipline is generally, but not always, appropriate. For example, an employee having a sexual relationship with a minor client would invariably result in discharge proceedings, even if the employee had an otherwise spotless record.

1. Was the employee warned about the possible consequences of his conduct?

2. Was the rule reasonably related to the orderly and safe operation of the department?

3. Did the employer investigate before administering discipline?

4. Was the investigation fair and objective?

5. Did the investigation produce substantial evidence of misconduct?

6. Has the employer applied its rules evenhandedly and without discrimination?

G. Loudermill Hearing

As discussed below, before suspending or discharging an employee, the employee must be given an opportunity to respond to the allegations and understand that he/she could be subject to suspension/termination.

SECTION IV:
WHEN AND HOW TO
DISCIPLINE EMPLOYEES

I. Determining Appropriate Discipline

A. Collective Bargaining Agreements and Past Practice: All Employees

1. Collective bargaining agreements typically provide that employees shall not be disciplined or discharged except for "just cause."

2. Some personnel rules also apply a just cause or similar standard for discipline to be imposed.

3. Some employees may be "at-will" without any expectation as to continued employment and therefore may be disciplined or discharged without establishing any particular standard of cause or cause at all. However, to protect against discrimination charges, employers should be cautious about imposing unfair discipline against an employee simply because he or she is not protected by a union contract or other policies. Employers will still need to justify the decision to the EEOC or courts in the event of a discrimination charge or other legal challenge.

B. Appropriate Level of Discipline

The discipline must be appropriate for the infraction.

1. Discharge is reserved for the most serious and egregious infractions or for "the last straw" violation.

2. The concept of progressive discipline is borne out of this requirement.

a. Avoid contract language or policies that mandate progressive discipline or lists discipline in numeric order without the clear caveat that the employer may select the appropriate discipline based upon the offense;

b. Preserve the option to discharge for serious conduct that occurs for the first time.

3. Discharging a long-time employee with an otherwise spotless record is difficult even if the misconduct is serious though not egregious.

C. The Burden of Proof is on the Employer

D. Progressive Discipline

1. Verbal Reprimand

2. Written Reprimand

3. Withholding salary increments (if permitted)

4. Suspension

5. Demotion (if appropriate)

6. Discharge

E. **"**Daugherty Factors" for Just Cause

Some arbitrators still use what is referred to as the "Daugherty Factors" for just cause, although these factors have fallen out of favor over the years. Nevertheless they are still worth considering during the process of investigating and imposing discipline.

The seven factors were established in Grief Brothers Cooperage, 42 LA 555, 558 in 1964 by Arbitrator Carroll R. Daugherty, namely:

1. Notice. Did the employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?

   An employer's failure to clearly express its expectations may give rise to an appearance of unfairness if an employee is disciplined for violating a rule or policy.

2. Reasonable rule or order. Were the employer's rules reasonably related to (a) the orderly efficient and safe operation of the employer's business; and, (b) the performance that the employer might properly expect of the employee?

3. Investigation. Did the employer before administering the discipline to an employee make an effort to discover whether the employee did, in fact, violate or disobey a rule or order of management?

4. Fair investigation. Was the employer's investigation conducted fairly and objectively?

5. Proof of the investigation to the decision maker. Did the person making the determination have substantial evidence or proof that the employee was guilty as charged?

6. Equal treatment. Has the employer applied its rules, orders and penalties even handedly and without discrimination to all employees?

7. Penalty. Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense; and, (b) the record of the employee in his/her service with the employer?

II. Implementing Effective Discipline

A. **Promulgate Clear Rules and Policies.** An employer's failure to clearly express its expectations may give rise to an appearance of unfairness if an employee is disciplined for violating a rule or policy.

B. **Consistently and Fairly Enforce All Rules and Policies.**

C. **Conduct a Reasonable Inquiry and Investigation prior to Determining Discipline, Except in the Most Obvious and Heinous Situations.**

D. **Provide a Notice of Charges in Sufficient Detail so that the Employee can Understand Them.**

E. **Give the Employee an Opportunity to be Heard Prior to Making a Final Decision Regarding Discipline or Termination.**

F. **Follow Appropriate Progressive Discipline Except in Cases of Serious Misconduct**. Look at an employee's entire record before determining the appropriate disciplinary action. Determine what discipline is fair under the circumstances, appropriate to the magnitude of the offense in light of the

employee's prior discipline and designed to deter the employee from engaging in the same or similar conduct in the future.

G. **Treat Similarly Situated Employees Equally.** "Similarly situated" does not mean that each employee who engages in the same misconduct must be treated in exactly the same way.

EXAMPLE: Employee A has a long history of disciplinary actions, including tardiness, insubordination and abuse of sick leave. The employee has been issued reprimands and has been suspended. Employee B has no prior disciplinary actions. Employees A and B engage in a heated argument in in front of members of the public.

The Employer is not prohibited from imposing a more severe sanction on Employee A, in light of that employee's discipline history. In fact, it might be counterproductive to treat the two employees the same. The employer should, however, have a clear, documented basis for treating them differently in the event of a challenge.

H. **Document Misconduct and Performance Deficiencies.**

1. Inaccurate or incomplete performance evaluations will be used by the employee to establish that no real problem could have existed since you failed to note it. Do not be nice. Be truthful and complete.

2. Failure to have documented prior warnings or discipline will be used by the employee to establish that the problem did not exist prior to the current incident giving rise to discipline. The employee will argue (and the arbitrator will probably agree) that if s/he had been given a warning, s/he would have corrected the problem or more clearly understood the seriousness of the matter.

I. Employers are discouraged from entering into agreements whereby discipline is removed from the file after a period of time.

III. Imposing Discipline: Once the Discipline has Been Decided, How Should it be Imposed?

A. **Who Imposes Discipline:** The immediate supervisor should generally be the person to actually impose the discipline, unless the immediate supervisor is alleged to have engaged in inappropriate conduct related to the

employee in the past or related to the incident giving rise to the disciplinary action.

B All disciplinary actions should be imposed in a planned, calm and respectful manner and not in the heat of the moment.

C. In nearly all cases, the supervisor should consult with the department head and personnel department prior to imposing discipline to ensure that all parties agree on the appropriate action and that it is consistent with overall employer policy and practice.

D. **Impose Discipline Privately:** Discipline should be imposed in a private location where the parties cannot be seen or overheard by co-workers, members of the public or others. Only supervisory employees and the employee's union representative, if any, should be present when the discipline is imposed.

1. Due to data practices implications as well as potential defamation actions, only supervisors should be involved in disciplinary action. Supervisors must take steps to ensure that no co-workers or other nonsupervisory individuals are informed of the disciplinary action by the employer (the employee is free to tell them if he or she wishes). This includes taking care to have disciplinary letters typed only by confidential secretaries, refraining from discussing the discipline with the employee or supervisors where they might be overheard.

2. There may be occasions when an employee needs to be immediately corrected by his/her supervisor. Even under these circumstances, however, the supervisor must take care to take the employee aside, out of the hearing of others, before discussing the conduct.

E. **Document all Disciplinary Action.** This includes oral reprimands, where a memorandum verifying that it has occurred should be retained, either in the personnel file or a separate file.

In the event that the employer is sued in the future on the grounds that it negligently retained an employee, documentation of all prior discipline imposed on the employee may save the employer from liability.

EXAMPLE: Employee A tells an inappropriate joke of a sexual nature to Employee B. Supervisor gives employee an oral reprimand, but does not document that she has done so. Employee A

continues to tell inappropriate jokes and ultimately the Employer is sued by Employee B. The Employer may be unable to establish that any action was taken against Employee A.

SECTION V:
DISCHARGE OF EMPLOYEES

I. All of the rules and considerations of general applicability to discipline cases, discussed above, also apply in discharge cases.

II. Discharging veterans involves different considerations and a different proceeding than non-veteran cases. To be safe, include a veteran's preference notice within all discharge, layoff or demotion notices, regardless of whether or not you believe the person is a veteran.

III. Public employees under a collective bargaining agreement or other policy or contract establishing a standard (such as just cause) for termination have an expectation of continued employment and a property interest triggering the due process clause of the U.S. Constitution.

A. Procedural Due Process Required

1. Notice of expectations and work rules.

2. Notice of performance deficiencies.

3. Notice of charges for egregious conduct justifying termination.

B. <u>Loudermill</u> Pre-Termination Hearing

Prior to being discharged and deprived of their property interest in their job, including a suspension, public employees have the right to an informal pre-termination meeting to respond to the allegations against them prior to a decision being made. The <u>Loudermill</u> hearing is informal.

C. Post-Termination Hearing Rights.

1. Arbitration proceedings pursuant to a collective bargaining agreement, including proceedings under Minn. Stat. § 626.892.

2. Hearing pursuant to a personnel policy.

3. Merit System Appeal

D. "If at first you don't succeed, try, try again."

Employers who have tried to terminate an employee and who, through arbitration or other process is reinstated, sometimes become discouraged and give up. Losing a discharge case, however, does not mean that you are permanently left with a problem employee. To eventually succeed, however, supervisors must continue to document performance problems and continue to discipline the employee. Ultimately, the employee will either improve, resign or be fired.

E. Unemployment Compensation

1. Employees who voluntarily resign generally are disqualified from receiving unemployment compensation for a period of time.

2. Employees who are laid off or fired for incompetence are entitled to unemployment compensation.

3. Employees discharged for misconduct may be disqualified.

SECTION VI:
EXIT INTERVIEWS

I. Reasons to Conduct an Exit Interview

A. Exit interviews provide an employee with the opportunity to identify areas of concern regarding their employment. Do not promise this as a right. There may be circumstances where you will not want to provide an exit interview.

B. In cases where the employee has been terminated, in some cases an exit interviews may give the employee the opportunity to express his or her views, which may decrease the likelihood of future litigation with the employee. Be careful to have a witness present and to not say anything which might constitute an admission.

C. For resigning employees in particular, the exit interview gives the employer the opportunity to learn the reasons the person is leaving and specifically ask questions regarding the work environment and any problems the

employee encountered. If the employee then states that there was no problem, and later sues for a hostile work environment, the employee's statement can be used as an admission. This is also true for discharged and laid-off employees.

II. Procedures for Conducting an Exit Interview

A. The County should develop a policy for exit interviews. The policy should provide the procedures for conducting exit interviews, including who will notify the employee of the date of the exit interview, who will conduct exit interviews, and how the results of exit interviews will be used. This should include a statement that the interview is at the employer's discretion and is not an employment right.

B. Do not have the person's immediate supervisor conduct or participate in the exit interview. The exiting employee may be reluctant to express dissatisfaction to the person they worked most closely with or whose management style caused them to resign.

C. Avoid conducting the exit interview alone. As with hiring interviews, statements made at an exit interview may be used against the County in future litigation.

D. Do not apologize for a decision made to terminate the employee or for any actions the County took or failed to take during employment. Be polite and treat the employee with dignity.

III. Sample Questions and Areas of Discussion:

A. For Discharged Employees:

Would you like to share your opinions about the circumstances or incidents leading to your discharge?

B. For All Employees:

Did you have any concerns regarding: training, staffing, salary/benefits, or supervision?

Would you like to discuss any dissatisfaction that you had with your job? (This information may help to prevent similar situations from recurring.)

Did you have any problems getting along with co-workers or supervisors?

Is there anything about the work environment which you think should be changed or improved?

Is there anything else that you would like to discuss?

Discuss: final pay, vacation pay, and continuation of insurance benefits

Ask the employee to return all company property and help them collect his or her own property. Do this in a respectful manner that does not imply that the exiting employee is dishonest (i.e. do not escort them to the door with a guard).

C. **Housekeeping Matters**

1. Develop a checklist to ensure that all separation notices, including COBRA, state continuation of life insurance, etc. are given and copies retained in the personnel file.

2. Have the employee sign off that they have returned all property and all government data in their possession.

TENNESSEN NOTICE AND GARRITY WARNING TO EMPLOYEE

Name of Employee: _____

1. You are being interviewed by _____, an administrator of the County of _____.

2. The purpose of this interview is to collect information regarding [***specify purpose]*** [example: "allegations of misconduct raised against an employee of the police department, including possible misuse of equipment, misuse of sick leave, poor community relations and insubordination.]

3. The information collected may be used by the County in administrative proceedings such as grievance procedures, termination, suspensions or other disciplinary proceedings, as well as employee evaluations and job assignments***.[specify any other uses]*** The information may also be used in civil litigation.

4. You are directed by ***[Specify Department Head or other Official]*** to truthfully and completely answer all questions posed to you during the course of this interview. Providing false or misleading information during this interview will be considered insubordination and may result in disciplinary action against you, including possible termination of your employment. You **are** legally required to provide the information requested.

5. Information provided during the course of this interview and the fruits of such information will not be used against you in any criminal proceedings.

6. Failure or refusal to fully and truthfully provide answers to all questions posed will result in disciplinary action against you. Similarly, disciplinary action may be imposed against you based upon the information you provide. With respect to information not specifically requested, be advised that this interview may be the only opportunity you will have to present information to the County prior to a conclusion/decision being reached regarding discipline or other action in this matter. Failure or refusal to provide all relevant information may result in the County's decision(s) being based on incomplete information.

7. Any type of retaliation or reprisals by you or at your direction or suggestion against other employees or witnesses participating in the investigation into allegations against you, including any form of harassment, intimidation or coercion, shall be considered misconduct and insubordination.

8. The information which you provide during this interview may be released to the County Board, County Administration, agents of the County***, [the Minnesota Department of Human Rights, the Equal Employment Opportunity Commission if harassment/discrimination allegations are raised]*** the unemployment compensation authorities***, [Specify any other involves entities, such as the Merit System, etc.]*** other individuals or entities directly or indirectly involved in the matter(s) discussed, including complainants and witnesses, other employees of the County and the representatives of such individuals. This information may also become public and may be released to other individuals and entities authorized by law to receive it or as ordered by a court of law. This information may also be used in civil litigation.

9. Nothing in this Notice shall be construed as waiving any work-product privileges or other privileges that may apply to this investigation.

10. [As the subject of this investigation, you may have a union representative, if any, present during this interview.]

By signing below you acknowledge that you have been given an opportunity to read this Notice prior to being interviewed. A copy will be provided to you upon request.

Dated:_____ _____

Signature of Employee

TENNESSEN NOTICE

Name of Employee: _____

1. You are being interviewed by _____, an administrator of the County of _____.

2. The purpose of this interview is to collect information regarding [**specify purpose]**

3. The information collected may be used by the County in administrative proceedings such as grievance procedures, termination, suspensions or other disciplinary proceedings, as well as employee evaluations and job assignments**.[specify any other uses]** The information may also be used in civil litigation .

4. You are not legally required to provide private or confidential information regarding yourself during this interview. However, failure or refusal to provide all relevant information, whether or not specifically requested, may result in decisions being made based on incomplete information.**[If person is employee, add: "If you choose to provide information, that information must be true and not misleading. Providing false or misleading information will be considered misconduct.]**

5. The information which you provide during this interview may be released to the County Board, County Administration, agents of the County**, [the Minnesota Department of Human Rights, the Equal Employment Opportunity Commission if harassment/discrimination allegations are raised]** the unemployment compensation authorities**, [Specify any other involves entities, such as the Merit System, etc.]** other individuals or entities directly or indirectly involved in the matter(s) discussed, including complainants and witnesses, other employees of the County and the representatives of such individuals. This information may also become public and may be released to other individuals and entities authorized by law to receive it or as ordered by a court of law. This information may also be used in civil litigation.

6. Nothing in this Notice shall be construed as waiving any work-product privileges or other privileges which may apply to this investigation.

By signing below you acknowledge that you have been given an opportunity to read this Notice prior to being interviewed. A copy will be provided to you upon request.

Dated:_____ _____

Signature

Employee Name: _____ Date: _____

Job Title: _____ Last Day of Employment _____

EMPLOYEE SEPARATION CHECKLIST

Written Notice of Resignation/Termination/Retirement (circle one) _____

Return of Keys, Equipment, Misc. Items to Employer _____

Retrieval of Personal Property from Workplace _____

Voice Mail Password (if applicable) _____

COBRA Notification/State Continuance Coverage _____

Exit Interview _____

Separation Information (Vac. Leave/Sick Leave/Overtime . . .) _____

Return of All Government Data in the Employee's Possession _____

Other _____

_____ _____

Signature of Employee Signature of Individual Conducting

cc: Personnel File

enc.

RRM: 5069282